

Before the
Library of Congress
Copyright Office
Washington, D.C.

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

COMMENTS



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I. INTRODUCTION

The American Cable Association (“ACA”) files these comments in response to the Copyright Office’s Notice of Proposed Rulemaking (“NPRM”) regarding the implementation of provisions in the Satellite Television Extension and Localism Act of 2010 (“STELA”) that will allow copyright owners to audit certain SOAs filed with the Copyright Office.¹ The Copyright Office first proposed regulations implementing the STELA audit provisions in an NPRM released June 14, 2012.² In response, interested parties filed comments seeking a number of changes to the Copyright Office’s proposed regulations, including ACA, which highlighted the burdens that the proposed rules would impose on smaller copyright licensees, and offered practical remedies to these concerns.³

After initial comments were filed, NCTA, DirecTV, and a group representing certain copyright owners submitted a joint proposal for revising the proposed regulations (the “Joint Stakeholders’ Proposal”). According to the NPRM, this proposal addresses most of the concerns raised by commenters to the *1st Copyright Audit NPRM*. The Copyright Office incorporated most of the Joint Stakeholders’ suggestions into its proposed regulations (the

¹ *In the Matter of Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers*, Notice of Proposed Rulemaking, Docket No. 2012-5, 78 FR 27137 (rel. May 9, 2013) (“*2nd Copyright Audit NPRM*” or “*NPRM*”).

² *In the Matter of Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers*, Notice of Proposed Rulemaking, Docket No. 2012-5, 77 FR 35643 (rel. June 14, 2012) (“*1st Copyright Audit NPRM*”).

³ Specifically, ACA advocated that the Copyright Office should: (i) never shift an audit’s cost to a statutory licensee (i.e. the cable operator); (ii) provide relief to smaller cable operators if the Copyright Office does allow cost-shifting to the statutory licensee; and (iii) provide more than two weeks to a cable operator to respond to an auditor’s report. *1st Copyright Audit NPRM*, Comments of the American Cable Association at 3-9 (filed Aug. 13, 2012 (“ACA Comments”). The National Cable and Telecommunications Association (“NCTA”) and AT&T also opposed the Copyright Office’s proposal to shift the costs of an audit to a statutory licensee. See *1st Copyright Audit NPRM*, Comments of the National Cable and Telecommunications Association at 12 (filed Aug. 13, 2012) (“[C]ost shifting to cable operators would be unfair”); Comments of AT&T at 5 (filed Aug. 13, 2012) (“AT&T objects to the cost-shifting provision of the Proposed Rule.”).

“Revised Proposal”), and now seeks comment on the Revised Proposal.⁴

ACA appreciates the effort expended by the Copyright Office in considering comments from parties potentially affected by SOA audits, and especially appreciates the Copyright Office’s consideration of the burden of an audit process on smaller cable operators. As ACA explained in its Comments to the *1st Copyright Audit NPRM*, audits can be costly and time consuming for the audited party, especially for ACA members, who primarily consist of smaller cable operators.⁵ These operators have limited resources, both financial and administrative, to devote toward complying with an audit, and potentially paying its costs. Accordingly, ACA’s comments below focus on ways to minimize the burden of the proposals in the current NPRM.

First, ACA supports the proposed mechanism for determining whether, and to what extent, the copyright owner or the cable operator is responsible for paying the cost of an SOA audit. In particular, ACA strongly supports the proposal that a statutory licensee that is required to pay all or part of the cost of an audit, would not be required to pay for any portion of the audit’s costs that exceeds the amount of an underpayment on its SOA(s) identified by an auditor.⁶ However, as outlined in these comments, ACA suggests that the Copyright Office clarify the limits of the proposed audit cost-shifting in that particular circumstance.

ACA also urges adoption of two other proposals that provide extra protection for smaller cable operators. Specifically, ACA supports the Copyright Office’s proposal to: (i) require copyright owners to file an additional notice with the Copyright Office when seeking to audit a larger sample of cable systems owned by the cable operator; and (ii) require that expanded multiple system operator (“MSO”) audits occur the year after the initial audit.

Finally, the Copyright Office seeks comment on whether there is any benefit in requiring

⁴ *2nd Copyright Audit NPRM* at 27137.

⁵ ACA Comments at 3-4.

⁶ *2nd Copyright Audit NPRM* at 27148.

statutory licensees to provide audit-related information that should be apparent from the face of their SOAs. ACA submits that whatever benefit is derived, it is far outweighed by the administrative and financial burdens of compiling and submitting this information, especially for smaller cable operators.

II. THE COPYRIGHT OFFICE SHOULD ESTABLISH CLEAR LIMITS ON WHEN COST-SHIFTING TO THE STATUTORY LICENSEE IS PERMITTED

Under the Copyright Office's proposal, copyright owners are responsible for the total cost of the audit except in two situations. First, a statutory licensee will be responsible for the total cost of the audit if the auditor finds an underpayment of 10 percent or more.⁷ Second, a statutory licensee will pay half of the audit costs when a statutory licensee files a good faith objection to an auditor's finding of an underpayment of 10 percent or more, and the reason for the objection, if correct, would result in a net aggregate underpayment between five and ten percent.⁸ The proposal also states that statutory licensees would not be required to pay for any portion of the auditor's costs that exceed the amount of the underpayment on its SOA(s) identified through the audit process.⁹

ACA supports this cost-shifting mechanism, particularly the Copyright Office's proposal to limit any potential audit cost-shifting to the amount of the statutory licensee's net aggregate underpayment reported on its SOAs as identified by an auditor. Among the many sound reasons in support of the general approach to cost-shifting, ACA agrees with the Copyright Office that splitting audit costs if the auditor finds a net aggregate underpayment of less than five percent may impose an unfair burden on small cable operators.¹⁰

⁷ *2nd Copyright Audit NPRM* at 27148.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* ("The Office did not adopt the methodology proposed by the Joint Stakeholders, because it may impose an unfair burden on small cable operators. Specifically, the Joint Stakeholders would require the licensee to pay for half the cost of the audit if the auditor discovered a net aggregate underpayment of 10

However, because there exists at least one situation in which the cost-shifting is only arguably clear, ACA requests further explanation of this mechanism. That is, the proposed regulation is silent regarding the situation where the auditor finds a net aggregate underpayment of more than 10 percent on the SOAs at issue, but the statutory licensee submits a written explanation of its good faith objections to the auditor's report and the net aggregate underpayment made by the statutory licensee on the basis of this explanation is five percent or less. In this scenario, ACA believes that no cost-shifting would occur,¹¹ but urges the Copyright Office to affirm this interpretation of the proposed rule.

III. COPYRIGHT OWNERS SHOULD BE REQUIRED TO FILE AN ADDITIONAL NOTICE WITH THE COPYRIGHT OFFICE WHEN SEEKING TO EXPAND AN AUDIT

In the NPRM, the Copyright Office proposes to require copyright owners to file another notice of intent to audit with the Copyright Office when seeking to audit a larger sample of cable systems owned by the cable operator.¹² As explained by the Copyright Office, this will provide the statutory licensee with advance notice of the SOAs or cable systems that would be included within the expanded audit.¹³ ACA supports this additional notice requirement. It will serve a useful purpose for cable operators by both giving them lead time to determine how best to balance their day-to-day operations in complying with an expanded audit, and allowing them to begin preparing the information potentially required by the expanded audit at the earliest opportunity.

percent or less – even if the underpayment was as low as .001 percent of the amount reported on the Statements of Account. In other words, the licensee could potentially be required to pay a portion of the auditor's costs whenever there is an underpayment, regardless of the amount of that underpayment.”).

¹¹ ACA assumes that when the Copyright Office specifically states that the costs for the audit would be evenly split between the copyright owner and the statutory licensee when the statutory licensee's good faith objection would result in an aggregate underpayment of between five and ten percent, that the Copyright Office did not intend for the costs to be split when the amount is less than five percent.

¹² 2nd *Copyright Audit NPRM* at 27143.

¹³ *Id.*

IV. EXPANDED MSO AUDITS SHOULD BE POSTPONED TO THE NEXT CALENDAR YEAR

Under the NPRM's proposed regulations, if the auditor discovers an underpayment during the initial audit, the copyright owners could expand the audit to a larger sample of cable systems owned by an MSO.¹⁴ However, in order to protect the interests of MSOs, the Copyright Office's Revised Proposal would prohibit copyright owners from auditing this larger sample of cable systems owned by an MSO until the following calendar year.¹⁵ ACA supports this Copyright Office proposal.

Audits can be costly and time consuming for the audited party; expanded audits can be more taxing. ACA members, who are primarily smaller MSOs, have limited resources, both financial and administrative, to devote toward an audit. They have even less money and time for an expanded audit. The Copyright Office's proposal would appropriately minimize the burden on these smaller cable operators by not subjecting them to both an audit and an expanded audit in the same calendar year. The proposal to conduct the expanded audit in the year after the initial audit would allow smaller operators to return their focus to their day to day operators for a period of time following an initial audit before once again having to redirect their limited resources toward an expanded audit.

V. THE COPYRIGHT OFFICE SHOULD NOT REQUIRE LICENSEES TO PROVIDE INFORMATION TO AN AUDITOR THAT IS APPARENT FROM THE FACE OF THEIR SOAs

In the NPRM, consistent with the Joint Stakeholders' suggestions, the Copyright Office proposes to require statutory licensees to provide an auditor and a representative of the participating copyright owners with a certified list of the broadcast signals retransmitted under each SOA that is at issue in the audit, including the call sign for each broadcast signal and each

¹⁴ 2nd *Copyright Audit NPRM* at 27144.

¹⁵ *Id.*

multicast signal.¹⁶ In addition, cable systems and MSOs would be required to identify the classification of each signal on a community by community basis.¹⁷ ACA opposes this proposal.

The Copyright Office's proposal would require cable operators to compile and submit information that is readily available to auditors and the copyright owners from its SOAs.¹⁸ Moreover, the proposed regulations would require statutory licensees to retain any records needed to confirm the accuracy of the calculations and royalty payments reported in its SOAs for at least three and a half years after the last day of the year in which the SOA was filed with the Copyright Office.¹⁹ Between the filed SOA(s), and the availability of the records a statutory licensee must maintain, the auditor should have sufficient means to compile the information that the Copyright Office proposes that the statutory licensee compile and submit.

Obligating cable operators to collect and forward the prescribed information would increase the administrative and financial burdens of the audit process, especially for smaller cable operators (who often retain outside consultants to help prepare their SOAs), and the burdens would far outweigh any likely identified benefit. As discussed, audits are generally burdensome processes, and can be especially onerous for smaller cable operators. Imposing burdens on statutory licensees that are more appropriately imposed on the auditor needlessly increases the audit's burdens on them. This would conflict with the prior recommendations of the Copyright Office to minimize the administrative burdens of the compulsory license process in its periodic reports.²⁰

¹⁶ 2nd *Copyright Audit NPRM* at 27141.

¹⁷ *Id.*

¹⁸ ACA also notes that each SOA submitted to the Copyright Office contains the signature of an owner, agent of the owner, officer, or partner of the cable system certifying the correctness of the statements of fact contained within the SOA.

¹⁹ 2nd *Copyright Audit NPRM* at 27142.

²⁰ See, e.g., *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights at 41-42 (Aug. 1, 1997) (“[T]he administrative complexity

VI. CONCLUSION

ACA appreciates the Copyright Office's receptivity to feedback from interested parties, and its willingness to give all parties an opportunity to comment on the Revised Proposal. In general, ACA supports the rules proposed in the NPRM, with one main exception. As set forth above, the administrative and financial burdens, especially for smaller cable operators, of providing information to an auditor that is already included in an SOA, outweighs any limited benefit derived from providing the information a second time. Accordingly, the Copyright Office should not adopt this proposal.

Respectfully submitted,



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of the current cable rates is burdensome, and in many respects, unfair. Many hours are spent by cable systems just to understand how much they owe and how to fill out the forms (which often requires legal advice.); Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, U.S. Copyright Office, at 106 (2008) (“[T]he royalty structure should be simplified to make it administratively efficient for users of the license, copyright owners, and Copyright Office examiners.”).