Before the
United States Copyright Office
Library of Congress
Washington, D.C. 20559

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

COMMENTS OF DISH NETWORK L.L.C.

I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. ("DISH") submits these comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.[1] DISH agrees with the Copyright Office that any new auditing requirements must abide by the prohibition against retroactive rulemaking. Applied correctly, this prohibition means that the auditing requirements should not apply to those Statements of Account filed prior to the effective date of the rules proposed here. In addition, the Copyright Office's proposal to impose the cost of the audit on the requesting copyright holders is consistent with practice and common sense, and will help deter frivolous audit requests. More generally, the Copyright Office should avoid imposing unnecessary burdens on satellite carriers and cable operators by properly defining the scope, timing, recordkeeping, frequency, and duration of the audit. Only limited alterations to the proposed rules are needed to address these issues while simultaneously preserving the efficacy of the audit

[1] Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers, 77 Fed. Reg. 35,643 (2012) ("*NPRM*").

process itself. DISH's proposed alterations are shown in blackline format in the attached Appendix.

II. THE NEW VERIFICATION REGIME SHOULD NOT BE APPLIED RETROACTIVELY

DISH supports the Copyright Office's preliminary finding that the new auditing requirements cannot be applied retroactively. In a petition for rulemaking, the Copyright Owners have asked the Copyright Office for the right to audit Statements of Account submitted by satellite carriers for periods even prior to the enactment of the Satellite Television Extension and Localism Act of 2010 ("STELA").[2] This retroactive application is not supported by legal precedent or the Copyright Office's authority under the Copyright Act. In addition, the Copyright Office should clarify that the new auditing procedures will not be applied retroactively to Statements of Account filed prior to the effective date of final rules adopted in this proceeding.

First, DISH agrees with the Copyright Office that it has no authority to impose any new requirements on the Statements of Account submitted by satellite carriers for periods prior to 2010.[3] The Copyright Office correctly states that "congressional enactments and administrative rules [can]not be construed to have retroactive effect unless their language requires this result," citing *Bowen v. Georgetown University Hospital*,[4] and that the Copyright Owners have therefore

---

[2] Copyright Owners, Petition for Rulemaking at 4 (filed Jan. 31, 2012) ("Petition for Rulemaking"). The "Copyright Owners" are Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Music Claimants, Public Television Claimants, Canadian Claimants Group, National Public Radio, Broadcaster Claimants Group, and Devotional Claimants.

[3] *NPRM*, 77 Fed. Reg. at 35645.

[4] *Id.* (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

asked "for something the [Copyright] Office [can]not give as a matter of law."[5] If applied retroactively, the proposed new rules would "create[] a new obligation," "impose[] a new duty," and "attach[] a new disability in respect to transactions or considerations already past."[6] As the Supreme Court said in *Bowen*, "a statutory grant of legislative rulemaking authority" cannot be applied retroactively unless authority to do so is "conveyed by Congress in express terms."[7] That prohibition is also hardwired into the text of the Administrative Procedure Act, which defines a "rule" as an agency statement with "future effect."[8] Providing parties "an opportunity to know what the law is and to conform their conduct accordingly" is at the very root of due process.[9]

Second, the Copyright Office should take the additional step of finding that the new auditing procedures cannot be applied retroactively to Statements of Account filed by satellite carriers prior to the effective date of final rules adopted in this proceeding. Such retroactive application is not permitted under *Bowen* either.[10] Whether an agency order can be applied retroactively is determined by when the agency imposes the regulation, rather than by when Congress provided an agency with specific legislative rulemaking authority.[11] In *Bowen* itself,

---

[5] *Id.* (quoting *Motion Picture Association of America, Inc. v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1996)).

[6] *Marrie v. SEC*, 374 F.3d 1196, 1207 (D.C. Cir. 2004) (quoting *Nat'l Mining Ass'n v. DOL*, 292 F.3d 849, 859 (D.C. Cir. 2002) (internal quotation marks omitted).

[7] *Bowen*, 488 U.S. at 208.

[8] 5 U.S.C. § 551(4); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987).

[9] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008); *see also Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words.").

[10] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 208.

[11] *See* 5 U.S.C. § 551(4) (requiring rulemakings to have "future effect"); *Bowen*, 488 U.S. at 208 ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be

for example, the Supreme Court found retroactivity in rules whose effect ran back to the date of enactment of the enabling statute.[12] Similarly here, the Copyright Office does not have the authority under Section 119 of the Copyright Act to retroactively apply these new rules to satellite carries after the enactment date of STELA but before new audit rules are in place. In revising Section 119, Congress merely provided authority to "issue regulations to permit interested parties to verify and audit the statements of account and royalty fees submitted by satellite carriers under this subsection."[13] This is not the express grant of authority that *Bowen* requires.

Third, in order to adopt a uniform audit regime across copyright licensees, the Copyright Office should specify that cable operators will only be subject to audits for Statements of Account filed after the effective date of the rules proposed here. Unlike Section 119, which provides no express backward looking authority to the Copyright Office,[14] Section 111 does reference audits "for accounting periods beginning on or after January 1, 2010."[15] But the presence of the words "or after" in Section 111 gives the Copyright Office the discretion to define a date later than January 1, 2010 for the cable audit rules to go into effect. Given the

---

understood to encompass the power to *promulgate retroactive rules* unless that power is conveyed by Congress in express terms.") (emphasis added); *id.* at 224 (Scalia, J. concurring) (arguing that the plain meaning of the APA's definition for "rule" precludes an agency from adopting rules that have a primary retroactive effect in the sense of changing what the law was in the past without "some special congressional authorization."); *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002) (noting that the APA's bar on retroactive rulemakings barred the Sierra Club's request to convert the "effective date of EPA's court-ordered determination . . . *to the date the statute envisioned*, rather than the actual date of EPA's action") (emphasis added).

[12] *Bowen*, 488 U.S. at 206.

[13] 17 U.S.C. § 119(b)(2).

[14] *See id.* § 119(b)(2) (making no mention of the period to which the rules would apply).

[15] *Id*. § 111(d)(6).

Copyright Office's preference for "a single regulation" applicable to both satellite carriers and cable operators,[16] the simplest approach is for audits for both types of entities to be available only for Statements of Account filed after the effective date of the audit rules.

In order to avert unlawful retroactive application of the proposed audit procedures, DISH proposes that the Copyright Office alter the proposed Section 201.16(b)(7) to read as follows:

> (7) *Statement of Account* or *Statement* means a semiannual Statement of Account filed with the Copyright Office under sections 111(d)(1) or 119(b)(1) of title 17 of the United States Code, as amended by Public Law 111-175, for an accounting period beginning on or after the date of enactment of these rules.

III. THE RULES SHOULD NOT IMPOSE UNNECESSARY OR DUPLICATIVE BURDENS

While audits can be useful in protecting rights, they also inevitably entail an administrative burden on the business being audited. As a matter of sound public policy, the burden should not exceed what is necessary to ensure the effectiveness of the audit. In particular, the scope of audit should be narrowly defined to ensure that it focuses on verification of Statements of Account. The duration of the audit should be similarly circumscribed so that the process does not linger on beyond a reasonable time. In addition, the Copyright Office's proposals on recordkeeping and audit frequency should be adopted with a minor clarification.

A. Scope

The scope of the audit of Statements of Account authorized by Congress is a narrow one. STELA restricts the audit to confirmation of "the correctness of the calculations and royalty payments reported" by the satellite carrier or cable provider.[17] Verification of each Statement of Account thus should be limited to verifying that the cable operator and satellite carrier has identified the correct list of network and non-network stations transmitted, and confirming that it

[16] *NPRM*, 77 Fed. Reg. at 35644.

[17] *Id*. § 111(d)(6)(E).

has multiplied the correct number of subscribers receiving each station by the relevant royalty rate. "Verification" does not require a deeper and more burdensome inquiry into the cable or satellite carrier's business operations or processes, the revealing of confidential information to copyright holders, or burdensome recordkeeping requirements.

The Copyright Office should thus restrict the scope of the audit under Section 201.16(f) to the satellite or cable operator's records of the stations transmitted to its subscribers during the relevant period and records of the resulting royalty payments. And it should specifically exclude all other confidential business records and examination of business processes. DISH proposes slightly altering the proposed Section 201.16(f) as follows to appropriately limit the scope of the audit:

> (f) *Scope of the audit*. The audit shall be restricted to the cable operator's or satellite carrier's records of programs transmitted to its subscribers and payments made to copyright holders and performed in accordance with generally accepted auditing standards (GAAS). The audit shall not extend to any other confidential business records or review of any business processes.

B. Timing

The time period for completing the audit should be defined more clearly, in order to ensure that the process is completed expeditiously. During any auditing process, a business must devote certain resources to ensuring compliance with the auditor's needs and responding to inquiries. The longer the auditing process is stretched out, the greater the resource strain. In their Petition for Rulemaking, the Copyright Owners themselves proposed an expedited time period in which to *begin* the process, but the proposal is not meaningful if no time limit is placed on *completing* it.[18] Both are necessary. Thus, DISH proposes amending Section 201.16(g) to read as follows:

---

[18] Petition for Rulemaking at 12.

> (g) *Timing and Consultation*. Within 15 days of being selected, the auditor shall notify the statutory licensee in writing of the impending audit, and the statutory licensee will make the required records available to the auditor within 30 days of receiving the notice. The auditor will commence the audit within 30 days of receiving access to the records from statutory licensee, and the auditor shall deliver a copy of the report to the statutory licensee within 60 days thereafter and prior to delivering the report to any copyright owner(s), except where the auditor has a reasonable basis to suspect fraud and that disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud. The auditor shall review his or her conclusions with a designee of the licensee within 30 days thereafter. If the statutory licensee disagrees with any of the facts or conclusions set forth in the report, the licensee may provide the auditor with a written response setting forth its views within two weeks after the date of the initial consultation between the auditor and the licensee's designee. If the auditor agrees that there are errors in the report, he or she shall correct those errors before the report is delivered to the copyright owner(s). The auditor shall include the licensee's written response, if any, as an attachment to his or her report before it is delivered to any copyright owner(s).

C. Recordkeeping

The Copyright Office correctly declines to require satellite carriers and cable operators to retain the relevant records beyond the time when the copyright holders can either audit them or challenge them in court (42 months).[19] Certainly there is no value in retaining the relevant records beyond the time when a cause of action could be brought based on those records. Retaining those records increases certain costs and risks to satellite carriers and cable operators, such as the cost of training personnel and obtaining storage space and the risk of inadvertent disclosure of confidential or private information.

However, DISH does not see the need for the proposal to require satellite carriers and cable operators to retain records for three years after issuance of the final report by the auditor, even if that report finds no errors.[20] Unless the auditor's final report indicates the auditor's view

---

[19] *NPRM*, 77 Fed. Reg. at 35647.

[20] *Id.* ("Should the Office announce the receipt of a notice of intent to audit a particular Statement, the statutory licensee would be required to retain its records concerning the

that a satellite carrier or cable operator has committed copyright infringement, there is no cause of action under the Copyright Act to be preserved and so no reason for the records to be retained as well. And, of course, under the audit frequency limitations proposed by the Copyright Office, the copyright holders would not be free to send an auditor to examine those records a second time.

As a result, DISH proposes to revise the proposed rules on record retention to read as follows:

> (l) *Retention of records*. For each semiannual Statement of Account that a statutory licensee files with the Copyright Office for accounting periods beginning on or after January 1, 2010, the licensee shall maintain all records necessary to confirm the correctness of the calculations and royalty payments reported in each Statement for at least three and a half years after the last day of the year in which that Statement was filed with the Office or until the accuracy of that Statement has been verified by the auditor in his final report—whichever comes first. If the auditor is unable to verify the accuracy of the Statement, however, the statutory licensee shall maintain all records necessary to confirm the correctness of the calculations and royalty payments reported in that Statement for at least three years after the date that the auditor delivers a written report setting forth his or her conclusions to the copyright owner(s) who retained the auditor's services.

D. Audit Frequency

The Copyright Office properly points out that once a satellite carrier's Statement of Account for a given year has been audited, "there is no apparent need for additional audits, because all copyright owners would have been given an opportunity" to participate.[21] DISH agrees. Copyright holders have every incentive to work together to ensure that their rights are protected, meaning that more than one audit per year would only serve to burden the program distributors, without providing any meaningful degree of additional protection. Even the rules

calculations and royalty payments reported in that Statement for at least three years after the date that the auditor delivers his or her final report to the copyright owner(s).").

[21] *NPRM*, 77 Fed. Reg. at 35647.

proposed by the Copyright Owners acknowledge the need to limit the frequency of these audits.[22]

E. Costs

The Copyright Office is also correct to require that the costs of the auditing process be borne by the copyright holders engaged in the auditing process—as the Copyright Owners themselves proposed.[23] The Copyright Office's proposed rules provide for an audit conducted at the request of any copyright holders and by an auditor that the copyright holders are to select.[24] It is only fair, then, that the copyright holders who initiate and control the process should also bear the associated costs. This would also be useful to deter disruptive and frivolous audits.

Nor should the costs of an audit be shifted to the satellite carriers and cable operators in the event a five percent discrepancy exists between the auditor's results and the particular Statement of Account.[25] This could apply improper pressure on the auditor to find discrepancies even where they do not exist in order to justify the audit to those commissioning it.

IV. CONCLUSION

DISH commends the Copyright Office on being careful not to violate applicable prohibitions on retroactivity or to overburden service providers with needlessly expensive, extensive, or lengthy audit requirements. The Copyright Office's proposed rules, with the adjustments proposed herein, will effectively provide for an accurate audit of the Statements of Account while avoiding the excessive disruption and burden that a runaway audit would create.

---

[22] Petition for Rulemaking at 11.

[23] *Id.* at 12.

[24] *NPRM*, 77 Fed. Reg. at 35646.

[25] *Id.* at 35651.

Respectfully submitted,

/s/

Jeffrey H. Blum
Senior Vice President and
Deputy General Counsel
Alison Minea
Corporate Counsel
Hadass Kogan
Associate Corporate Counsel
DISH Network L.L.C.
1110 Vermont Avenue, NW, Suite 750
Washington, D.C. 20005
(202) 293-0981

August 13, 2012

Appendix: Blackline of Proposed Revisions

Section 201.16(b)(7): *Statement of Account* or *Statement* means a semiannual Statement of Account filed with the Copyright Office ~~for an accounting period beginning on or after January 1, 2010~~ under sections 111(d)(1) or 119(b)(1) of title 17 of the United States Code, as amended by Public Law 111-175**, for an accounting period beginning on or after the date of enactment of these rules.**

Section 201.16(f): *Scope of the audit*. The audit shall be **restricted to the cable operator's or satellite carrier's records of programs transmitted to its subscribers and payments made to copyright holders and** performed in accordance with generally accepted auditing standards (GAAS). **The audit shall not extend to any other confidential business records or review of any business processes.**

Section 201.16(g): ***Timing and*** *Consultation*. ~~Before delivering a~~ **Within 15 days of being selected, the auditor shall notify the statutory licensee in writing of the impending audit, and the statutory licensee will make the required records available to the auditor within 30 days of receiving the notice. The auditor will commence the audit within 30 days of receiving access to the records from statutory licensee, and the auditor shall deliver a copy of the report to the statutory licensee within 60 days thereafter and prior to delivering the** report to any copyright owner(s), except where the auditor has a reasonable basis to suspect fraud and that disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud~~, the~~**. The** auditor shall ~~deliver a copy of that report to the statutory licensee and shall~~ review his or her conclusions with a designee of the licensee within 30 days thereafter. If the statutory licensee disagrees with any of the facts or conclusions set forth in the report, the licensee may provide the auditor with a written response setting forth its views within two weeks after the date of the initial consultation between the auditor and the licensee's designee. If the auditor agrees that there are errors in the report, he or she shall correct those errors before the report is delivered to the copyright owner(s). The auditor shall include the licensee's written response, if any, as an attachment to his or her report before it is delivered to any copyright owner(s).

Section 201.16(l): Retention of records. For each semiannual Statement of Account that a statutory licensee files with the Copyright Office for accounting periods beginning on or after January 1, 2010, the licensee shall maintain all records necessary to confirm the correctness of the calculations and royalty payments reported in each Statement for at least three and a half years after the last day of the year in which that Statement was filed with the Office~~. If the Office publishes a Federal Register notice announcing the receipt of a notice of intent to audit a specific Statement of Account~~ **or until the accuracy of that Statement has been verified by the auditor in his final report—whichever comes first. If the auditor is unable to verify the accuracy of the Statement, however**, the statutory licensee shall maintain all records necessary to confirm the correctness of the calculations and royalty payments reported in that Statement for at least three years after the date that the auditor delivers a written report setting forth his or her conclusions to the copyright owner(s) who retained the auditor's services.