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

In the Matter of	)	
Copyright Office Fees	)	**Docket No. 2012-1**

REPLY COMMENTS OF COPYRIGHT OWNERS

Pursuant to the Notice of Proposed Rulemaking, 77 Fed. Reg. 72,788 (Dec. 6, 2012) ("NPRM") in the captioned docket, as modified by 78 Fed. Reg. 10,583 (Feb. 14, 2013), Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Music Claimants, Canadian Claimants Group, National Public Radio, Broadcaster Claimants Group, and Devotional Claimants (collectively "Copyright Owners") submit the following reply comments concerning the modified fee schedule related to filing statements of account ("SOAs") by cable systems and satellite carriers as authorized by 17 U.S.C. §§ 111(d)(1)(G), 119(b)(1)(C), and 708(a)(10)-(11), which were enacted as part of the Satellite Television Extension and Localism Act, Pub. L. No. 111-175, 124 Stat. 1218.

INTRODUCTION AND SUMMARY

In response to the NPRM, Copyright Owners filed comments addressing the Office's modified fee schedule for cable systems and satellite carriers that submit SOAs pursuant to Sections 111 and 119 of the Copyright Act. Comments of Copyright Owners (filed Jan. 7, 2013) ("Copyright Owners Comments"). In those comments, Copyright Owners emphasized that the proposed fees failed to account for significant expenses incurred by the Office in administering the statutory licenses. *See id*. at 3-6. Copyright Owners also pointed out that, by relying on

historical averages that significantly overestimate the number of Form 3 systems that will pay filing fees, the Office's proposed fees are too low to fulfill the congressional objective of allocating all administrative costs related to the license evenly between statutory licensees and copyright owners. *See id*. at 6-11.

Two other parties filed comments in response to the NPRM. The National Cable and Telecommunications Association ("NCTA") focused on NCTA's inability to assess the reasonableness of the Office's costs, and the filing fees related thereto, without having access to the cost studies on which the Office relied in formulating its proposed filing fees. Comments of NCTA at 3-6 (filed Jan. 7, 2013) ("NCTA Comments"). NCTA noted that it had filed a request for additional information about the Office's cost studies under the Freedom of Information Act ("FOIA"). *Id.* at 2-3. The American Cable Association ("ACA") also filed comments, which were limited to advocating for a "hardship" exception that would allow smaller Form 3 systems to pay reduced filing fees if those systems certify that the proposed fees constitute a financial hardship. Comments of ACA at 4-7 (filed Jan. 7, 2013) ("ACA Comments").

On February 7, 2013, in response to NCTA's request for additional information, the Office invited stakeholders to attend a public meeting in which it provided greater detail about the Office's methodology for estimating the costs used in determining filing fees for cable operators and satellite carriers. Representatives from NCTA, ACA, DirecTV, and Copyright Owners attended the meeting.

Although Copyright Owners appreciate the Office's willingness to provide greater detail about its methodology for estimating the administrative costs it included in its fee proposal, Copyright Owners believe that the Office has no statutory basis for excluding any of the costs that it deducts from royalties paid pursuant to the statutory licenses in Section 111 and 119 of the

Copyright Act, 17 U.S.C. §§ 111 and 119, as reflected in the Licensing Division's Operating Costs (released by the Library of Congress, U.S. Copyright Office, on a quarterly basis). Consequently, for the reasons expressed in Copyright Owners' initial comments, the Office should base its proposed filing fees on all such costs. *See* Copyright Owners Comments at 3-6. In addition, the Office should incorporate accurate data regarding the number of Form 3 cable systems likely to file SOAs in the accounting periods following the adoption of the proposed filing fee. The current proposal relies on an outdated, three-year average that masks the continuously declining number of Form 3 systems due to consolidation that has already occurred and that, from a historical perspective, is certain to continue. *Id.* at 6-8. In the near term, a filing fee of $950 for Form 3 systems would result in the Office recovering approximately 50 percent of the costs it incurs in administering the Section 111 license. *Id.* at 8.

The proposed fees for satellite carriers (who did not file comments) should also be adjusted to reflect the actual costs of administering the satellite license. As discussed in the Copyright Owners' initial comments, the Office should employ a methodology tied to the number of subscribers that results in a fee that approximates half of the costs of administering the satellite license. *Id.* at 8-10. Setting satellite filing fees in this way will fairly allocate administrative costs among satellite carriers and serve the congressional objective of proportional allocation of costs between copyright owners and statutory licensees. *See id.* Finally, the Office lacks the authority under the statute to institute the "hardship" exception proposed by ACA.

DISCUSSION

I. The Office Has No Basis For Excluding Administrative Costs, Including Fiscal Costs, From Its Fee Calculation.

During the public meeting on February 7, 2013, the Office reiterated that its fee proposal excludes certain fiscal expenses, expenses the Office claims benefit Copyright Owners. NCTA, which complained about the lack of information related to the Office's fee study, has also suggested that the Office may have incurred other expenses that, in its view, may principally benefit Copyright Owners. NCTA Comments at 3-6. NCTA contends that such costs are not "reasonable" and should not be included in calculating a proposed filing fee.

The Office must include all of its costs of administering the Section 111 and Section 119 licenses in setting filing fees for cable systems and satellite carriers. Since 1978, the excluded costs have been considered part of the "reasonable costs incurred by the Copyright Office" under Section 111 that may be deducted from the royalty funds. *See* 17 U.S.C. § 111(d)(2). Nothing in STELA suggests that the same costs can or should be excluded from the reasonable costs used to set filing fees. For the reasons previously described, the Copyright Office has no basis for excluding certain costs as ones that, in the Copyright Office's view, "principally benefit copyright owners." *See* Copyright Owners Comments at 4-5 (explaining that the costs at issue benefit all participants and that, in any event, the Office has no authority to impose these costs solely on Copyright Owners). The Office's arbitrary exclusion of a significant portion of these costs deviates from the expressed intent of Congress in 17 U.S.C. § 708(a), which mandates that the Office establish fees to recover the costs incurred by the Office for the "collection *and* administration of the SOAs *and* any royalty fees deposited with such statements." *See* Copyright Owner Comments at 3-6 (emphases altered).

The Office should also reject NCTA's suggestion that the Licensing Division has engaged in unnecessarily searching examinations of SOAs. The Licensing Division's examination of SOAs benefits copyright owners and statutory licensees, as evidenced by the over $5.5 million in refunds issued by the Licensing Division from 2008 to 2012. *See* Library of Congress, U.S. Copyright Office, Licensing Division Operating Costs as of December 31, 2012. More importantly, the Licensing Division does not have the power to conduct an audit of the SOAs (STELA created an audit right for Copyright Owners that the Office is currently attempting to implement). Because the Licensing Division's examination is necessarily limited to the information on the face of the SOA, the Office should include all reasonable costs of reviewing those statements for facial errors—all of which the Office deducts from the royalty funds.

II. The Office Has Inconsistently Applied Its Methodology As Evidenced By Its Use Of Outdated Information Regarding The Number Of Form 3 Cable Systems.

During the public meeting on February 7, 2013, the Office explained that it generally relied on 2011 data in estimating the Office's administrative expenses. However, the Office noted that in a few instances, it discounted those expenses where they were unlikely to recur or where the Office determined that those expenses were unusually high in 2011 and therefore not representative of the Office's expected costs going forward. Unfortunately, by averaging the number of Form 3 systems that filed SOAs over the last three years, the filing fee calculation uses a number that is *not* representative of the number of Form 3 systems that can be expected to file SOAs going forward.

In the February 7 meeting, the Office confirmed what Copyright Owners assumed in their comments, namely, that the Office used three-year historical averages to determine the number

of Form 3 systems that would be expected to pay the proposed filing fee in the future. Specifically, after identifying the costs that were included in its fee study, the Office explained that it then calculated the amount of fees it expected to collect by multiplying the three-year averages of the number of Form 1, Form 2, and Form 3 cable systems by the proposed filing fees for each type of system ($15, $20, and $725 respectively). Of particular note, the Office projected that it expected to receive 2,300 Form 3 SOAs annually (approximately 1,150 per accounting period). But only 1,015 Form 3 cable systems filed SOAs in the last 2011 accounting period, which reflects a continuing downward trend in the number of Form 3 SOA filings. Copyright Owners Comments at 7. Thus, based on the most recent data available from 2011, the Office cannot reasonably expect more than 2,030 Form 3 SOAs to be filed in future years (1,015 Form 3 systems filing two statements per year), far fewer than the 2,300 referenced by the Office in the February 7, 2013 meeting.

In estimating the number of Form 3 systems (and, thus, the estimated future amounts collected from the proposed fees), the Office arbitrarily deviated from its general reliance on 2011 data except where the Office has a reasonable basis to conclude that the 2011 data is anomalous. As Copyright Owners explained in their previous comments, given the unambiguous trend of increasing consolidation in the cable industry, the 2011 data likely *overstates* the number of Form 3 cable systems that will file SOAs in future years. For that reason, the Office's use of historical averages lacks any justifiable record basis. *See id.* at 6-8. When Copyright Owners, during the February 7 public meeting, questioned the Office's use of historical averages to determine the number of Form 3 systems, the Office indicated that it was simply exercising caution in setting fees because 17 U.S.C. § 708(a) prohibits filing fees from exceeding 50 percent of the Office's administrative costs.

That explanation does not support the Office's decision for two reasons. First, because the Office has wrongly excluded certain fiscal costs, the proposed fees do not come close to representing 50 percent of the reasonable costs that STELA sought to have recovered through filing fees. *See* Copyright Owners Comments at 5. Second, even if the Office were correct to exclude fiscal costs—and for the reasons previously expressed, *id.* at 3-6, the Copyright Office lacks a statutory basis for excluding such costs—the Office has already exercised caution by setting the proposed fees at 47 percent of the costs included in the Office's study. While it is possible that the number of Form 3 cable systems could rise in a given accounting period, there is no historical evidence indicating that such an increase would be a substantial one. Since 1998, only twice has the number of Form 3 systems increased from one calendar year to the next, with the largest increase coming in 2009, when Form 3 filings rose by 26.[1] Such a marginal increase would not result in the filing fee recovery exceeding 50 percent of the Office's costs incurred in administering the license, even if the Office were to persist in its underinclusive approach to calculating reasonable costs.[2] And those rare increases in the number of Form 3 systems pale in comparison to the clear historical trend toward increasing consolidation, which has resulted in a drop from over 2,300 cable systems in 1998 to approximately 1,015 cable systems by the end of 2011.[3]

[1] Source: Cable Data Corporation.

[2] Furthermore, in the event that the aggregate fees collected by the Office exceed 50 percent of the Office's administrative costs in a given year, the Office could require that the portion of the fees exceeding 50 percent be refunded to cable operators and/or satellite carriers.

[3] The Office cannot reasonably justify its proposed filing fee by pointing to reduced costs flowing from the filing of fewer SOAs. As a historical matter, the costs of administering the statutory license have increased substantially during the same period in which the number of Form 3 systems declined. Specifically, Licensing Division operating costs for cable amounted to $2,502,810 in 1998 and $4,621,826 in 2011. *See* Library of Congress, U.S. Copyright Office, Licensing Division Operating Costs as of September 30, 2012, at 14, 27. Annual costs thus rose by over $2 million during the same period that the number of Form 3 systems fell from 2,300 to just over 1,000. And, in 2010, Congress modified the Section 111 license to allow cable systems to pay royalties on a community-by-community basis, and as a result, the complexity of the SOAs has increased as more and more cable systems have taken advantage of this option and included community-by-community calculations of distant signal royalty payments.

Finally, the Office should note that notwithstanding the mandate in STELA to adopt filing fees, which was enacted on May 27, 2010, the Office did not begin a rulemaking proceeding until January 2012, more than 18 months later. Cable operators and satellite carriers already have avoided paying filing fees (as well as audit requirements) for each of the six accounting periods since the enactment of STELA, while Copyright Owners have had to bear the entire burden of these expenses during this time period (and the thirty years prior to STELA). Given the significant benefit that the cable and satellite industries have already received from this delay, the Office should not further aggravate the harm to Copyright Owners by using an unrealistic estimate of the number of Form 3 systems that will pay the proposed filing fee. At a minimum, the Office should consult the Licensing Division and use updated data regarding the number of Form 3 systems that filed SOAs in the last two accounting periods (2011-2 and 2012-1). The Office should then adjust its proposed fee to account for a realistic number of Form 3 cable systems that are likely to file SOAs in future accounting periods. In the near term, a cable filing fee of $950, *see* Copyright Owners Comments at 8, and a satellite fee set in the manner described in the Copyright Owners Comments, *id.* at 10, would generate figures approximating 50 percent of the administrative costs.

III. The Office Should Reject ACA's Request For A "Hardship" Exception.

ACA has proposed that the Office adopt a "hardship" exception for cable operators that, "company-wide," have fewer than 400,000 subscribers. ACA Comments at 4. Under the ACA proposal, such operators could qualify for the exception—and pay a $50 fee rather than the proposed $725 fee—merely by certifying that the systems owned by the operator have 400,000 or fewer subscribers and that payment of the normal fee would constitute a "financial hardship." *Id.* at 4-5. The Office should reject this proposal.

First, there is no statutory basis for such an exclusion, as the Office has recognized. *See* NPRM at 72,790-91 (finding no statutory authority for "the Register [to] creat[e] exceptions or waivers to the general fee"). The Office's justification for assessing lower fees for Form 1 and Form 2 systems, *see* NPRM at 72,790 (noting "minimal amount of processing required and the typical royalty payments associated with [Form 1/2] statements"), does not exist for Form 3 systems, which file more complex SOAs and which account for the lion's share of the royalties handled by the Office. There is no reason to believe, and ACA has certainly not made any showing, that the costs of processing Form 3 SOAs vary based on a Form 3 system's number of subscribers. Section 708(a) of the Copyright Act does not give the Office the power to "creat[e] exceptions or waivers to the general fee" for what ACA contends are "small" Form 3 systems. *Id.* at 72,790-91; *see Public Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989) ("[T]here exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." (quotation omitted)).

Nor does ACA's proposed exception fall under an agency's authority to create "*de minimis*" exceptions implicating "trivial or no value." *See Public Citizen*, 869 F.2d at 1556 (acknowledging that "an administrative agency has an implied *de minimis* authority to create even certain categorical exceptions to a statute 'when the burdens of regulation yield a gain of trivial or no value'"). According to Cable Data Corporation, approximately 1,015 Form 3 cable systems filed SOAs in the second accounting period of 2011. ACA's proposed exception would allow 290 of those Form 3 cable systems, or approximately 29 percent, to qualify for the "hardship" exception that would allow them to avoid paying nearly all of the filing fees required

under Section 708(a) as a means of recovering the costs of administering the licensing system.[4] In any event, the proposed filing fee does not pose a financial hardship: based on 2011-2 data from Cable Data Corporation, the systems that fit within ACA's definition of "small" Form 3 systems had average gross receipts of over $2.6 million. The proposed filing fee represents 0.027 percent of their average gross receipts and, thus, is inconsequential, not a hardship.

Second, ACA's proposal is an invitation to abuse. The certification itself requires nothing more than an "explanation" as to why the payment constitutes a financial hardship. The proposal (like the statute) does not provide the Office with any criteria for assessing that explanation. ACA contemplates that every "explanation" will automatically result in a reduced filing fee. Thus, even if the proposal were statutorily permissible, which it is not, the Office should reject it as unworkable.

CONCLUSION

For the reasons stated, Copyright Owners urge the Office to incorporate all of the Licensing Division's operating costs in its fee calculation, to calculate the fees necessary to recover approximately half of the Licensing Division's operating costs by using the most recent data available regarding the number of Form 3 cable systems, and to reject ACA's proposal for a hardship exception.

[4] ACA's proposal purports to apply to systems that, whether individually or in conjunction with affiliates, have fewer than 400,000 subscribers. According to Cable Data Corporation, 290 systems fitting that profile filed SOAs in the second accounting period of 2011.

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