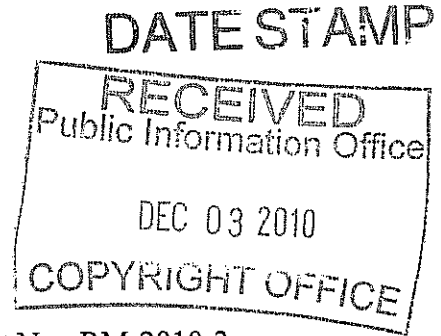


Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.



Refunds Under the Cable
Statutory License

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Docket No. RM-2010-3

REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its reply comments in the above-captioned Copyright Office (“Office”) rulemaking proceeding.

The Office has proposed amending its rules to expressly designate the “system-wide” royalty calculation methodology as the governing approach for determining a cable operator’s royalty fee obligations prior to the effective date of the Satellite Television Extension and Localism Act of 2010 (“STELA”) and to bar the payment of any refunds, for any reason, to a cable operator that used the “subscriber group” calculation methodology on a pre-STELA statement of account. As NCTA’s initial comments in response to the Office’s Notice of Proposed Rulemaking (“NPRM”) explained, the adoption of such a rule would be inconsistent with both the letter and spirit of the legislative compromise adopted to resolve the decades-long phantom signal dispute.

The only other party submitting comments in response to the Office’s NPRM, the Program Suppliers, did not directly address the proposed rule; instead, the Program Suppliers raised a broader issue – the circumstances under which the Office’s rules provide for the payment of refunds in general. NCTA and the Program Suppliers have now consulted with one another and are in agreement that the adoption of the proposed rule is unnecessary and that the Office instead should adopt certain other revisions to Section 201.17(m), agreed to by NCTA

and the Program Suppliers, that would clarify as a general matter the process by which operators may obtain refunds.

DISCUSSION

I. The Office Should Not Adopt the Proposed Rule.

The rule proposed by the Office in this proceeding is not necessary and should not be adopted. Section 111(d)(1)(D), as amended by STELA, speaks for itself and provides all of the guidance needed for copyright owners, copyright users, and the Office to determine a cable operator's royalty fees and to make refunds where appropriate. Moreover, it is not just the cable industry that believes that the adoption of the proposed rule would be ill-advised. NCTA understands that the Program Suppliers agree that the rule being considered by the Office is unnecessary. Under the circumstances, NCTA repeats its call for the Office *not* to adopt a rule that will cause confusion and uncertainty and thus undermine Congress' efforts to resolve the phantom signal controversy.¹

Furthermore, for the reasons given in NCTA's initial comments, the proposed regulation is not just unnecessary, it is inconsistent with the relevant statutory language and legislative history of the amendment to Section 111(d)(1)(D). That provision of STELA sought to resolve the long-standing "phantom signal" controversy both prospectively and retroactively. In the case of pre-STELA statements of account that calculated royalties using the subscriber group methodology, amended Section 111(d)(1)(D) establishes that a cable operator is *not* required to recalculate its royalty fee using the system-wide approach in order to satisfy its royalty fee obligations and avoid liability. In addition, the amended provision indicates that an operator using the subscriber group approach on an amendment to a pre-STELA statement of account

¹ Among other things, the proposed rule would create particular confusion and delay with regard to the status of statements of account that were filed for the second accounting period of 2010 since those statements were not due until after the effective date of STELA, but in some cases were filed before that date.

may obtain refunds to the extent that they do not “aris[e] out of” the operator’s use of the subscriber group methodology.

The proposed rule runs counter to Congress’ clear intent to hold cable operator’s harmless for their past use of the subscriber group methodology. It would effectively penalize cable operators who used the subscriber group methodology on statements of account for accounting periods occurring prior to 2010 and would prevent refunds from being recovered for amendments to pre-STELA statements of account even where the amendment does not arise from the operator’s use of subscriber group or system-wide reporting. For example, the Office’s proposed rule would deny refunds to cable operators who used subscriber groups where the overpayment in question occurred because the operator incorrectly reported a local signal as distant or mistakenly paid royalties for a signal not actually carried anywhere in the system. In such cases (assuming that any applicable procedural prerequisites for requesting a refund have been met), there is nothing in STELA that allows the Office to deny an operator that calculates its royalties using the subscriber group methodology the same refund that would be available to an operator whose royalties reflect a system-wide computation.

II. The Office Should Amend its Rules To Clarify Its Refund Procedures.

As noted above, the Program Suppliers’ initial comments in response to the NPRM did not specifically address the proposed rule but instead focused on the general procedural requirements for issuing refunds. NCTA has discussed this issue with the Program Suppliers and the parties agree that, under current Copyright Office rules, a cable operator is not entitled to a refund where the operator voluntarily initiates an amendment to its statement of account outside the 60-day period set forth in Section 201.17(m)(3)(i) of the Office’s rules. The parties also agree that the rules would benefit from clarification with respect to the processing of

refund requests arising out of reformed statements of account filed by a cable operator in response to inquiries initiated by the Copyright Office.


When a cable operator receives an inquiry from the Office relating to a statement of account, the operator typically will review the statement and, to the extent warranted by this review, submit a revised statement. Where such revised statement indicates that the operator underpaid its royalties, it is both the expectation and practice that the operator will remit the additional royalties to the Office, with interest. Where the review triggered by the Office's inquiry indicates that the operator has overpaid, the Office's longstanding practice has been to issue the appropriate refund, even though the request for such refund falls outside the 60-day window that governs operator-initiated refund requests.²

The above policy, which currently is not expressly codified in the Office's rules, represents a rational approach to create incentives for parties to voluntarily respond to inquiries issued by the Copyright Office. NCTA and the Program Suppliers have collaborated on a proposed revision to Section 201.17(m), attached hereto, that would clarify and codify the Office's refund policy. NCTA urges the Office to adopt these revisions.

² See Letter from Nanette Petruzzelli, Acting General Counsel, Copyright Office to Kristen Anderson, Marcus Cable Associates, L.P. (June 2, 1997). Refund requests made in response to an inquiry initiated by the Office also are not subject to the filing fee requirement applicable to self-generated amendments and refund requests.

Respectfully submitted,

**NATIONAL CABLE &
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37 C.F.R. § 201.17

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(m) *Corrections, supplemental payments, and refunds.*

(1) Upon compliance with the procedures and within the time limits set forth in paragraph (m)(3) of this section, corrections to Statements of Account that are either initiated by a cable operator or responsive to an inquiry by the Licensing Division will be placed on record, supplemental royalty fee payments will be received for deposit, or refunds will be issued, in the following cases:

(i) Where, with respect to the accounting period covered by a Statement of Account, any of the information given in the Statement filed in the Copyright Office is incorrect or incomplete and such correction or completion does not change the royalty fee;

(ii) Where calculation of the royalty fee payable for a particular accounting period was incorrect, and the amount deposited in the Copyright Office for that period was either too high or too low; or

(iii) Where in response to an inquiry by the Licensing Division, the cable operator submits a recalculation showing the royalty fee payable for the accounting period that is the subject of the inquiry was incorrect, and the amount deposited in the Copyright Office for that period was either too high or too low.

(2) Corrections to Statements of Account will not be placed on record, supplemental royalty fee payments will not be received for deposit, and refunds will not be issued, where the information in the Statements of Account, the royalty fee calculations, or the payments were correct as of the date on which the accounting period ended, but changes (for example, addition or deletion of a distant signal) took place later.

(3) Requests that corrections to a Statement of Account be placed on record, that fee payments be accepted, or requests for the issuance of refunds, shall be made only in the cases mentioned in paragraph (m)(1) of this section. Such requests shall be addressed to the Licensing Division of the Copyright Office, and shall meet the following conditions:

(i) The request must be in writing, must clearly identify its purpose, and, solely in the case of a request for a refund filed under paragraph (m)(1)(ii) of this section, must be received in the Copyright Office before the expiration of 60 days from the last day of the applicable Statement of Account filing period, or before the expiration of 60 days from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request, whichever time period is longer. A request filed under paragraph (m)(1)(ii) of this section made by telephone or by telegraphic or similar unsigned communication, will be considered to meet the requirements of this paragraph (m)(3)(i) if it clearly identifies the basis of the request, if it is received in the Copyright Office within the required 60-day period, and if a written request meeting all the conditions of this paragraph (m)(3) is also received in the Copyright Office within 14 days after the end of such 60-day period;

(ii) The Statement of Account to which the request pertains must be sufficiently identified in the request (by inclusion of the name of the owner of the cable system, the community or communities served, and the accounting period in question) so that it can be readily located in the records of the Copyright Office;

(iii) The request must contain a clear statement of the facts on which it is based and provide a clear basis on which a refund may be granted, in accordance with the following procedures:

(A) In the case of a request filed under paragraph (m)(1)(i) of this section, where the information given in the Statement of Account is incorrect or incomplete, the request must clearly identify the erroneous or incomplete information and provide the correct or additional information;

(B) In the case of a request filed under paragraph (m)(1)(ii) of this section, where the royalty fee was miscalculated and the amount deposited in the Copyright Office was either too high or too low, the request must be accompanied by an affidavit under the official seal of any officer authorized to administer oaths within the United States, or a statement in accordance with section 1746 of title 28 of the United States Code, made and signed in accordance with paragraph (e)(14) of this section. The affidavit or statement shall describe the reasons why the royalty fee was improperly calculated and include a detailed analysis of the proper royalty calculations;

(C) In the case of a request filed under paragraph (m)(1)(iii) of this section, the request shall be identified as "Response to Licensing Division Inquiry" and include a detailed analysis of the proper royalty calculations;

(iv)

(A) All requests filed under this paragraph (m) (except those filed under paragraph (m)(1)(iii) of this section) must be accompanied by a filing fee in the amount prescribed in §201.3(e) of this part for each Statement of Account involved. Payment of this fee may be in the form of a personal or company check, or of a certified check, cashier's check or money order, payable to: Register of Copyrights. No request will be processed until the appropriate filing fees are received.

(B) All requests that a supplemental royalty fee payment be received for deposit under this paragraph (m), must be accompanied by a remittance in the full amount of such fee. Payment of the supplemental royalty fee must be in the form of a certified check, cashier's check, or money order, payable to: Register of Copyrights; or an electronic payment. No such request will be processed until an acceptable remittance in the full amount of the supplemental royalty fee has been received.

(v) All requests submitted under this paragraph (m) must be signed by the cable system owner named in the Statement of Account, or the duly authorized agent of the owner, in accordance with paragraph (e)(14) of this section.

(vi) A request for a refund is not necessary where the Licensing Division, during its examination of a Statement of Account or related document, discovers an error that has resulted in a royalty overpayment. In this case, the Licensing Division will forward the royalty refund to the cable system owner named in the Statement of Account without regard to the time limitations provided for in paragraph (m)(3)(i) of this section.

(4) Following final processing, all requests submitted under this paragraph (m) will be filed with the original Statement of Account in the records of the Copyright Office. Nothing contained in this paragraph shall be considered to relieve cable systems from their full obligations under title 17 of the United States Code, and the filing of a correction or supplemental payment shall have only such effect as may be attributed to it by a court of competent jurisdiction.

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