

**Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C. 20024**

Copyright Office Fees

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Docket No. 2012-1

**COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS
ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby responds to the Copyright Office’s revised proposal to adopt a filing fee of \$725 for cable system Form SA3 statements of account (“SOAs”).¹ As discussed below, the Office will be committing a fundamental legal error if it adopts the proposed cable filing fees before NCTA and other interested parties have been given an opportunity to review and comment upon the “cost studies” cited as the basis for those fees. Moreover, the Office has not yet demonstrated that the proposed fees satisfy the statutory “reasonableness” standard. Under the circumstances, the Office should defer taking any further action with respect to its proposed cable filing fees until the public has the requisite opportunity to review and comment on the data and reasoning behind the Office’s proposal.

BACKGROUND

Pursuant to authority granted the Office by the Satellite Television Extension and Localism Act of 2010 (“STELA”), on March 28, 2012, the Office proposed for the first time to impose filing fees on cable system semi-annual statutory license SOAs.² The March Notice

¹ Copyright Office Fees, Notice of Proposed Rulemaking, Docket No. 2012-1, 77 Fed. Reg. 72788 (Dec. 6, 2012).

² Copyright Office Fees, Notice of Proposed Rulemaking, Docket No. 2012-1, 77 Fed. Reg. 18742 (Mar. 28, 2012).

recommended the following fees: (i) Cable Form SA1 – \$15; (ii) Cable Form SA2 – \$20; and (iii) Cable Form SA3 – \$500.³

Both the cable industry and the copyright owners objected to the fees proposed in the March Notice. NCTA explained that without access to the “cost study” used by the Office in formulating the proposed fees it was impossible to ascertain whether, as Congress had directed, the Office had based its proposal on the “reasonable expenses associated with the review and processing of SOAs and associated royalty payments.”⁴ On the other hand, the copyright owners attacked the March Notice’s filing fee proposals, alleging that they were set too low to recover the cable industry’s “share” of the Office’s “actual reported operating costs.”⁵

Thereafter, on December 8, 2012, the Office published a new notice of proposed rulemaking (the “December Notice”) increasing the proposed Form SA3 filing fee from \$500 to \$725. As the basis for its decision to increase its proposed SA3 filing fee by nearly 50%, the December Notice cites to a “second study” that used a “revised methodology” in order to “more precisely capture the cost of providing the services in question.”⁶ The contents of this “second study,” like the study on which the original fee proposal was based, were not made public.

Lacking access to either the original cost study underlying the fees proposed in the March Notice or the revised cost study referenced in the December Notice, NCTA submitted a

³ *Id.* The Office also proposed a filing fee of \$75 per form for the semi-annual SOAs submitted by satellite carriers.

⁴ NCTA Comments at 1, *citing* 17 U.S.C. § 708. The American Cable Association (“ACA”) also filed comments in response to the March Notice, urging the Office to adopt a waiver process for those cable systems (both large and small) where payment of the filing fee would result in financial hardship.

⁵ Copyright Owner Comments at 1-2.

⁶ 77 Fed. Reg. at 72789.

Freedom of Information Act (“FOIA”) request to the Office on December 13, 2012 seeking production of both fee studies.⁷ To date, NCTA has not received a response to its FOIA request.⁸

DISCUSSION

A basic tenet of administrative law requires an agency to “identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.”⁹ As the D.C. Circuit explained:

To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.¹⁰

The Copyright Office has failed to satisfy this standard, twice putting forward proposed rules establishing cable SOA filing fees without disclosing the “cost studies” on which it relied in formulating those fees. For that reason, NCTA urges the Office to act expeditiously to grant its FOIA request. If the Office adopts the proposed fee rule without first making the relevant cost studies available for review by NCTA and other interested stakeholders, it will be committing “serious procedural error.”

While the opportunity to fully examine and analyze the cost studies would be necessary to evaluate the Office’s methodology for calculating costs related to cable SOAs, the December Notice raises numerous questions on its face. Fundamentally, the December Notice fails to

⁷ A copy of NCTA’s FOIA request is attached hereto. The December Notice expressly refers to both of these studies. 77 Fed. Reg. at 72789.

⁸ The Office has 20 “working days” to respond to a FOIA request. 37 C.F.R. § 203.4(f). Thus, the deadline for the Office to respond to NCTA’s FOIA request is on or about January 15, 2013. Even if NCTA had filed its FOIA request on the same day that the December Notice was published in the Federal Register (December 6, 2012), the deadline for the Office to respond would still fall after the date on which these comments are due.

⁹ *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir., 1982).

¹⁰ *Id.* See also *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (the information that an agency must reveal for public evaluation in a rulemaking setting includes the technical studies and data on which the agency relies).

demonstrate that the costs on which the fees are based reflect the “reasonable expenses” incurred by the Office in administering the cable compulsory license, as required by STELA. The December Notice’s explanations of the decision to conduct a new study to ascertain the relevant expenses, the new study’s methodology, and how the new study’s findings translated into the Office’s proposals are vague and incomplete. Adoption of the proposed fees on the basis of those explanations would constitute arbitrary and capricious agency action.

For example, the December Notice explains that the Office reexamined the SOA program costs using a “traditional methodology” instead of the “additive model” used in formulating the March Notice proposal.¹¹ The December Notice suggests that the latter approach “is sometimes not as successful in determining the cost of a more complex task, such as the processing of an entire SOA.”¹² This explanation begs the very question that NCTA raised in its comments in response to the March Notice – why, exactly, is the review of a cable SOA necessarily deemed a “complex task.” The Office’s own rules indicate that, upon receiving an SOA, the Office’s only required tasks are to (i) make an official record of the date when such Statement and fee were physically received by the Office and (ii) examine the Statement and fee “for obvious errors and omissions appearing on the face of the documents.”¹³ While the Office may well engage in a more searching review of cable SOAs than is called for by its rules, neither the March Notice nor the December Notice provide any explanation of why costs related to this expanded review should be borne by the cable industry as a “reasonable expense.” Further review of the underlying cost studies is necessary to determine whether and to what extent the Office may be including tasks and costs in its calculation beyond those contemplated by Congress.

¹¹ 77 Fed. Reg. at 72789.

¹² *Id.*

¹³ NCTA Comments at 4-5, *citing* 37 C.F.R. § 201.17(c)(2).

In addition, the December Notice states that the “revised methodology” takes into account costs that were not reflected in the earlier cost study, such as costs incurred in “exceptional cases that involve time-intensive research or problem resolution.”¹⁴ The December Notice cites as an example the costs involved in matching an electronic funds transfer payment with an SOA received much earlier or later than the payment or without a remittance advice.¹⁵ But the Notice offers no information to justify the claim that matching payments to SOAs is a particularly difficult or time-consuming task nor does it attempt in any way to quantify how often this or similar situations arise or the costs involved. Moreover, absent access to the cost studies, the record also is devoid of any data that would allow NCTA to examine whether or how the original cost study accounted for such expenses.

Other aspects of the proposed methodology also raise questions about the “reasonableness” of the costs the Office proposes to assess against the cable industry. For example, while the December Notice indicates that the Office’s new cost study appropriately excludes certain costs related to the salaries of staff who work in the Licensing Division’s Fiscal Section because “so much of the work of these employees is dedicated to royalty management functions that serve copyright owners,”¹⁶ there is no indication that the cost study considered whether and to what extent other tasks performed by the Licensing Division principally benefit copyright owners and should thus be excluded from the fee calculation in whole or in part.

Finally, the December Notice states that the revised cost study includes “non-routine staff effort” such as that engaged in by the Office “to facilitate its implementation of STELA” and

¹⁴ 77 Fed. Reg. at 72790.

¹⁵ *Id.*

¹⁶ *Id.*

also costs associated with the Office’s “reengineering project.”¹⁷ Again, access to the cost studies will help NCTA and other interested parties assess which actions taken by the Office to implement STELA were included in the new study and to what extent were those actions not included in the previous study. Presumably, those cost studies will also indicate to what extent the filing fees reflect the Office’s “reengineering” costs. The questions that NCTA raised in its comments on the March Notice remain as to whether these are one-time costs unlikely to recur in future accounting periods and, in any event, whether it would be reasonable or appropriate to base cable filing fees on these administrative costs.

CONCLUSION

For all these reasons, the Office should not recommend the adoption of the proposed filing fee schedule without giving stakeholders an opportunity to fully review and comment on the cost studies on which those fees are based.

Respectfully submitted,

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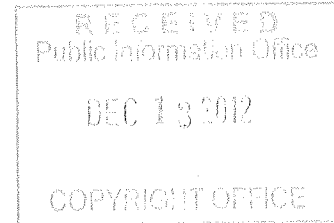
¹⁷ *Id.*

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December 13, 2012

**VIA CERTIFIED MAIL/RETURN RECEIPT
AND HAND DELIVERY**

U.S. Copyright Office
FOIA Requester Service Center
Copyright Office
GC/I&R
P.O. Box 70400
Washington, D.C. 20024



Re: FREEDOM OF INFORMATION ACT REQUEST

Dear Sir or Madam:

This is a request made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, including the policies and procedures of the Copyright Office relating to FOIA requests codified in Part 203 of Chapter II of Title 37 of the Code of Federal Regulations.

This firm represents the National Cable & Telecommunications Association ("NCTA") in connection with the Copyright Office's proceeding to establish filing fees for the semi-annual submission of cable compulsory license Statement of Account forms. *See In the Matter of Copyright Office Fees*, Notice of Proposed Rulemaking, Docket No. 2012-1, 77 Fed. Reg. 72788 (December 6, 2012). *See also In the Matter of Copyright Office Fees*, Notice of Proposed Rulemaking, Docket No. 2012-1, 77 Fed. Reg. 18742 (March 28, 2012).


Pursuant to FOIA, NCTA respectfully requests that the Copyright Office produce copies of (1) the "New Cost Study for Setting Cable and Satellite SOA Filing Fees" and (2) the "original cost study for the Office's administration of the cable and satellite statutory licenses," both of which are referenced in the Office's December 6, 2012 Notice of Proposed Rulemaking in Docket No. 2012-1 (77 Fed. Reg. at 72789).

Kindly forward the requested information to my attention at the address above. This firm, on behalf of NCTA, agrees to be responsible for the payment of all copying charges and other recoverable costs incurred by the Copyright Office in connection with its preparation of its response to this request. See 37 C.F.R. § 203.6.

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If you require any additional information, please do not hesitate to contact me at (202) 939-7924 and/or sdavidson@edwardswildman.com.

Very truly yours,

A handwritten signature in black ink, appearing to read "Seth A. Davidson", written in a cursive style.

Seth A. Davidson