

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC**

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

REPLY COMMENTS OF JOINT STAKEHOLDERS

The National Cable & Telecommunications Association, DIRECTV, LLC, Program Suppliers, Joint Sports Claimants, Public Television Claimants, Canadian Claimants Group, Devotional Claimants, National Public Radio, Music Claimants (Broadcast Music, Inc. , American Society of Composers, Authors & Publishers and SESAC, Inc.) (collectively “Joint Stakeholders”) hereby submit, in lieu of reply comments in the above-captioned rulemaking proceeding, the text of an agreed-upon set of rules (the “Audit Procedure Rules”) implementing sections 111(d)(6) and 119(b)(2) of the Copyright Act as amended by the Satellite Television Extension and Localism Act of 2010 (“STELA”). In light of the fact that these statutory provisions were enacted over two years ago, the Joint Stakeholders urge the Copyright Office to adopt the Audit Procedure Rules as promptly as possible after receiving any further public comment.

The Audit Procedure Rules are the product of the Joint Stakeholders’ efforts to develop a clear, efficient, and fair set of audit procedures that comport with Congress’ intent. While adhering to the general framework of the rules proposed in the Office’s Notice of Proposed Rulemaking and to other examples of statutory license audit procedures, the terms of the Audit Procedure Rules have been carefully tailored to take into consideration the unique characteristics

of the cable and satellite compulsory licenses. The Audit Procedure Rules reflect significant compromises by all parties with the objective of securing a workable set of audit procedures consistent with STELA.

The Joint Stakeholders request that the Office adopt the Audit Procedure Rules without substantive alteration.

Respectfully submitted,

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JOINT STAKEHOLDERS' PROPOSED AUDIT PROCEDURE RULES

§ 201.16 Verification of a Statement of Account and royalty fee payments for secondary transmissions made by cable systems and satellite carriers.

(a) *General.* This section prescribes general rules pertaining to the verification of a Statement of Account and royalty fees filed with the Copyright Office pursuant to sections 111(d)(1) and 119(b)(1) of title 17 of the United States Code, as amended by Pub. L. 111-175.

(b) *Definitions.*

(1) The term *cable system* has the meaning set forth in section 201.17(b)(2) of this chapter.

(2) *MSO* means an entity that owns, controls, or operates more than one *cable system*.

(3) *Copyright owner* means any person or entity, or designated agent or representative of a person or entity, that owns the copyright in a work embodied in a secondary transmission made by a statutory licensee that filed a Statement of Account with the Copyright Office for an accounting period beginning on or after January 1, 2010.

(4) *Generally accepted auditing standards (GAAS)* means the auditing standards promulgated by the American Institute of Certified Public Accountants (AICPA).

(5) *Net aggregate underpayment* means the aggregate amount of underpayment found by the auditor less the aggregate amount of any overpayments found by the auditor, as measured against the total amount of royalties reflected on the Statements of Account examined by the auditor.

(6) *Participating copyright owner* means a copyright owner that has filed a notice of intent to audit a particular statutory licensee pursuant to paragraph (c) of this section and any other copyright owner that has given notice of its intent to participate in such audit pursuant to paragraph (d) of this section.

(7) The term *satellite carrier* has the meaning set forth in section 119(d)(6) of title 17 of the United States Code.

(8) The term *secondary transmission* has the meaning set forth in section 111(f)(2) of title 17 of the United States Code, as amended by Pub. L. 111-175.

(9) *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 Pub. L. 111-175.

(10) *Statutory licensee* or *licensee* means a cable system or satellite carrier that filed a Statement of Account with the Office under sections 111(d)(1) or 119(b)(1) of title 17 of the United States Code, as amended by Pub. L. 111-175.

(c) *Notice of intent to audit.* Any copyright owner that intends to audit a semiannual Statement of Account for an accounting period beginning on or after January 1, 2010 must notify the Register of Copyrights no later than three years after the last day of the year in which the Statement was filed with the Office. The notice shall identify the statutory licensee that filed the Statement(s) with the Copyright Office, the Statement(s) and accounting period(s) that will be subject to the audit, and the copyright owner that filed the notice, including its name, address, telephone number, facsimile number, and email address, if any. In addition, the notice shall include a statement that the copyright owner owns, or represents a copyright owner who owns, a work that was embodied in a secondary transmission made by the statutory licensee during one or more of the accounting period(s) specified in the Statement(s) of Account that will be subject to the audit. The copyright owner shall serve the notice of intent to audit on the statutory licensee at the same time that the notice is filed with the Copyright Office. Within thirty (30)

days after the notice has been received in the Office, the Office will publish a notice in the FEDERAL REGISTER announcing the receipt of the notice of intent to audit.

(d) *Participation by other copyright owners.* Within thirty (30) days after a notice of intent to audit a statutory licensee is published in the FEDERAL REGISTER pursuant to paragraph (c) of this section, any other copyright owner who owns a work, or represents a copyright owner who owns a work, that was embodied in a secondary transmission made by that statutory licensee during an accounting period covered by the Statement(s) of Account referenced in the FEDERAL REGISTER notice and who wishes to participate in the audit of such Statement(s) of Account must give written notice of such participation to the statutory licensee and to the copyright owner that filed the notice of intent to audit. The notice given pursuant to this paragraph shall include all of the information specified in paragraph (c) of this section.

(e) *Selection of the auditor and communications with auditor during the course of the audit.*

(1) The participating copyright owner(s) shall provide to the statutory licensee a list of three independent and qualified auditors, along with information reasonably sufficient for the statutory licensee to evaluate the proposed auditors' independence and qualifications including:

(i) the auditor's *curriculum vitae* and a list of audits that the auditor has conducted pursuant to sections 111(d)(6) or 119(b)(2) of title 17;

(ii) a list and, subject to any confidentiality or other legal restrictions, a brief description of any other work the auditor has performed for any of the participating copyright owners during the prior two calendar years;

(iii) a list identifying the participating copyright owners for whom the auditor's firm has been engaged during the prior two calendar years; and,

(iv) a copy of the engagement letter that would govern the auditor's performance of the audit and that provides for the auditor to be compensated on a non-contingent flat fee or hourly basis that does not take into account the results of the audit.

(2) The statutory licensee shall select one of the proposed auditors within five (5) business days of receiving the list of auditors from the participating copyright owners, and that auditor will then conduct the audit on behalf of all copyright owners who own a work that was embodied in a secondary transmission made by the statutory licensee during the accounting period(s) specified in those Statement(s).

(3) The auditor shall be qualified and independent as defined in this subsection. An auditor shall be considered qualified and independent if:

(i) He or she is a certified public accountant and a member in good standing with the AICPA;

(ii) He or she is not, for any purpose other than the audit, an officer, employee, or agent of any participating copyright owner;

(iii) He or she is independent as that term is used in the Code of Professional Conduct of the AICPA, including the Principles, Rules, and Interpretations of such Code applicable generally to attest engagements; and

(iv) He or she is independent as that term is used in the Statements on Auditing Standards promulgated by the Auditing Standards Board of the AICPA and Interpretations thereof issued by the Auditing Standards Division of the AICPA.

(4) Following the selection of the auditor and until the distribution of the auditor's report to the participating copyright owner(s) pursuant to paragraph (h) of this section, there may be no *ex parte* communications regarding the audit between the selected auditor and the participating copyright owner(s) or their representatives provided, however, that the auditor may engage in such *ex parte* communications where either (i) the auditor has a reasonable basis to suspect fraud and that participation by the statutory licensee in communications regarding the suspected fraud would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud; or (ii) the auditor provides the licensee with a reasonable opportunity to participate in communications with the participating copyright owner(s) or their representatives and the licensee declines to do so.

(f) *Scope of the audit.* The auditor shall have exclusive authority to request verification of all information reported on the Statements of Account subject to the audit in order to confirm the correctness of calculations and royalty payments reported therein; provided, however, that the auditor shall not determine whether: (1) any cable system properly classified any broadcast signal as required by sections 201.17(e)(9)(iv)-(v) & 201.17(h); or (2) a satellite carrier properly determined that any subscriber or group of subscribers is eligible to receive any broadcast signals under section 119(a) of title 17 of the United States Code, as amended by Pub. L. 111-175. The auditor is permitted to verify the carriage of the broadcast signals on each Statement of Account after reviewing the certified list of broadcast signals provided by cable systems or MSOs pursuant to paragraph (g)(1) of this section. The audit shall be performed in accordance with GAAS and with consideration given to minimizing the costs and burdens associated with the audit.

(g) *Obligations of the Statutory Licensee.*

(1) Within thirty (30) days of the auditor's selection by a cable system or MSO pursuant to paragraph (e)(2) of this section, the cable system or MSO, as applicable, shall provide the auditor and participating copyright owner(s) a certified list of all broadcast signals retransmitted pursuant to the compulsory license in each community covered by each of the Statements of Account subject to the audit. The list must include the call sign of each broadcast signal, including each retransmitted multicast signal, on a community by community basis, along with the classification of such signals pursuant to sections 201.17(e)(9)(iv)-(v) & 201.17(h).

(2) The statutory licensee shall provide the auditor with reasonable access to the licensee's books and records and any other information that, consistent with GAAS, the auditor needs in order to conduct his or her audit, and the statutory licensee shall provide the auditor with any information the auditor reasonably requests promptly after receiving such a request.

(3) The audit will be conducted during regular business hours at a location designated by the statutory licensee. If the auditor and statutory licensee agree, the audit may be conducted in whole or in part by means of electronic communication.

(4) Upon prompt written notice to the participating copyright owner(s), the statutory licensee may elect to suspend the audit for up to sixty (60) days during the period immediately preceding the semi-annual due dates for filing Statements of Account; provided, however, that if the participating copyright owner(s) notify the licensee, within ten (10) days of receiving the notice of suspension, of their good faith belief that suspension of the audit could prevent the auditor's report from being delivered to the participating copyright owner(s) before the statute of limitations expires on any claims under the Copyright Act related to a Statement of Account covered by that audit, the statutory licensee may not suspend the audit unless it first executes a

tolling agreement to extend the statute of limitations by a period of time equal to the period of time during which the audit would be suspended.

(h) *Audit Report.*

(1) Upon completion of the audit, the auditor shall prepare a written report setting forth his or her findings and conclusions. Prior to delivering the report to any participating copyright owner, the auditor shall deliver a copy of that report to the statutory licensee and consult with a designee of the licensee regarding the findings and conclusions in the report for a period not to exceed thirty (30) days, except that the auditor may deliver the report simultaneously to the licensee and participating copyright owner(s) where the auditor has a reasonable basis to suspect fraud and that disclosure would, in the reasonable opinion of the auditor, prejudice investigation of such suspected fraud.

(2) If, upon consulting with the licensee, the auditor agrees that there are errors in the report, the auditor shall correct those errors before delivering the report to the participating copyright owner(s). If the statutory licensee disagrees with any of the findings or conclusions set forth in the report, the licensee may provide the auditor with a written explanation of its good faith objections within fourteen (14) days after the last day of the consultation period.

(3) Within five (5) business days following the last date on which the statutory licensee may provide the auditor with a written response to the audit report pursuant to this paragraph, and subject to the confidentiality provisions set forth in paragraph (m) of this section, the auditor shall deliver the final auditor's report, including the statutory licensee's written response, if any, to the participating copyright owner(s), and to the statutory licensee.

(i) *Corrections, supplemental payments, and refund.*

(1) Where the final auditor's report concludes that (i) any of the information reported on a Statement of Account is incorrect or incomplete, (ii) that the calculation of the royalty fee payable for a particular accounting period was incorrect, or (iii) that the amount deposited in the Copyright Office for that period was too low, a statutory licensee may, within sixty (60) days of the delivery of the final auditor's report to the participating copyright owners and the statutory licensee, or within ninety (90) days of the delivery of such report in the case of an audit of an MSO, cure such incorrect or incomplete information or underpayment by filing with the Office an amendment to the Statement of Account and supplemental royalty fee payments utilizing the procedures set forth in sections 201.11(h) or 201.17(m).

(2) Notwithstanding sections 201.17(m)(3)(i) and 201.11(h)(3)(i), where the final auditor's report reveals an overpayment by the statutory licensee for a particular Statement of Account, the statutory licensee may request refunds of such overpayments within sixty (60) days, of the delivery of the final auditor's report to the participating copyright owners and statutory licensee.

(j) *Costs of the audit.*

(1) Except as provided in this paragraph, the participating copyright owner(s) shall pay for the full costs of the auditor. If the auditor concludes that there was a net aggregate underpayment of more than ten (10) percent, the statutory licensee that is the subject of the audit shall pay the auditor's costs. If the statutory licensee provides the auditor with a written explanation of its good faith objections to the final auditor's report pursuant to paragraph (h)(2) and the net aggregate underpayment made by the statutory licensee on the basis of that explanation is not more than ten (10) percent, the costs of the auditor shall be split evenly between the statutory licensee and the participating copyright owner(s); provided, however, that

if a court, in a final judgment (*i.e.*, after all appeals have been exhausted) concludes there was a net aggregate underpayment exceeding ten (10) percent, the statutory licensee shall, subject to paragraph (j)(3) of this section, reimburse the participating copyright owner(s), within sixty (60) days of that final judgment, for any costs of the auditor that the participating copyright owners have paid.

(2) If a statutory licensee is responsible for any portion of the costs of the auditor, a representative of the participating copyright owner(s) will provide the statutory licensee with an itemized accounting of the auditor's total costs and the statutory licensee shall reimburse such representative for the appropriate share of those costs within thirty (30) days of the statutory licensee's payment of supplemental royalties (if applicable) or within ninety (90) days of the delivery to the participating copyright owners and the statutory licensee of the final auditor's report, whichever is later. Notwithstanding the foregoing, if a court, in a final judgment (*i.e.*, after all appeals have been exhausted) concludes that the statutory licensee's net aggregate underpayment, if any, was ten (10) percent or less, the participating copyright owner(s) shall reimburse the licensee, within sixty (60) days of the final judgment, for any costs of the auditor that the licensee has paid.

(3) No later than the fifteenth of each month during the course of the audit, the auditor shall provide the participating copyright owner(s) and the statutory licensee with itemized statements of the costs incurred by the auditor during the previous month.

(4) No portion of the auditor's costs that exceed the amount of the net aggregate underpayment may be recovered from the statutory licensee.

(k) *Frequency of verification.*

(1) Except as provided in this paragraph, no cable system, MSO, or satellite carrier shall be subject to more than one audit per calendar year and the audit of a particular cable system or satellite carrier shall include no more than two of the Statements of Account from the previous six (6) accounting periods submitted by that cable system or satellite carrier.

(2) Once a notice of intent to audit one or more Statements of Account has been received by the Office, a notice of intent to audit the same Statement of Account will not be accepted for publication in the FEDERAL REGISTER.

(3) If the final auditor's report concludes that there has been a net aggregate underpayment of five (5) percent on the audited Statements of Account of a particular cable system or satellite carrier, the participating copyright owners may direct the auditor immediately to commence an audit of all of the Statements of Account filed by that particular cable system or satellite carrier during the previous six (6) accounting periods.

(4) An MSO shall be subject to no more than one audit per calendar year and such audit shall be limited to a sampling of no more than ten (10) percent of the MSO's Form 3 cable systems, and no more than ten (10) percent of the MSO's Form 2 systems, except that (i) the number of Statements of Account of a particular cable system subject to audit in a calendar year may be expanded in accordance with paragraph (k)(3) and (ii) the sample of cable systems of an MSO that may be audited in a calendar year may be expanded so that thirty (30) percent of the MSO's Form 3 cable systems and thirty (30) percent of the MSO's Form 2 cable systems may be examined in the calendar year following a year in which the auditor concludes that there was a net aggregate underpayment of five (5) percent or more for the MSO's audited systems.

(5) Where an MSO is subject to an expanded audit under this paragraph, the participating copyright owner(s) may elect to have the expanded audit conducted by an auditor

selected by the statutory licensee pursuant to the procedures set forth in paragraph (e) of this section. In the alternative, the participating copyright owner(s), upon the provision to the statutory licensee of updated information reasonably sufficient to allow the statutory licensee to determine that there has been no material change in the auditor's independence and qualifications, may elect to have the expanded audit conducted by the same auditor that performed the prior year's audit, provided that the participating copyright owner(s) may not exercise this option in consecutive years with respect to the MSO that is the subject of the expanded audit.

(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 statutory 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 one-half years after the last day of the year in which that Statement or an amendment of that Statement was filed with the Office and, in the event that such Statement or amendment is the subject of an audit conducted pursuant to this section, for one year after the auditor delivers the final auditor's report to the participating copyright owner(s).

(m) *Confidentiality.*

(1) For purposes of this section, confidential information shall include any non-public financial or business information pertaining to a Statement of Account that has been subjected to an audit under sections 111(d)(6) or 119(b)(2) of title 17 of the United States Code, as amended by Pub. L. 111-175.

(2) Access to confidential information under this section shall be limited to:

(i) The auditor; and

(ii) Subject to executing a reasonable confidentiality agreement, outside counsel for the participating copyright owners, and any third party consultants retained by outside counsel, those employees, agents, consultants and independent contractors of the auditor who are not employees, officers, or agents of a participating copyright owner for any purpose other than the audit, who are engaged in the audit of a Statement of Account or activities directly related hereto, and who require access to the confidential information for the purpose of performing such duties during the ordinary course of their employment;

(3) The auditor and any person identified in paragraph (m)(2)(ii) of this section shall implement procedures to safeguard all confidential information received from any third party in connection with an audit, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the auditor or such person.

**JOINT STAKEHOLDERS' PROPOSED AUDIT PROCEDURE RULES
(COMPARED WITH COPYRIGHT OFFICE PROPOSED RULES)**

§ 201.16 Verification of a Statement of Account and royalty fee payments for secondary transmissions made by cable systems and satellite carriers.

(a) *General.* This section prescribes general rules pertaining to the verification of a Statement of Account and royalty fees filed with the Copyright Office pursuant to sections 111(d)(1) and 119(b)(1) of title 17 of the United States Code, as amended by Pub. L. 111-175.

(b) *Definitions.* ~~(1) Auditor means a qualified and independent accountant who is not an officer, employee or agent of a copyright owner, but has been selected to audit a Statement of Account on behalf of copyright owners under sections 111(d)(6) and 119(b)(2) of title 17 of the United States Code, as amended by Pub. L. 111-175.~~

(1) ~~(2)~~ The term *cable system* has the meaning set forth in §section 201.17(b)(2) of this chapter.¶

(2) MSO means an entity that owns, controls, or operates more than one cable system.

(3) *Copyright owner* means any person or entity, or designated agent or representative of a person or entity, that owns the copyright ~~owner of~~in a work embodied in a secondary transmission made by a statutory licensee that filed a Statement of Account with the Copyright Office for an accounting period beginning on or after January 1, 2010.

(4) *Generally accepted auditing standards (GAAS)* means the auditing standards promulgated by the American Institute of Certified Public Accountants (AICPA).¶

(5) Net aggregate underpayment means the aggregate amount of underpayment found by the auditor less the aggregate amount of any overpayments found by the auditor, as measured against the total amount of royalties reflected on the Statements of Account examined by the auditor.¶

(6) Participating copyright owner means a copyright owner that has filed a notice of intent to audit a particular statutory licensee pursuant to paragraph (c) of this section and any other copyright owner that has given notice of its intent to participate in such audit pursuant to paragraph (d) of this section.

~~(5)~~(7) The term *satellite carrier* has the meaning set forth in section 119(d)(6) of title 17 of the United States Code.

~~(6)~~(8) The term *secondary transmission* has the meaning set forth in section 111(f)(2) of title 17 of the United States Code, as amended by Pub. L. 111-175.

~~(7)~~(9) *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 Pub. L. 111-175.

~~(8)~~(10) *Statutory licensee* or *licensee* means a cable system or satellite carrier that filed a Statement of Account with the Office under sections 111(d)(1) or 119(b)(1) of title 17 of the United States Code, as amended by Pub. L. 111-175.

(c) *Notice of intent to audit.* Any copyright owner that intends to audit a semiannual Statement of Account for an accounting period beginning on or after January 1, 2010 must notify the Register of Copyrights no later than three years after the last day of the year in which the Statement was filed with the Office. The notice shall identify the statutory licensee that filed the Statement(s) with the Copyright Office, the Statement(s) and accounting period(s) that will be subject to the audit, and the copyright owner that filed the notice, including its name, address, telephone number, facsimile number, and email address, if any. In addition, the notice shall include a statement ~~establishing~~ that the copyright owner owns, or represents a copyright

owner who owns, a work that was embodied in a secondary transmission made by the statutory licensee during one or more of the accounting period(s) specified in the Statement(s) of Account that will be subject to the audit. The copyright owner shall serve the notice of intent to audit on the statutory licensee at the same time that the notice is filed with the Copyright Office. Within thirty (30) days after the notice has been received in the Office, the Office will publish a notice in the FEDERAL REGISTER announcing the receipt of the notice of intent to audit.¶

(d) Participation by other copyright owners. Within thirty (30) days after a notice of intent to audit a statutory licensee is published in the FEDERAL REGISTER pursuant to paragraph (c) of this section, any other copyright owner who owns a work, or represents a copyright owner who owns a work, that was embodied in a secondary transmission made by that statutory licensee during an accounting period covered by the Statement(s) of Account referenced in the FEDERAL REGISTER notice and who wishes to participate in the audit of such Statement(s) of Account must give written notice of such participation to the statutory licensee and to the copyright owner that filed the notice of intent to audit. The notice given pursuant to this paragraph shall include all of the information specified in paragraph (c) of this section.¶

(e) Selection of the auditor and communications with auditor during the course of the audit. ¶

(1) The participating copyright owner(s) shall provide to the statutory licensee a list of three independent and qualified auditors, along with information reasonably sufficient for the statutory licensee to evaluate the proposed auditors' independence and qualifications including:¶

- (i) the auditor's curriculum vitae and a list of audits that the auditor has conducted pursuant to sections 111(d)(6) or 119(b)(2) of title 17; ¶
- (ii) a list and, subject to any confidentiality or other legal restrictions, a brief description of any other work the auditor has performed for any of the participating copyright owners during the prior two calendar years;¶
- (iii) a list identifying the participating copyright owners for whom the auditor's firm has been engaged during the prior two calendar years; and, ¶
- (iv) a copy of the engagement letter that would govern the auditor's performance of the audit and that provides for the auditor to be compensated on a non-contingent flat fee or hourly basis that does not take into account the results of the audit._____

~~(d) Selection of the auditor. Any other copyright owner who wishes to participate in the audit of the Statement(s) of Account identified in a notice of intent to audit must notify the copyright owner that filed the notice of intent to audit within 30(2)_____ The statutory licensee shall select one of the proposed auditors within five (5) business days of receiving the publication of the notice in the FEDERAL REGISTER. Those copyright owner(s) who have agreed to participate in the audit shall designate an independent and qualified auditor to list of auditors from the participating copyright owners, and that auditor will then conduct the audit the Statement(s) on behalf of all copyright owners who own a work that was embodied in a secondary transmission made by the statutory licensee during the accounting period(s) specified in those Statement(s). Any dispute about the selection of the auditor shall be resolved by these copyright owner(s). Promptly after the auditor has been selected, these copyright owner(s) shall provide the statutory licensee with the auditor's name, address, telephone number, facsimile number, and email address, if any.~~

~~(e) — Independence and qualifications of the auditor. (1)(3)~~ The auditor shall be qualified and independent as defined in this subsection. ~~If the statutory licensee has reason to believe that the auditor is not qualified or independent, it shall raise the matter with the copyright owner(s) who selected the auditor before the commencement of the audit. If the matter is not resolved, the statutory licensee may raise the issue with the American Institute of Certified Public Accountants' Professional Ethics Division and/or the auditor's State Board of Accountancy while the audit is being performed.~~ An auditor shall be considered qualified and independent if:

~~(2) — An auditor shall be considered qualified if:~~

~~(i)-(i)~~ (i) He or she is a certified public accountant, and a member in good standing with the AICPA;

~~(ii)-(ii)~~ (ii) He or she is not, for any purpose other than the audit, an officer, employee, or agent of any participating copyright owner ~~for any purpose other than the audit;~~

~~(iii)-(iii)~~ (iii) He or she is independent as that term is used in the Code of Professional Conduct of the ~~American Institute of Certified Public Accountants~~ AICPA, including the Principles, Rules, and Interpretations of such Code applicable generally to attest engagements; and

~~(iv)-(iv)~~ (iv) He or she is independent as that term is used in the Statements on Auditing Standards promulgated by the Auditing Standards Board of the AICPA and Interpretations thereof issued by the Auditing Standards Division of the AICPA.¶

(4) Following the selection of the auditor and until the distribution of the auditor's report to the participating copyright owner(s) pursuant to paragraph (h) of this section, there may be no ex parte communications regarding the audit between the selected auditor and the participating copyright owner(s) or their representatives provided, however, that the auditor may engage in such ex parte communications where either (i) the

auditor has a reasonable basis to suspect fraud and that participation by the statutory licensee in communications regarding the suspected fraud would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud; or (ii) the auditor provides the licensee with a reasonable opportunity to participate in communications with the participating copyright owner(s) or their representatives and the licensee declines to do so.

~~(f)~~ (f) Scope of the audit. The ~~audit shall be performed in accordance with generally accepted auditing standards (GAAS);~~ auditor shall have exclusive authority to request verification of all information reported on the Statements of Account subject to the audit in order to confirm the correctness of ~~the calculations and royalty payments reported~~ therein; provided, however, that the auditor shall not determine whether: (1) any cable system properly classified any broadcast signal as required by sections 201.17(e)(9)(iv)-(v) & 201.17(h); or (2) a satellite carrier properly determined that any subscriber or group of subscribers is eligible to receive any broadcast signals under section 119(a) of title 17 of the United States Code, as amended by Pub. L. 111-175. The auditor is permitted to verify the carriage of the broadcast signals on each Statement of Account after reviewing the certified list of broadcast signals provided by cable systems or MSOs pursuant to paragraph (g)(1) of this section. The audit shall be performed in accordance with GAAS and with consideration given to minimizing the costs and burdens associated with the audit.¶

(g) Obligations of the Statutory Licensee. ¶

(1) Within thirty (30) days of the auditor's selection by a cable system or MSO pursuant to paragraph (e)(2) of this section, the cable system or MSO, as applicable, shall provide the auditor and participating copyright owner(s) a certified list of all broadcast signals retransmitted pursuant to the compulsory license in each community covered by each of the Statements of Account subject to the audit. The list must include the call sign of each broadcast signal, including each retransmitted multicast signal, on a community by

community basis, along with the classification of such signals pursuant to sections

201.17(e)(9)(iv)-(v) & 201.17(h).¶

(2) The statutory licensee shall provide the auditor with reasonable access to the licensee's books and records and any other information that, consistent with GAAS, the auditor needs in order to conduct his or her audit, and the statutory licensee shall provide the auditor with any information the auditor reasonably requests promptly after receiving such a request.

(3) The audit will be conducted during regular business hours at a location designated by the statutory licensee. If the auditor and statutory licensee agree, the audit may be conducted in whole or in part by means of electronic communication.¶

(4) Upon prompt written notice to the participating copyright owner(s), the statutory licensee may elect to suspend the audit for up to sixty (60) days during the period immediately preceding the semi-annual due dates for filing Statements of Account; provided, however, that if the participating copyright owner(s) notify the licensee, within ten (10) days of receiving the notice of suspension, of their good faith belief that suspension of the audit could prevent the auditor's report from being delivered to the participating copyright owner(s) before the statute of limitations expires on any claims under the Copyright Act related to a Statement of Account covered by that audit, the statutory licensee may not suspend the audit unless it first executes a tolling agreement to extend the statute of limitations by a period of time equal to the period of time during which the audit would be suspended. ¶

(h) Audit Report.

~~(g) Consultation. Before delivering a report to any copyright owner(s), except (1)~~

Upon completion of the audit, the auditor shall prepare a written report setting forth his or her findings and conclusions. Prior to delivering the report to any

participating copyright owner, the auditor shall deliver a copy of that report to the statutory licensee and consult ~~review his or her conclusions~~ with a designee of the licensee regarding the findings and conclusions in the report for a period not to exceed thirty (30) days, except that the auditor may deliver the report simultaneously to the licensee and participating copyright owner(s) 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 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.~~ ¶

(2) If, upon consulting with the licensee, the auditor agrees that there are errors in the report, ~~he or she~~ the auditor shall correct those errors before delivering the report ~~is delivered to the copyright owner(s).~~ ~~The auditor shall include the~~ to the participating copyright owner(s). ~~If the statutory licensee disagrees with any of the~~ ~~facts or conclusions set forth in the report, the~~ findings or conclusions set forth in the report, the licensee may provide the auditor with a written explanation of its good faith objections within fourteen (14) days after the last day of the consultation period. ¶

(3) Within five (5) business days following the last date on which the statutory licensee may provide the auditor with a written response to the audit report pursuant to this paragraph, and subject to the confidentiality provisions set forth in paragraph (m) of this section, the auditor shall deliver the final auditor's report, including the statutory

licensee's written response, if any, ~~as an attachment to his or her report before it is delivered to any to the participating~~ copyright owner(s), and to the statutory licensee.

~~(h)(i) Corrections and supplemental payments, and refund. ¶~~

(1) _____ Where the final auditor ~~has concluded's report concludes~~ that (i) any of the information ~~given in~~reported on a Statement of Account is incorrect or incomplete, (ii) that the calculation of the royalty fee payable for a particular accounting period was incorrect, or (iii) that the amount deposited in the Copyright Office for that period was too low, a ~~licensee may file a correction~~statutory licensee may, within sixty (60) days of the delivery of the final auditor's report to the participating copyright owners and the statutory licensee, or within ninety (90) days of the delivery of such report in the case of an audit of an MSO, cure such incorrect or incomplete information or underpayment by filing with the Office an amendment to the Statement of Account and supplemental royalty fee payments ~~with the Office in accordance with~~utilizing the procedures set forth in ~~§§~~sections 201.11(h) or 201.17(m).

~~(i) — Distribution of the auditor's report. No less than 60 days after the date that the auditor delivered his or her report to the statutory licensee and subject to the confidentiality provisions set forth in paragraph (m) of this section, the auditor shall deliver a written report to the copyright owner(s) who retained the auditor's services setting forth his or her conclusions. At the same time the auditor shall deliver a copy of that report to the statutory licensee. The copyright owner(s) shall retain this report for a period of not less than three years.¶~~

(2) _____ Notwithstanding sections 201.17(m)(3)(i) and 201.11(h)(3)(i), where the final auditor's report reveals an overpayment by the statutory licensee for a particular

Statement of Account, the statutory licensee may request refunds of such overpayments within sixty (60) days, of the delivery of the final auditor's report to the participating copyright owners and statutory licensee.

~~(j) — *Costs of the audit.* The copyright owner(s) who selected the auditor shall pay the auditor for his or her work in connection with the audit, unless the auditor concludes that there was an underpayment of five percent or more reported in any Statement of Account that is subject to the audit, in which case, the auditor's fee shall be paid by the statutory licensee that deposited that Statement with the Copyright Office with the proviso that if a court, in a final judgment (i.e., after all appeals have been exhausted) rejects that determination, the copyright owners will reimburse the licensee for its payment of the auditor's services.~~ (j) *Costs of the audit.* ¶

(1) Except as provided in this paragraph, the participating copyright owner(s) shall pay for the full costs of the auditor. If the auditor concludes that there was a net aggregate underpayment of more than ten (10) percent, the statutory licensee that is the subject of the audit shall pay the auditor's costs. If the statutory licensee provides the auditor with a written explanation of its good faith objections to the final auditor's report pursuant to paragraph (h)(2) and the net aggregate underpayment made by the statutory licensee on the basis of that explanation is not more than ten (10) percent, the costs of the auditor shall be split evenly between the statutory licensee and the participating copyright owner(s); provided, however, that if a court, in a final judgment (i.e., after all appeals have been exhausted) concludes there was a net aggregate underpayment exceeding ten (10) percent, the statutory licensee shall, subject to paragraph (j)(3) of this section, reimburse the participating copyright owner(s), within sixty (60) days of that final judgment, for any costs of the auditor that the participating copyright owners have paid.¶

(2) If a statutory licensee is responsible for any portion of the costs of the auditor, a representative of the participating copyright owner(s) will provide the statutory licensee with an itemized accounting of the auditor's total costs and the statutory licensee shall reimburse such representative for the appropriate share of those costs within thirty (30) days of the statutory licensee's payment of supplemental royalties (if applicable) or within ninety (90) days of the delivery to the participating copyright owners and the statutory licensee of the final auditor's report, whichever is later. Notwithstanding the foregoing, if a court, in a final judgment (i.e., after all appeals have been exhausted) concludes that the statutory licensee's net aggregate underpayment, if any, was ten (10) percent or less, the participating copyright owner(s) shall reimburse the licensee, within sixty (60) days of the final judgment, for any costs of the auditor that the licensee has paid.

¶

(3) No later than the fifteenth of each month during the course of the audit, the auditor shall provide the participating copyright owner(s) and the statutory licensee with itemized statements of the costs incurred by the auditor during the previous month. ¶

(4) No portion of the auditor's costs that exceed the amount of the net aggregate underpayment may be recovered from the statutory licensee.

~~(k) Frequency of verification. (1) Subject to the limitations in paragraph (k)(3) of this section, a copyright owner may include more than one Statement of Account in its notice of intent to audit, but each Statement of Account shall be subject to audit only once.~~

¶

(1) Except as provided in this paragraph, no cable system, MSO, or satellite carrier shall be subject to more than one audit per calendar year and the audit of a

particular cable system or satellite carrier shall include no more than two of the Statements of Account from the previous six (6) accounting periods submitted by that cable system or satellite carrier.

(2) Once a notice of intent to audit ~~a particular semiannual~~ one or more Statements of Account has been received ~~in~~ by the Office, a notice of intent to audit the same Statement of Account will not be accepted for publication in the FEDERAL REGISTER.

~~(1) A satellite carrier or a cable operator that owns a single cable system shall be subject to no more than one audit per calendar year.~~

(3) If the final auditor's report concludes that there has been a net aggregate underpayment of five (5) percent on the audited Statements of Account of a particular cable system or satellite carrier, the participating copyright owners may direct the auditor immediately to commence an audit of all of the Statements of Account filed by that particular cable system or satellite carrier during the previous six (6) accounting periods.

~~(2) A cable operator that owns multiple cable systems shall be subject to no more than three audits per calendar year. Each~~ (4) An MSO shall be subject to no more than one audit per calendar year, and such audit shall be limited to a sampling of no more than ~~fifty~~ ten (10) percent of the MSO's Form 3 cable systems ~~owned by that operator, unless the auditor concludes that there was an underpayment of five percent or more reported in any Statement of Account filed by that operator, in which case, the audit may be expanded to include any and all of the cable systems owned by that operator. The specific cable systems to be included within each sampling shall be selected by the copyright owner(s) who retained the auditor's services. The limitation on the number of systems under common ownership that can be audited in a calendar year does not limit in any way, and no more than ten (10) percent of the MSO's Form 2 systems, except that (i) the number of Statements of Account~~ submitted by the selected systems of a particular cable system

subject to audit in a calendar year may be expanded in accordance with paragraph (k)(3) and (ii) the sample of cable systems of an MSO that may be audited in a calendar year; may be expanded so that thirty (30) percent of the MSO's Form 3 cable systems and thirty (30) percent of the MSO's Form 2 cable systems may be examined in the calendar year following a year in which ~~owned by that operator, unless~~ the auditor concludes that there was a net aggregate underpayment of five (5) percent or more for the MSO's audited systems. ¶

(5) Where an MSO is subject to an expanded audit under this paragraph, the participating copyright owner(s) may elect to have the expanded audit conducted by an auditor selected by the statutory licensee pursuant to the procedures set forth in paragraph (e) of this section. In the alternative, the participating copyright owner(s), upon the provision to the statutory licensee of updated information reasonably sufficient to allow the statutory licensee to determine that there has been no material change in the auditor's independence and qualifications, may elect to have the expanded audit conducted by the same auditor that performed the prior year's audit, provided that the participating copyright owner(s) may not exercise this option in consecutive years with respect to the MSO that is the subject of the expanded audit.

~~(H)(I) 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 statutory 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 one~~-half years after the last day of the year in which that Statement or an amendment of 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, 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~~ and, in the event that such Statement or amendment is the subject of an audit conducted pursuant to this section, for one year after the auditor delivers ~~a written~~ the final

auditor's report ~~setting forth his or her conclusions~~ to the participating copyright owner(s) ~~who retained the auditor's services.~~

~~(m)~~ (m) Confidentiality. ~~¶~~

(1) ~~For~~ purposes of this section, confidential information shall include any non-public financial or business information pertaining to a Statement of Account that has been subjected to an audit under sections 111(d)(6) or 119(b)(2) of title 17 of the United States Code, as amended by Pub. L. 111-175. ~~Confidential information also shall include any information so designated in a confidentiality agreement which has been duly executed between a statutory licensee and any other interested party, or between one or more interested parties; provided that all such information shall be made available for the audit procedure provided for in this section.~~

~~(2)~~ (2) Access to confidential information under this section shall be limited to:

~~(i)~~ (i) The auditor; and

~~(ii)~~ (ii) Subject to ~~an appropriate~~ executing a reasonable confidentiality agreement, outside counsel for the participating copyright owners, and any third party consultants retained by outside counsel, those employees, agents, consultants and independent contractors of the auditor who are not employees, officers, or agents of a participating copyright owner for any purpose other than the audit, who are engaged in the audit of a Statement of Account or activities directly related hereto, and who require access to the confidential information for the purpose of performing such duties during the ordinary course of their employment. ~~;~~

~~(3)~~ (3) The auditor and any person identified in paragraph (m)(2)(ii) of this section shall implement procedures to safeguard all confidential information received from any third party in connection with an audit, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the auditor or such person.