

**Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress**

Notice of Proposed Rulemaking)	
)	37 C.F.R. Part 201
)	Docket No. 2012-5
Verification of Statements of Account)	
Submitted by Cable Operators and)	
Satellite Carriers)	

Comments of AT&T Inc.

AT&T Inc., on behalf of its operating company affiliates (collectively “AT&T”), offers these Comments on the Copyright Office’s Notice of Proposed Rulemaking (the “NPRM”) setting forth revised proposed regulations designed to implement the provisions of the Satellite Television Extension and Localism Act of 2010 (“STELA”) requiring the Copyright Office to promulgate rules to enable copyright owners to audit Statements of Account (“SOA”) that cable operators and satellite carriers file with the Copyright Office for the secondary transmissions of broadcast programming pursuant to the statutory licenses contained in Sections 111 and 119 of the Copyright Act. 78 Fed. Reg. 27,137 (May 9, 2013) (the “Revised Proposal”).

AT&T commends the Copyright Office for seeking further comment in this proceeding and for the many revisions that it has incorporated into the Revised Proposal. AT&T believes that these changes go a long way toward making for a better audit process. Among other things, AT&T agrees with the clarifications that contingent fees are not permitted and that the auditor is not to determine whether a broadcast signal was properly classified in the SOAs, as well as provisions limiting the scope of the systems to be audited, and those allowing licensees to obtain refunds if indicated based on the auditor’s final report. As discussed below, however, there are still a few additional changes to the Revised Proposal that AT&T believes are necessary.

I. Cost Shifting

In its earlier comments and reply comments, AT&T demonstrated that the statute does not authorize the Copyright Office to shift the costs of an audit to the party being audited

and that cost shifting is inconsistent with the purposes of the audit process.¹ Contrary to the position taken in the Revised Proposal, AT&T continues to believe that its position is correct, and that cost shifting should not be imposed for both legal and policy reasons. AT&T will not, however, reiterate its arguments here, but incorporates its prior comments by reference.²

With regard to the cost shifting mechanism set forth in the Revised Proposal, AT&T has specific concerns about the requirement that statutory licensees who dispute the auditor's findings that there has been a net underpayment of more than ten percent (10%) would be required to pay for the cost of the audit and seek reimbursement through a legal proceeding. AT&T objects to this proposal for both policy and practical reasons.

First, the enforcement mechanism built into the statutory license is based upon the copyright owners ultimately seeking recourse through the courts if they believe that the licensee has failed to fulfill its obligations under the statute and the rules. AT&T believes that there is no basis for changing this fundamental premise merely because the copyright owners now have the added resource of an audit to help them assess whether an enforcement proceeding should be undertaken. If, after the audit has been concluded, there continues to be a disagreement between the copyright owners and the licensee regarding compliance, AT&T submits that the determination as to whether a legal proceeding should be commenced should remain with the copyright owners, including with respect to whether the cost shifting thresholds have been met. In making that determination, the copyright owners would now have the added benefit of factoring in both the auditor's findings and the potential recovery of the audit costs in assessing whether a legal proceeding is a worthwhile undertaking. By requiring the licensee to pay for the audit and seek reimbursement in the event of a dispute, the Revised Proposal essentially shifts the enforcement obligation from the copyright owners to the licensee.

Retaining ultimate responsibility for an enforcement proceeding with the copyright owners makes sense from a practical perspective as well. As proposed, the licensee could be required to pay audit costs for multiple copyright owners in the event the auditor had concluded that there was a net underpayment of more than ten percent (10%). Then, if the licensee is successful in demonstrating that the auditor's conclusions were not correct and that there was no basis for shifting the costs of the audit, the licensee would be forced to seek reimbursement from numerous sources. This would be both an unwieldy and potentially costly process, which would be avoided by maintaining the enforcement

¹ Comments of AT&T, Docket No. 2012-5 (filed Aug. 13, 2012) ("AT&T Comments") at 5-8, Reply Comments of AT&T, Docket No. 2012-5 (filed Oct. 24, 2012) ("AT&T Reply Comments") at 2-3. See also Comments of American Cable Association at 3 ("ACA strongly recommends that the Copyright Office not include a cost-shifting provision in its final regulations implementing audits as required by STELA."); Comments of DISH Network L.L.C. at 9 ("Nor should the costs of an audit be shifted to the satellite carriers and cable operators . . ."); Comments of NCTA at 13 ("[W]e do not believe it is equitable for cable operators to be forced to bear any of the auditor's costs.").

² AT&T Comments, *supra*, at 5-8; AT&T Reply Comments, *supra*, at 2-3.

obligations, including with respect to collection of audit costs where warranted, with the copyright owners.

Accordingly, AT&T again urges the Copyright Office to revise the cost shifting mechanism to require that, in the event of a dispute over the auditor's final report, the licensee's obligations to pay for the costs of the audit would arise only after a final determination upholding the auditor's findings that there was a net underpayment of more than ten percent (10%).³

II. There is No Need for Statutory Licensees to Provide a Certified List of Broadcast Signals

The Revised Proposal contains a provision that would require the licensee to provide a certified list of the broadcast signals retransmitted under each SOA, including call sign and each multicast signal, as well as the classification of each signal on a community by community basis.⁴ As the Copyright Office notes, however, all of this information is already contained in the SOA itself, which has been certified under penalty of perjury.⁵ AT&T believes that there is no need to include this "make-work" step in the audit process, as it does not provide the auditor or the copyright owners with any information that is not readily available from the SOA. Accordingly, AT&T supports the removal of these requirements.

III. The Regulations Should Ensure that the Requirements do not Impose Under Burdens on Operators

In its earlier comments, AT&T requested that the regulations clarify that, while system operators are required to provide information sufficient to enable the auditor to perform an audit in accordance with generally accepted accounting standards, they should not be required to provide data at the individual subscriber level.⁶ In the NPRM, the Copyright Office acknowledges AT&T's comments, but states that provisions requiring the auditor to safeguard confidential information should address AT&T's concerns.⁷

³ For the same reasons, AT&T opposes the "cost-splitting" proposal that would require the licensee to pay for half of the costs of the audit if it disputed the auditor's conclusions that there was a net underpayment of more than ten percent (10%), but acknowledged an underpayment between five and ten percent. *See, Revised Proposal*, § 201.16(j). Indeed, if a court ultimately concludes that the cost shifting threshold had not been met, there should be no requirement for the licensee to pay for any of the audit costs.

⁴ *See* §§ 201.17(e)(9)(iv) – (v) and 201.17(h) of the proposed regulations.

⁵ *See* NPRM at 27141.

⁶ AT&T Reply Comments, *supra*, at 4.

⁷ NPRM, *supra*, at 27142.

While AT&T is certainly concerned about maintaining the confidentiality of information provided to the auditor, its concerns regarding auditor requests that would require that information be provided at the individual subscriber level relate more to undue burdens and costs being placed on the licensee, as well as requests that do not take into account the operator's billing systems and standard recordkeeping practices. As AT&T explained, it would be unwarranted to require the operator to adapt its billing and recordkeeping requirements to the auditor. Rather, the auditor must adapt to the billing systems and methods utilized by the operator. Accordingly, AT&T again submits that it would be more reasonable for the regulations to provide that a system operator meets its audit response burden if it provides the auditor with information in the form of reports that include the number of subscribers, the amount of revenue and the numbers of subscribers and revenues applicable to specific service offerings at the system level in a manner sufficient to allow the audit to be conducted under generally accepted accounting standards.

CONCLUSION

In sum, AT&T commends the Copyright Office for seeking further comments and for implementing a number of changes in the Revised Proposal to reflect licensee concerns, but respectfully submits that additional changes are necessary to ensure that the regulations ultimately adopted do not impose unreasonable burdens on system operators or obligations that go beyond those required to effectuate the purposes of the verification provisions set forth in STELA.

Respectfully submitted,

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