

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)

REPLY COMMENTS



Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
2415 39th Pl, NW
Washington, DC 20007
(202) 494-5661

Barbara S. Esbin
Scott C. Friedman
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable
Association

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I. INTRODUCTION

The American Cable Association (“ACA”) files these reply comments in support of a point raised in AT&T’s comments filed in the above-captioned proceeding.¹ Specifically, ACA concurs with AT&T that in cases where an auditor’s written report finds an underpayment of an amount that would trigger a shifting of any of the audit’s cost to the statutory licensee, and the statutory licensee formally disputes the auditor’s written report, the copyright owners who initiated the audit should remain responsible for the audit’s full costs until such time that a court makes a final judgment (a “final determination”) upholding the auditor’s written report.² To interpret the cost-shifting mechanism differently, and require a statutory licensee who disputes an auditor’s written report to first pay the copyright owners for the audit’s costs (either in full or part), would place an added burden on a statutory licensee dissatisfied with the written report to take the additional step of undertaking a subsequent action to obtain reimbursement for any audit costs it has paid. This could mean having to take legal action against one or more uncooperative copyright owners, a particularly onerous burden for smaller cable operators. Accordingly, as discussed below, the Copyright Office should revise its proposed rules to clarify that the copyright owners remain liable for payment of an audit’s costs until a final determination on the amount of underpayment is obtained.

II. STATUTORY LICENSEES SHOULD NOT BE REQUIRED TO PAY FOR THE COST OF AN AUDIT AND THEN HAVE TO SEEK REIMBURSEMENT THROUGH A LEGAL PROCEEDING

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

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”).

² ^{2nd} *Copyright Audit NPRM*, AT&T Comments at 2 (filed June 10, 2013) (“AT&T Comments”).

total cost of the audit if the auditor finds an underpayment of 10 percent or more.³ 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.⁴

The Copyright Office's proposal is not clear on the following critical issue: when an auditor's written report finds a net aggregate underpayment of more than ten percent, and the statutory licensee objects in good faith to the written report's finding, at what point of time must a statutory licensee reimburse a copyright owner for the audit's costs. This ambiguity could be interpreted to require a statutory licensee in this situation to pay the copyright owners for the audit's costs after the auditor issues its written report, but before a final determination is made on the statutory licensee's good faith objection.⁵ Shifting the responsibility of paying an audit's costs to the statutory licensee prior to a final determination is inconsistent with the Copyright Act, and could result in the need for the licensee to take further legal action to reclaim its payment for the auditor's costs from copyright owners. This would be unduly burdensome, especially for smaller licensees.

ACA agrees with AT&T that an audit process that requires a statutory licensee to pay for an audit's costs after the auditor issues its written report, but before a final determination is made, would, in this circumstance, effectively shift the enforcement obligation from the copyright owners to the statutory licensee. This would occur because a statutory licensee that ultimately

³ 2nd *Copyright Audit NPRM* at 27148.

⁴ *Id.* In both situations, 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

⁵ ACA notes that the Copyright Office's proposal does address statutory licensees seeking reimbursement from the copyright owners. In this situation, if a court, in a final judgment, concludes that the net aggregate underpayment was 10% or less, that the copyright owners would have 60 days to reimburse the statutory licensee for any costs of the auditor that the licensee has paid. See 2nd *Copyright Audit NPRM* at 27152.

prevails in disputing the auditor's findings of underpayment in the written report would need to subsequently seek reimbursement from the copyright owners for its outlaid costs for the audit.⁶ This is neither fair nor consistent with the statutory scheme.

Under the Copyright Act, if a copyright owner believes that a cable operator has violated its rights, it may bring an infringement action against the operator.⁷ Put another way, copyright owners, not the statutory licensees, have the responsibility to seek recourse through the courts for underpayments.⁸ ACA supports AT&T's contention 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.⁹ If, after an audit is concluded, there remains a disagreement about whether the auditor's written report is accurate, the auditor's costs should remain with the copyright owners, until such time that all legal remedies have been exhausted.

For ACA members, who are smaller cable operators, an audit process that shifts the responsibility of paying an audit's costs to the statutory licensee prior to a final determination and requires the licensee to take further legal action to reclaim its payment for the auditor's costs from copyright owners would be burdensome and unfair. Smaller cable operators will generally have fewer financial and legal resources than the group of copyright owners that initiated the audit. It is burdensome and unfair to put these operators, who may wish to exercise their right to dispute the auditor's written report, in the position of having to pay first and later expend additional resources to get the copyright owners to return the money that copyright

⁶ See AT&T Comments at 2.

⁷ See 17 U.S.C. § 501.

⁸ AT&T Comments at 2.

⁹ *Id.*

owners are responsible to pay under the audit cost-shifting rules.¹⁰ The additional cost of seeking final adjudication of the matter, and the return of the statutory licensee's money, may actually exceed the amount of money that the licensee would expect to get back from the copyright owners for costs already outlaid for the auditing process. In this circumstance, the statutory licensee would have no financially viable recourse to be properly reimbursed in the event that the copyright owners refuse to do so voluntarily. The Copyright Office must take this reality into account, and not require statutory licensees to pay for an audit's costs prior to a final determination.

III. CONCLUSION

The Copyright Office should revise its proposed rules to clarify that in the event of a dispute over the auditor's written report, the statutory licensee's obligations to pay for all or any part of the costs of the audit would arise only after a final determination upholding the auditor's written report finding that there was a net aggregate underpayment of more than ten percent or between five and ten percent when splitting the costs. This revision is consistent with ACA's Comments, which focused on ways to minimize the burden of the proposals in the current NPRM,¹¹ and the Copyright Office should adopt it.

¹⁰ At the very least, ACA suggests that the Copyright Office require copyright owners to put any cost-shifting payments from a statutory licensee in escrow until a final determination is made.

¹¹ See 2nd *Copyright Audit NPRM*, Comments of the American Cable Association (filed June 10, 2013).

Respectfully submitted,



By: _____

Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
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