

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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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 proposed revised fee schedule for filing cable and satellite statements of account (“SOAs”).² Specifically, after conducting further analysis of the fees it originally proposed, the Licensing Division now proposes a \$725 filing fee for each SA-3 long form cable Statement of Account (“SOA”),³ and new fees for other SOAs.⁴ Additionally, in response to ACA’s proposal that the Copyright Office establish a streamlined waiver process for smaller cable operators where payment of the filing fee would impose a financial hardship, the Copyright Office sought comment on whether it was permitted by law to adopt such waivers.⁵

In response to the Copyright Office’s inquiry into its statutory authority to provide waivers where payment of the filing fee would impose a financial hardship, ACA proposes an alternative approach that it believes is fully consistent with the Copyright Act. ACA suggests that the Copyright Office establish an additional filing fee category for SA-3 long form cable SOA filers that certify in advance that (i) they serve, company-wide, 400,000 or fewer subscribers, and (ii) payment of the SA-3 filing fee would impose a financial hardship. ACA proposes that the filing fee for this SA-3 small cable financial hardship fee category be set at \$50. In order to ensure a streamlined process, the small cable operator should be permitted to assume that the Copyright

¹ *In the Matter of Copyright Office Fees*, Notice of Proposed Rulemaking, Docket No. 2012-1, 77 FR 72788 (rel. Dec. 6, 2012) (“*Revised Fees NPRM*”).

² *Id.*

³ *Revised Fees NPRM* at 72790.

⁴ Additionally, the NPRM proposes a \$725 filing fee for each satellite SOA, and \$15 and \$20 filing fees, respectively, for SA-1 and SA-2 short form cable SOAs,

⁵ *Revised Fees NPRM* at 72790-72791.

Office deems its qualification for the SA-3 small cable financial hardship fee category accepted upon submission, unless contacted by the Copyright Office. This approach would provide meaningful relief for eligible providers, and would be consistent with Congress' goal of permitting the Copyright Office to recover up to 50 percent of its administrative costs by establishing fees for filers.

II. THE COPYRIGHT OFFICE HAS A HISTORY OF PROVIDING SPECIAL CONSIDERATION TO BOTH SMALL CABLE OPERATORS AND OTHERS WHEN ITS RULES WOULD IMPOSE A FINANCIAL HARDSHIP

Since its inception, the cable copyright compulsory license, as established by Congress and implemented by the Copyright Office, has recognized that not all cable operators are equal, particularly with regard to their available financial resources, and that special consideration at times is appropriate for small cable operators. The Copyright Office has also recognized that that special consideration is appropriate for cable operators when the Copyright Office's requirements would impose a financial hardship.

The cable copyright compulsory license has long accounted for operating differences between systems of different sizes and backgrounds. First, smaller cable systems pay far lower royalties than larger systems.⁶ Second, smaller systems are permitted to 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 therefore typically carry a larger number of distant signals than their larger urban counterparts.⁷ Moreover, in 2008, the Copyright Office noted that smaller cable operators should continue to be treated differently

⁶ A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, U.S. Copyright Office, at 42 (1997).

⁷ *Id.*

from larger operators.⁸ Further, the Copyright Office recognized that increased royalties for small cable systems limited operating cash flow and raised concerns that increased royalties could lead to such systems dropping distant broadcast signals.⁹ In 2011, the Copyright Office again expressed concern about the impact of its recommendations on cable operators with limited financial resources, particularly smaller ones.¹⁰

Additionally, the Copyright Office has historically recognized that its regulations may impose financial hardship on some cable operators, and has specifically acknowledged that it should make available waivers for filers where its regulations would impose a financial hardship. In 2006, the Copyright Office stated 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.”¹¹ Consequently, the Copyright Office amended its regulations to include a waiver provision.¹² 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.¹³ These waiver requests must also be submitted at least 60 days prior to

⁸ 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.”).

⁹ *Id.*

¹⁰ 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.”).

¹¹ *In the Matter of Electronic Payment of Royalties*, Final Rule, Docket No. RM 2006-4, 71 FR 45739, 45739 (Aug. 10, 2006)

¹² *Id.*

¹³ *Id.*; see 37 C.F.R. § 201.17(k)(3).

the royalty due date.

In light of the consideration that Congress and the Copyright Office has historically given to both small cable operators and others when the Copyright Office's rules imposed a financial hardship, ACA urges the Copyright Office to establish a separate fee category for cable operators filing SA-3 long form SOAs that have certified in advance that they are small and that payment of the filing fee would impose a financial hardship.

III. TO AFFORD MEANINGFUL RELIEF FOR SMALL CABLE OPERATORS WHERE THE FILING FEE WOULD IMPOSE A FINANCIAL HARDSHIP, THE COPYRIGHT OFFICE SHOULD ESTABLISH A \$50 SA-3 SMALL CABLE FINANCIAL HARDSHIP FEE CATEGORY

To afford more meaningful relief, the Copyright Office should now establish a separate fee category for cable operators filing SA-3 long form SOAs that serve, company-wide, 400,000 or fewer subscribers and who would find paying the SA-3 filing fee to impose a financial hardship. This additional fee category would be established at the same time that the Copyright Office establishes its other proposed fee categories. ACA proposes that cable operators may qualify for the special SA-3 filing category if they certify in advance that (i) they serve 400,000 or fewer subscribers; and (ii) paying the SA-3 filing fee would impose a financial hardship. Upon providing this certification, these filers would pay a \$50 filing fee for each SA-3 long form SOA. This reduced fee would provide meaningful relief for small cable operators who would face financial hardship if required to pay the other SA-3 filing fee.¹⁴

In order to be eligible for the SA-3 small cable financial hardship fee category, the small cable operator should be required to certify that it qualifies for the fee category. This certification should be signed by a company representative or officer responsible for its truthfulness, and should include a statement confirming that the owner of the cable system does

¹⁴ ACA does not propose establishing separate filing fee categories for small cable operators who file SA-1 and SA-2 forms and believe that paying these fees would impose a financial hardship.

not have more than 400,000 subscribers. The operator should also affirm that paying the regular SA-3 filing fee would impose a financial hardship. In addition, the small cable operator must submit a statement setting forth the reasons why payment of the regular SA-3 filing fee would impose a financial hardship. To obtain permission to pay the SA-3 small cable financial hardship filing fee, the cable operator shall submit to the Licensing Division its certified statement at least 60 days prior to the royalty due date.

To further help reduce administrative burdens for both operators and the Licensing Division, the Copyright Office should issue a standardized form for a cable system owner to certify in advance that it meets the definition of a small cable operator, and that paying the full filing fee would impose a financial hardship.¹⁵ Use of a streamlined certification process will help reduce the administrative burden and costs of qualifying for the reduced fee for these small cable operators. The form should also include space so that the small cable operator may set forth the particular reasons why paying the filing fee would impose a financial hardship to that operator. In addition, the small cable operator should be permitted to assume that the Copyright Office deems its qualification for the SA-3 small cable financial hardship fee category accepted upon submission, unless contacted by the Copyright Office.

IV. ESTABLISHING A \$50 SA-3 SMALL CABLE FINANCIAL HARDSHIP FEE CATEGORY WON'T DISRUPT THE GOALS OF RECUPPING THE COST OF PROCESSING FILINGS, AND IS CONSISTENT WITH CONGRESSIONAL INTENT

Establishing a SA-3 small cable financial fee category of \$50 for small cable operators where paying of the SA-3 fee would impose a financial hardship would comply with the requirement that the Copyright Office price its services fairly and assist with well functioning programs and recordkeeping.¹⁶

¹⁵ ACA attaches a proposed form as *Exhibit A*.

¹⁶ *Revised Fees NPRM* at 72790 (“Ultimately, the Office must price its services in a manner that is fair to the parties and conducive to well functioning programs and recordkeeping.”).

As part of the Satellite Television Extension and Localism Act of 2010 (“STELA”), Congress specifically authorized the Copyright Office to apportion up to 50 percent of the cost of processing the SOAs and royalty payments to licensees.¹⁷ In doing so, Congress provided two stipulations. Fees were mandated to “be reasonable.”¹⁸ STELA also capped the fees that may be collected by the Copyright Office 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.”¹⁹

Beyond STELA’s direction, Congress has granted the Copyright Office wide discretion to establish different categories for fees and the amounts to be paid. There is no statutory impediment to the Copyright Office establishing a fourth fee category for cable operators who file SA-3 forms and certify that they are small and that paying the SA-3 filing fee would impose a financial hardship. Moreover, the Copyright Act “indicates that fees shall be fair and equitable and give due consideration to the objectives of the copyright system.”²⁰ Accordingly, the Copyright Office would be acting well within its discretion in creating a SA-3 small cable financial hardship fee category of \$50.

Moreover, this filing fee structure is equitable, reasonable, and gives due consideration to the objectives of the Copyright system. ACA believes that establishing a filing fee category for SA-3 long form cable SOA filers who are small and for whom the fee will impose a financial hardship will not compromise the Copyright Office’s recovery of administrative costs as

¹⁷ 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).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Revised Fees NPRM at 72789, citing* 17 U.S.C. § 708(b)(4).

permitted by Congress. The Licensing Division now estimates that it will collect \$1.77 million in filing fees, representing 47 percent of the SOA program costs.²¹ The Licensing Division receives thousands of SOAs every six months.²² ACA estimates the number of SOA filers availing themselves of the financial hardship filing fee 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. First, only cable operators with 400,000 or fewer subscribers will qualify for the lower fees. Second, ACA estimates that among these SA-3 long form cable SOA filers only a small population would deem the SA-3 Filing Fees to impose a financial hardship.

²¹ *Id.* at 72790 ("Based on projected filings, the expected annual fee recovery will be approximately \$1.77 million, or approximately 47 percent of the estimated \$3.74 million total annual SOA program cost.").

²² 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 January 7, 2013).

V. CONCLUSION

Because the Copyright Office has never previously required an SOA filing fee, the Copyright Office should ease the financial burden imposed on SA-3 filers who would find the filing fee to impose a financial hardship. ACA proposes that the Copyright Office establish a SA-3 small cable financial hardship fee category of \$50 for small cable operators whom paying the SA-3 filing fee would impose a financial hardship. For the reasons outlined above, ACA urges the Copyright Office to adopt its proposal.

Respectfully submitted,



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EXHIBIT A

Certification	<p>CERTIFICATION (This form must be certified and signed in accordance with Copyright Office regulations, as explained in the general instructions.)</p> <ul style="list-style-type: none">• I, the undersigned, hereby certify that (Check one, <i>but only one</i>, of the boxes.)<ul style="list-style-type: none"><input type="checkbox"/> (Owner other than corporation or partnership) I am the owner of the cable system as identified in line 1 of space B; or<input type="checkbox"/> (Agent of owner other than corporation or partnership) I am the duly authorized agent of the owner of the cable system as identified in line 1 of space B and that the owner is not a corporation or partnership; or<input type="checkbox"/> (Officer or partner) I am an officer (if a corporation) or a partner (if a partnership) of the legal entity identified as owner of the cable system in line 1 of space B. • I, the undersigned, hereby certify that (Check only if applicable.)<ul style="list-style-type: none"><input type="checkbox"/> (Small cable operator) The owner of the cable system is the owner of cable systems with an aggregate total of 400,000 or fewer subscribers.<input type="checkbox"/> (Financial hardship) Paying the SA-3 filing fee would impose a financial hardship on the owner of the cable system because: _____ _____ _____ _____ _____ • I have examined the statement of account and hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith. [18 U.S.C., Section 1001(1986)] <p style="text-align: right; margin-right: 20px;">Handwritten signature:.....</p> <p style="text-align: right; margin-right: 20px;">Typed or printed name:.....</p> <p style="text-align: right; margin-right: 20px;">Title:.....</p> <p style="text-align: right; margin-right: 20px;">Date:.....</p>
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