

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

In the Matter of)
)
Copyright Office Fees) Docket No. 2012-1
)
Notice of Proposed Rulemaking)

COMMENTS



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May 14, 2012

I. INTRODUCTION

The American Cable Association (“ACA”) files these comments in response to the Copyright Office Fees Notice of Proposed Rulemaking (“NPRM”).¹ In the NPRM, the Copyright Office seeks comment on the Licensing Division’s proposal to establish filing fees for cable statements of account (“SOAs”).² Specifically, the Licensing Division proposes a \$500 filing fee for each SA-3 long form cable SOA, and \$15 and \$20 filing fees, respectively, for SA-1 and SA-2 short form cable SOAs.³ ACA appreciates that the Copyright Office has proposed a tiered filing fee approach, offering lower fees to cable operators filing short forms. At the same time, ACA submits that the proposed filing fees may result in a significant burden for some cable operators, particularly those that file multiple SA-3 long forms and face financial hardship. For these cable operators, the Copyright Office has provided no avenue for relief.

Accordingly, ACA recommends that the Copyright Office establish a streamlined waiver process for smaller cable operators where payment of the filing fee would result in a financial hardship. In addition, similar to the Copyright Office’s current practice for waivers of the electronic payment requirement,⁴ ACA recommends that the Copyright Office adopt a standard waiver process for larger cable operators. ACA proposes that such waivers be granted for two payment periods. ACA believes that permitting cable operators to seek waivers will greatly reduce financial burdens for some providers without materially compromising Congress’s goals in permitting the Copyright Office to recover up to 50% of its administrative costs.

¹ *In the Matter of Copyright Office Fees*, Notice of Proposed Rulemaking, Docket No. 2012-1, 77 FR 18742 (rel. Mar. 28, 2012).

² *Id.* at 18745 (rel. Mar. 28, 2012).

³ *Id.*

⁴ See *In the Matter of Electronic Payment of Royalties*, Final Rule, Docket No. RM 2006-4, 71 FR 45739 (Aug. 10, 2006) (“*Electronic Payment Waiver Order*”).

II. THE COPYRIGHT OFFICE SHOULD PROVIDE WAIVERS FOR SOA FILERS THAT FACE FINANCIAL HARDSHIP

Since its inception, the cable copyright compulsory license, as established by Congress, has long been sympathetic to the financial circumstances of cable operators, particularly smaller ones, and has provided special consideration for these operators. First, smaller systems pay a reduced fee.⁵ Second, smaller systems can carry adjacent market signals without a sharp increase in royalties because these systems are typically located in areas where consumers cannot receive off-air television service and usually carry a larger number of distant signals.⁶ Moreover, Congress understood that smaller cable systems would be less likely able to pay the same fees charged to larger systems.⁷

Like Congress, the Copyright Office has been historically compassionate toward cable operators with limited financial resources, especially smaller cable operators. In 2006, the Copyright Office acknowledged that with mandatory electronic payment, “there may be circumstances which would make it virtually impossible for a remitter to use the electronic payment option or would work a financial or other hardship.”⁸ Consequently, the Copyright Office amended its regulations to include a waiver provision.⁹ In these situations, the Copyright Office requires waiver requests to include a statement setting forth the reasons why the waiver should be granted and a signed certification by a duly authorized representative of the entity making the payment.¹⁰ In 2008, the Copyright Office noted that smaller cable operators should

⁵ A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, U.S. Copyright Office, at 42 (1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Electronic Payment Waiver Order* at 45739.

⁹ *Id.*

¹⁰ *Id.*; see 37 C.F.R. § 201.17(k)(3).

continue to be treated different from larger operators.¹¹ Further, the Copyright Office recognized that increased copyright fees for small cable systems limited operating cash flow and raised concerns that increased fees could lead to such systems dropping distant broadcast signals.¹² In 2011, the Copyright Office again expressed concern about the impact of its recommendations on cable operators with limited resources, particularly smaller ones.¹³

ACA asserts that in 2012, the factors that Congress and the Copyright Office relied upon in establishing and analyzing special rules for operators with limited resources, particularly smaller operators, still apply, and should be extended to those cable operators that face financial hardship. While Congress specifically authorized the Copyright Office to set fees for filing cable SOAs, Congress capped the fees at “one-half of the cost necessary to cover reasonable expenses incurred by the Copyright Office for the collection and administration of the [SOAs] and any royalty fees deposited with such statements.”¹⁴ Congress further required that any fees “be reasonable.”¹⁵

A reasonable filing fee structure must include a waiver process for cable operators that face financial hardship, particularly for smaller cable operators. For a small cable operator that

¹¹ Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, U.S. Copyright Office, at 121 (2008) (“The [Copyright Office] believes that small cable operators should continue to be treated differently under the statute because they provide a needed service and operate under economic constraints that are vastly different from those affecting larger operators.”).

¹² *Id.*

¹³ Satellite Home Viewer Extension and Reauthorization Act, Section 302 Report, U.S. Copyright Office, at 139 (2011) (“Before determining the date-specific trigger and transition period for the phase-out of the distant signal licenses, the Copyright Office recommends that Congress evaluate the concerns of stakeholders who operate with limited resources in the broadcast programming distribution chain and determine whether special consideration is advisable.”).

¹⁴ Satellite Television Extension and Localism Act of 2010, Title V of the “American Workers, State, and Business Relief Act of 2010,” Pub. L. 111-175, 124 Stat. 1218, 1244-12455 (2010), *amending* 17 U.S.C. § 708(a).

¹⁵ *Id.*

operates multiple systems, each requiring the filing of a Form SA-3, the total filing fee due can become significant. Exacerbating the matter, these operators are sometimes financially fragile, particularly given the higher costs associated with serving rural areas, and other marketplace forces, such as increased competition from DBS providers, and dramatically higher programming fees sought by national cable networks, regional sports networks, and local broadcasters. In order to provide meaningful relief for cable operators facing financial hardship, the Copyright Office must permit these operators to seek waivers from the proposed filing fees.

III. TO AFFORD MEANINGFUL RELIEF FOR CABLE OPERATORS FACING FINANCIAL HARDSHIP, THE COPYRIGHT OFFICE SHOULD ADOPT A STREAMLINED WAIVER PROCESS

To afford more meaningful relief to those cable operators that face financial hardship, the Copyright Office should adopt a waiver process to provide relief for operators subject to financial hardship. To that end, ACA proposes that the Copyright Office adopt a streamlined waiver process for smaller cable operators – those with 400,000 subscribers or less – facing financial hardship. In addition, ACA proposes that the Copyright Office provide a standard waiver process for larger operators based on similar criteria. Such waiver processes are not unusual for the Copyright Office, which has established rules that permit waivers of the electronic payment requirement.¹⁶

ACA urges the Copyright Office to adopt a streamlined waiver process for smaller cable operators that face financial hardship because the process for obtaining a waiver for these operators should not itself be burdensome. In order to obtain a waiver, smaller cable operators should be required to certify that they qualify for the waiver. A waiver request certification should be signed by a company representative or officer responsible for its truthfulness, and should include a statement that:

¹⁶ See 37 C.F.R. § 201.17(k)(3).

- The SOA filer meets the definition of a smaller cable operator; and
- Sets forth the reasons why payment of the filing fee would impose a financial hardship.

A smaller cable operator filing for a waiver should not be required to demonstrate negative cash flow in order to qualify for relief. Rather, the Copyright Office should only expect that a cable operator's assertion of financial hardship be reasonable under the circumstances. Because the waiver request certification would be signed by a company representative or officer responsible for its truthfulness, the waiver certification should not require the operator to submit any proof of financial condition.

Smaller cable operators should be able to consider the waiver granted when they make their request and receive an "acknowledgement of request," unless the Copyright Office notifies them of a problem or a question concerning the adequacy of the certification.¹⁷ Waivers should be granted for at least two payment periods with an opportunity for renewal.

For cable operators that do not meet the definition of a smaller cable operator, the Copyright Office should require submission of a signed certification that includes the following:

- Evidence of its financial condition, such as financial statements;
- A cost estimate for the filing fees that would be expected to be paid;
- A detailed statement explaining why its financial condition justifies waiving the filing fee; and
- An estimate of when the operator believes the filing fees would no longer be a financial hardship, along with supporting information.

Similar to the waiver for smaller cable operators, a larger cable operator should not be required to demonstrate negative cash flow. Instead, the cable operator's assertion of financial hardship should need only to be deemed reasonable under the circumstances by the Copyright Office.

ACA believes a filing fee waiver process will not compromise the Copyright Office's

¹⁷ The Federal Communications Commission recently adopted a similar streamlined process for small cable system waivers of the Commercial Advertisement Loudness Mitigation (CALM) Act requirements. See *In the Matter of Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, ¶¶ 49-55 (2011).

recovery of administrative costs as permitted by Congress. The Licensing Division estimates that it will collect \$1.157 million in filing fees, representing 47.9% of the SOA program costs.¹⁸ The Licensing Division receives thousands of SOAs every six months.¹⁹ ACA estimates the number of SOA filers requiring a filing fee waiver should represent only a tiny amount of these SOAs, and will not undercut the Copyright Office's recovery of up to half of its administrative costs. As a result, in order to provide meaningful relief for operators of cable systems facing financial hardship, the Copyright Office should adopt both streamlined and standard waiver processes.

IV. CONCLUSION

Because the Copyright Office has never previously required an SOA filing fee, the Copyright Office should ease the financial burden imposed on SOA filers by granting waivers of the proposed filing fees for cable systems that face financial hardship. ACA proposes a reasonable streamlined waiver process for small cable operators with less than 400,000 subscribers and a standard waiver process for larger cable operators. For the reasons outlined above, ACA urges the Copyright Office to adopt its proposal.

¹⁸ See <http://www.copyright.gov/docs/newfees/fees-stela.html> (last visited May 14, 2012).

¹⁹ As of 2011, NCTA reported that there were more than 7,100 cable systems in the U.S. Number of US Cable Headends, NCTA, available at <http://www.ncta.com/Stats/CableSystems.aspx> (citing Nielsen Focus) (last visited May 14, 2012).

Respectfully submitted,



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