Before the
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Washington, D.C.

Refunds Under the Cable Statutory License	))	Docket No. RM-2010-3

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned Copyright Office ("Office") rulemaking proceeding.[1]

The instant proceeding arises out of Congress' enactment, as part of the Satellite Television Extension and Localism Act of 2010 ("STELA"), certain amendments to Section 111 of the Copyright Act to resolve the long-standing dispute over the reporting and calculation of royalties for "phantom signals."[2] Specifically, the Office seeks comment on whether a cable operator whose pre-STELA Statement of Account calculated royalty payments on a community-by-community "subscriber group" basis in phantom signal situations should be treated as having "underpaid" those royalties and thus be deemed ineligible to receive a refund for overpayments that are entirely unrelated to the operator's treatment of phantom signals.[3] The rule that the

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1 75 Fed. Reg. 6116 (Oct. 4, 2010). NCTA is the principal trade association for the cable television industry in the United States. Its members include the owners and operators of cable systems serving more than 90 percent of the nation's cable television households, owners and operators of more than 200 cable-distributed program networks, and others interested in the cable industry.

2 *See generally* Pub. L. No. 111-175, § 104. The term "phantom signal" is typically used to refer to the situation in which a cable system serving multiple communities carries a distant signal in some, but not all, of those communities.

3 To our knowledge, instances in which cable operators that used subscriber groups in phantom signal situations have sought refunds for unrelated overpayments are relatively rare. Indeed, out of nine refund requests that the Licensing Division has identified as implicating the proposed rule, one merely recalculated the royalty due without requesting a refund and two involved refund requests by systems that paid for phantom signals on their pre-STELA Statements of Account (and thus would not be impacted by the proposed rule).

Office tentatively proposes to adopt provides that unless and until "all outstanding royalty fee obligations have been met, including those for carriage of each distant signal on a system-wide basis,"[4] an operator that used the subscriber group methodology on a pre-STELA Statement of Account so that its royalty calculations would reflect the actual availability of a distant signal in a particular community should not be allowed to recover, directly or through an offset, overpayments that are unrelated to such use of subscriber groups.[5]

In reaching the above conclusion, the Office misconstrues the retroactivity clause in STELA, finding that it "only shields a cable system from an infringement action ... and does not erase the cable system's obligation to have paid for the carriage of each distant signal on a system-wide basis."[6] The Office's interpretation of this provision is contrary to STELA and is inconsistent with the legislative history of the statutory provisions resolving the phantom signal issue. It would effectively penalize a cable operator for something Congress has expressly approved, namely the use on a pre-STELA Statement of Account of subscriber group-based royalty calculations in phantom signal situations. And it would reignite the uncertainty and controversy that the negotiated settlement of the phantom signal issue and implementing legislation were intended to permanently resolve. The Office should not adopt such a policy.

DISCUSSION

STELA was signed into law by the President on May 27, 2010.[7] Among its varied provisions, STELA includes several amendments to Section 111 of the Copyright Act that were agreed to by the cable and content industries as part of a negotiated settlement resolving the

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[4] 75 Fed. Reg. at 6117.

[5] *Id.* at 6118; *see also id.* at 6117 (stating that the Office "is not inclined to refund any fees for a non-phantom signal reporting error in the case where the operator has an outstanding balance owed for the carriage of a phantom signal").

[6] *Id.* at 6117.

[7] Pub. L. No. 111-175.

"phantom signal" issue.[8] The history of the phantom signal issue is well-known to the Copyright Office and need not be repeated here. Significant for purposes of this proceeding is that, at the urging of Congressional leaders, copyright owners and cable operators came together to find a solution to an issue that, according to House Judiciary Committee Chairman John Conyers, "has caused instability and confusion for the cable and content industries, to the detriment of consumers."[9]

NCTA, together with individual cable company representatives, was directly involved in the discussions that led to the statutory amendments at issue. The intent of those discussions and the resulting changes in the statute was to resolve, once and for all, the prospective and retroactive scope of a cable system's obligation to pay royalties for "phantom signals."

In order to resolve their competing positions on the appropriate payment methodology where a single cable system provided distant signals to some but not all of the communities it served, the cable industry and copyright owners worked out a carefully balanced, multi-part agreement to resolve past and future liability with respect to phantom signals. First, it was agreed that Section 111 would be amended to expressly allow prospective community-by-community subscriber group calculations in phantom signal situations. Second, the parties agreed to a retroactivity provision under which operators that filed pre-STELA Statements of Account using the subscriber group methodology to calculate their royalty payments in phantom signal situations were effectively deemed to be in compliance with Section 111, while cable operators who had paid for phantom signals on their pre-STELA Statements of Account were expressly precluded from obtaining any benefit (through refunds or offsets to other payment

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[8] *See, e.g.,* Cong. Rec. H3329 (Statement of Rep. Smith) ("Perhaps the most significant amendment to the cable license is a resolution of the phantom signal liability issue. **The provision in the bill was negotiated and is supported by both program owners and the cable industry**.") (emphasis supplied).

[9] Cong Rec. H13438 (Dec. 2, 2009) (Statement of Rep. Conyers). *See also* Cong Rec. S9373 (Sep. 15, 2009) (Statement of Sen. Leahy) ("I appreciate that members of the content community and the cable system (sic) came together to find a solution on which they can all agree").

obligations) by going back and revising their calculations to use the subscriber group methodology after-the-fact.[10] Finally, the cable industry agreed to increase the compensation paid to the copyright owners pursuant to the compulsory license by accepting a five percent hike in the base rate royalty fees payable by Form 3 systems (the only systems to which the phantom signal issue is relevant)[11] and by agreeing to make a number of "additional deposits" to the base royalty pool.[12]

The amendments to Section 111 implementing the phantom signal compromise thus dealt with both prospective and retroactive elements of phantom signal payments. The objective of Congress in enacting these provisions was to provide a permanent resolution of the phantom signal controversy. As the report accompanying the House version of what became STELA states, "[t]he Committee understands that there are two different readings of the statute and that the [phantom signal] issue should be resolved to provide certainty to both industries."[13]

The Office's proposed rule is antithetical to the goals of closure and certainty that are at the heart of the phantom signal settlement. The Office's statement in its rulemaking notice that STELA "did not alter how a cable system was to calculate its royalty fee obligation" on Statements of Account filed prior to enactment of the legislation completely misreads Congress' intent.[14] As the legislative history cited above makes clear, Congress understood that, prior to

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[10] 17 U.S.C. § 111(d)(1)(C)-(D) as amended by Pub. L. No. 111-175, §104(c)(1)(C). As specified by Congress, STELA's "date of enactment" is February 27, 2010. Pub. L. No. 111-175, §307. The reason for drawing a distinction was to prevent a "land rush" for refunds (or offsets) by operators who had paid for phantom signals on pre-STELA Statements of Account.

[11] 17 U.S.C. § 111(d)(1)(B) as amended by Pub. L. No. 111-175, §104(c)(1)(C). The legislation also reflects the fact that, as part of the negotiated settlement, it was agreed that the five percent increase in the base rates would resolve the "inflation adjustment" proceeding that might otherwise have been initiated in 2010. *See* 17 U.S.C. §804(b)(1) as amended by Pub. L. No. 111-175, §104(f).

[12] *See* Pub. L. No. 111-175, §104(c)(7).

[13] H. Rep. No. 111-319, 111th Cong., 1st Sess. at 12 (Oct. 28, 2009). *See also* Cong. Rec. H3328 (May 12, 2010) (Statement of Rep. Conyers) ("[T]he bill solves the so-called "phantom signal" problem in the cable license.... Now cable providers have more certainty, and copyright owners get more compensation.").

[14] 75 Fed. Reg. at 6117.

the legislation, there were competing views as to whether or not cable operators were required to pay for phantom signals. In addressing the issue in STELA, Congress did not pick a "winner" between these competing interpretations of the law; rather, Congress set the parameters of the law for both past and future accounting periods in a manner that would obviate the need for any further debate over the pre-legislation meaning of the law.

Congress did this by expressly immunizing cable operators from claims that their pre-STELA use of subscriber groups to address phantom signal situations resulted in an underpayment of royalties, while simultaneously ensuring that those operators who had paid for phantom signals on their pre-STELA Statements of Account were permanently bound by the results of their decision. There is no support in the statutory language or its legislative history for the Office's misguided interpretation of the retroactivity provision as merely barring infringement actions for the past use of the subscriber group methodology in phantom signal situations and not as extinguishing all direct or indirect claims that operators have outstanding "balances" of underpaid royalties as a result of their using such methodology.

Finally, the Office's proposed rule not only has the potential for reopening the settled status of pre-STELA royalty calculations, but also produces absurd and wasteful results. For example, adoption of the proposed rule could lead to the continuing expenditure of resources by the Office in challenging pre-STELA Statements of Account that use the subscriber group methodology in phantom signal situations. In this regard, NCTA notes that, even in situations where no refund request has been made or other errors identified, the Office continues to send letters to cable operators claiming that their use of the subscriber group methodology to calculate their pre-STELA royalties in phantom signal situations is contrary to law and has resulted in an underpayment. This plainly is contrary to Congress' intent to finally put this contentious issue to bed.

CONCLUSION

NCTA recognizes that the phantom signal issue was a long-standing bone of contention. But it has been resolved by an act of Congress implementing a multi-part, negotiated settlement of the issue that addresses the issue both prospectively and retroactively. While the number of instances in which the proposed rule would erect a barrier to refunds is limited, it is nonetheless important for the Office to respect the intent of Congress and to acknowledge that operators that calculated their pre-STELA royalties using subscriber groups in phantom signals situations are not to be penalized for not having calculated their royalties on a system-wide basis. The Office should not adopt the proposed rule.

Respectfully submitted,

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