

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C. 20024**

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

**COMMENTS AND PETITION FOR RECONSIDERATION OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) hereby submits its comments regarding the “Third Proposed Rule” published by the Copyright Office in its September 17, 2014 Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding implementing the “audit” provisions of the Satellite Television Extension and Localism Act of 2010 (STELA).¹ In addition, NCTA seeks reconsideration of certain rules published in the NPRM to the extent that a “final decision” has been reached on those provisions.²

DISCUSSION

The Third Proposed Rule makes a number of modifications to the Second Proposed Rule, which was based in large part on an agreed-upon set of audit procedures recommended to the Office on October 24, 2012 by the “Joint Stakeholders” – a group comprised of representatives of both copyright owners and copyright users, including NCTA (the “Joint Stakeholders’ Proposed Rule”).³ Some of the modifications proposed by the Third Proposed Rule would restore provisions that were part of the original Joint Stakeholders’ Proposal but had been revised

¹ 79 Fed. Reg. 55696 (Sept. 17, 2014).

² *Id.* at 55697, note 11.

³ See 78 Fed. Reg. 27147 (May 9, 2013); *see also* Reply Comments of Joint Stakeholders, Docket No. 2012-5 (filed Oct. 24, 2012); Reply Comments of NCTA, Docket No. 2012-5 (filed June 24, 2013) (“*NCTA Second Reply*”).

in Second Proposed Rule. However, in other instances, the Third Proposed Rule makes new changes to the Joint Stakeholders' Proposed Rule. Given that achieving consensus on a set of audit rules that met the competing concerns of audit participants required significant compromises, NCTA is disappointed that the Third Proposed Rule proposes to make further modifications in the Joint Stakeholders' Proposal. However, NCTA will limit its comments on the Third Proposed Rule to three changes in particular that it urges the Office to reconsider.

First, NCTA urges the Office to reconsider its decision not to specify an accounting standard to govern audits of Statements of Account.⁴ To the best of NCTA's knowledge, every other compulsory or statutory copyright license that is subject to an audit or "verification" procedure has, as part of its rules, an express provision establishing a governing auditing standard (either GAAS or, more recently, the AICPA "attest" standard).⁵ According to the Office, its decision not to include an auditing standard in the Third Proposed Rule is "final" and not subject to comment.⁶ Given that the First Proposed Rule, the Joint Stakeholders' Proposed Rule, and the Second Proposed Rule all contained a specified auditing standard, the absence of any auditing standard in the Third Proposed Rule is a change on which comment should be entertained.

Whatever concerns the Office may have with the establishment of a specific standard can be addressed by a rule that designates the AICPA attest standard as the "default" standard, but allows the auditor, the participating copyright owners, and the licensee to agree to modifications to that standard. NCTA fears that the lack of an established default standard could complicate

⁴ 79 Fed. Reg. at 55701.

⁵ See, e.g., 37 C.F.R. § 201.30 (e) (GAAS); 37 C.F.R. § 260.6(e) (GAAS); 37 C.F.R. § 261.7(e) (GAAS); 37 C.F.R. § 262.7(e) (GAAS); 37 C.F.R. § 210.17 (f)(2)(i)(A) (attestation). See also Final Rule, Docket No. 2012-7, 79 Fed. Reg. (Sept. 18, 2014) (discussing selection of attestation standard).

⁶ 79 Fed. Reg. at 55697, note 11.

and delay the process – a result that would be directly contrary to the Office’s objective. In contrast, NCTA’s approach will provide the participants in the audit with helpful certainty where necessary, but also provide them with the flexibility to adjust the standard if that would better serve the mutual interests of those participants.

Second, the Third Proposed Rule retains the revisions made in the Second Proposed Rule to the “record retention” provision in the Joint Stakeholders Proposed Rule. Specifically, the NPRM continues to take the position that licensees should be required to preserve records related to a particular statement of account not only for three and one-half years from the end of the year in which that statement was filed, but also for three years from the delivery of a final audit report.⁷ As indicated in our reply comments on the Second Proposed Rule, NCTA has no objection to the proposal for a retention period of three and one-half years from the last date of the year in which a statement of account is filed.⁸ However, NCTA urges the Office to reconsider its decision to require retention of documents for three years following the delivery of an audit report. Instead, the Office should limit the additional post-audit report retention period to one year, as suggested in the Joint Stakeholders’ Proposed Rule.⁹

In support of its request, NCTA notes that the NPRM acknowledged the potential administrative burdens associated with retaining records for extended periods when setting a schedule for the audit process.¹⁰ However, in rejecting the Joint Stakeholders’ proposed one-year post-audit record retention rule, the Office has dismissed those burdens as “minimal.”¹¹ The audit process is new and untested and, consistent with Congress’ goal that the process not be

⁷ 79 Fed. Reg. at 55708.

⁸ *NCTA Second Reply* at 4.

⁹ *Id.*

¹⁰ 79 Fed. Reg. at 55699.

¹¹ *Id.* at 55708.

administratively burdensome, the Office should have given more significant weight to the fact that the Joint Stakeholders were able to reach agreement that the mutual interests of the audit participants were sufficiently protected by a one-year post-audit record retention period.

Third, NCTA suggests that the Office make a minor modification to its new proposal that the participating copyright owners notify the Office of the completion of the audit and the audit results. To the extent that the Office, which has only a limited administrative role to play with respect to audits conducted pursuant to the STELA provisions, has a need to be notified that particular audits have been completed, the responsibility for giving that notice is best borne by the auditor. NCTA proposes that the auditor, upon receiving proof of delivery of its final report to the participating copyright owners and licensee, file with the Office (with copies served on the participating copyright owners and licensee), a simple declaration that the audit has been timely completed. There is no need for the notice (which would be a public record) to identify the results of the audit since that information will be known by the participating copyright owners and need not be made publicly available to owners who chose to forego their opportunity to participate in the audit.

CONCLUSION

For the reasons stated above, NCTA strongly urges the Office to reconsider and modify the Third Proposed Rule (i) to include a “default” auditing standard based on the AICPA attest standard; (ii) to conform the record retention period to the Joint Stakeholders’ Proposed Rule; and (iii) to shift responsibility for notifying the audit of the completion of the audit to the auditor (with service of the notice to the participating owners and licensee).

Respectfully submitted,

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