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

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

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

The National Cable & Telecommunications Association (“NCTA”) submits its Reply Comments in the above-captioned Copyright Office (“Office”) rulemaking proceeding.

INTRODUCTION

Throughout this proceeding, NCTA has urged the Office to give interested parties a meaningful opportunity to review and comment on the “cost studies” that the Office relied on in formulating its cable and satellite Statements of Account (“SOA”) filing fee proposals.¹ When the Office did not respond to these requests, NCTA filed a Freedom of Information Act (“FOIA”) request seeking access to the cost studies.²

On January 25, 2013, the Office responded to NCTA’s FOIA request, withholding 37 pages of relevant material and releasing only three pages (two of which were completely blank). The Office explained that its decision not to release the studies underlying the proposed filing

¹ The Office has issued two separate Notices of Proposed Rulemaking in this proceeding: 77 Fed. Reg. 18742 (Mar. 28, 2012) (initial filing fee proposal); 77 Fed. Reg. 72788 (Dec. 6, 2012) (revised filing fee proposal).

² Letter from Seth Davidson, Counsel for NCTA, to FOIA Requester Service Center, U.S. Copyright Office (Dec. 13, 2012). Upon learning of NCTA’s FOIA request, the Copyright Owners filed their own motion asking that the cost studies be made public. The Owners seconded NCTA’s contention that the Office is required by governing law to afford interested parties an opportunity to analyze and evaluate the methodology and results contained in the studies on which the proposed fees are based. Copyright Owners’ Request to Make Cost Studies Public and to Extend the Reply Comment Deadline, Docket No. 2012-1 (filed Jan. 15, 2013). *See also ARRL et al. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

fees was based on exemption 5 to FOIA, which protects an agency's "deliberative process."³ In lieu of making the cost studies (and the analyses and projections contained therein) available for public review and comment, the Office convened a meeting on February 7, 2013. Staff made an oral presentation to interested stakeholders, providing a limited amount of additional information regarding the Office's rationale for its revised filing fee proposal.⁴

While we appreciate the Office's attempt to provide NCTA and others with a further explanation of how the Office came up with its latest filing fee proposal and why it included – and excluded – certain costs on which that proposal was based, the procedure followed by the Office is an inadequate substitute for making the cost studies available to interested parties for review and analysis. Among other things, the February 7, 2013 staff briefing offered no information about the cost study on which the Office's initial March 2012 filing fee proposals were based and failed to fill in the missing pieces critical to understanding and assessing the reasonableness of the Office's revised filing proposal. More significantly, the staff briefing left unclear the precise methodology that the Office used (i) to identify the categories of costs that are reasonably attributable to the collection and administration of the SOAs and any royalty fees deposited with those SOAs, (ii) to determine the reasonableness of the expenses falling within those categories, and (iii) to establish the reasonableness of the Office's projections and judgments regarding the level of those expenses going forward.

The Office's failure to make public the cost studies has significantly limited NCTA's ability to evaluate and provide informed comment on whether the Office is fulfilling Congress' intent to establish "reasonable" filing fees based on "reasonable" expenses. We therefore

³ Letter from George Thuronyi, Chief FOIA Officer, U.S. Copyright Office, to Seth A. Davidson (dated Jan. 25, 2013).

⁴ *Copyright Office Fees 2012-2013*, Copyright.com, <http://www.copyright.gov/docs/newfees/> (last visited Feb. 10, 2013) (referencing Feb. 7, 2013 meeting).

disagree with the Office's decision to withhold these critical studies – and its failure to provide many details of the underlying costs – and urge the Office to reconsider its response to NCTA's FOIA request.⁵

However, even without access to the cost studies, two things are clear. First, the Copyright Owners' contention that the filing fee should be set at \$950 per Form SA3 SOA is based on a fundamentally flawed view of the statutory standard for establishing filing fees under the amendment to Section 708(a) enacted by Congress as part of the Satellite Television Extension and Localism Act of 2010 ("STELA").⁶ That standard sets one-half of the "reasonable expenses" as a ceiling, not a target, for the adoption of "reasonable" cable and satellite filing fees. Second, the filing fee proposals of both the Office and the Owners are based on expenses (including costs attributable to the Office's "reengineering" project and to the implementation of the 2010 STELA legislation) that are not representative of the costs that should be considered in setting the filing fees for future accounting periods. The Office should reconsider its revised filing fee proposal with these considerations in mind and establish a filing fee for Form SA3 SOAs that is less than the \$500 per form fee proposed in the initial Notice of Rulemaking.

⁵ Even if the Office is correct that exemption 5 applies to NCTA's FOIA request (an assertion that NCTA continues to dispute), the decision to withhold information pursuant to exemption 5 is discretionary. The Office, which already has voluntarily disclosed (albeit orally) some information that is undoubtedly contained in the withheld portions of the cost studies, should exercise its discretion to make those studies available in full.

⁶ Under the Copyright Owners' proposal, cable and satellite providers would be required to pay roughly \$2.2 million annually in filing fees. Copyright Owners' Comments at 11 (filed Jan. 7, 2013) (*hereinafter* "Copyright Owners' January 7, 2013 Comments").

DISCUSSION

I. THE COPYRIGHT ACT DISTINGUISHES BETWEEN THE COSTS TO BE CONSIDERED IN SETTING CABLE AND SATELLITE FILING FEES AND THE COSTS THAT ARE DEDUCTED FROM THE ROYALTY POOL AVAILABLE FOR DISTRIBUTION TO COPYRIGHT OWNERS.

The Office's December 6, 2012 *Notice* soliciting comment on increases to certain of its initial filing fee proposals estimates that the revised fees will yield approximately \$1.77 million annually from cable and satellite filers – an amount the Office characterizes as representing 47 percent of the “estimated \$3.74 million total annual SOA program cost.”⁷ The Copyright Owners have countered that, even as revised, the fees proposed by the Office are inadequate because they fail to recover one-half of the full amount that the Office deducts from the royalty pools available for distribution to copyright holders to offset certain of the Office's costs.⁸ The flaw in the Owners' position is that it erroneously assumes that Section 708(a) requires the Office to use the amount that the Copyright Act directs be deducted from the royalty pools as the target for setting cable filing fees.

The statutory provisions governing the deduction of costs from the royalty pools and the setting of filing fees for cable and satellite SOAs are not the same. On the one hand, Congress has broadly directed that the royalties collected under Sections 111 and 119 shall be deposited in the Treasury of the United States “after deducting the reasonable costs incurred by the Copyright Office under [Sections 111 and 119].”⁹ In contrast, the amendment to Section 708(a) authorizing the Office to establish and collect cable and satellite filing fees establishes a narrower standard. Those filing fees may not exceed one-half of the Office's “reasonable expenses ... for the collection and administration of the statements of account and any royalty fees deposited with

⁷ Copyright Office Fees, 77 Fed. Reg. 72788, 72790 (Dec. 6, 2012).

⁸ *Copyright Owners' January 7, 2013 Comments* at 3.

⁹ See 17 U.S.C. § 111(d)(2); see also 17 U.S.C. § 119(b)(3).

such statements”¹⁰ and must be reasonable in and of themselves.¹¹ In short, the statutory standard describes a ceiling on filing fees, not a target.

The fact that Congress did not simply intend for the Office to hold cable and satellite operators responsible for one-half of whatever amount is deducted from the royalty pools under Sections 111 and 119 is confirmed by reference to the legislative history of Section 708(a). The October 28, 2009 House Judiciary Committee report accompanying the legislation that became STELA contained an estimate from the Congressional Budget Office (“CBO”) of the amount of filing fee revenue that would be collected from cable and satellite companies pursuant to the legislation.¹² The CBO informed Congress that “based on information from the Copyright Office... [the] new filing fees [for cable and satellite combined] would ultimately generate about \$1 million per year for a total of \$7 million over the 2010-2019 period....”¹³

At the time the CBO was preparing its report, the amounts deducted from the cable and satellite royalty pools for the two previous royalty years (2007 and 2008) were \$3,188,924 and \$4,013,720 respectively.¹⁴ Had it been understood by the Copyright Office and CBO that Congress intended cable and satellite operators simply to shoulder half of the amount deducted from the funds available for distribution, as the Owners now claim, the CBO estimate of fee collections (using a conservative average of the 2007 and 2008 deductions) would have been 80 percent higher than the estimate it provided to Congress. In light of this evidence, it is apparent

¹⁰ NCTA previously questioned the “reasonableness” of including any expenses that go beyond the cost of performing the limited review of cable statements of account provided for in the Office’s rules. NCTA May 14, 2012 Comments at 4-5.

¹¹ 17 U.S.C. § 708(a).

¹² H.R. Rep. No. 111-319, at 17-18 (2009). *See also* Congressional Budget Cost Estimate, *H.R. 3570 Satellite Home Viewer Update and Reauthorization Act of 2009*, at 3 (Oct. 16, 2009) available at <http://cbo.gov/sites/default/files/cbofiles/ftpdocs/106xx/doc10656/hr3570.pdf>.

¹³ H.R. Rep. No. 111-319, at 18 (2009).

¹⁴ Data based on Financial Statements published by the Copyright Office’s Licensing Division as of December 30, 2009.

the Owners are mistaken in assuming that the total amount deducted from the annual revenue pool under Sections 111 and 119 is the proper starting place for determining the share of costs that must be covered by the newly-adopted cable and satellite SOA filing fees.

II. CERTAIN COSTS MUST BE EXCLUDED FROM THE FILING FEE CALCULATION TO ACCOUNT FOR ABERRATIONAL EXPENSES AND OTHER NON-RECURRING EXPENSES.

According to the December 6, 2012 *Notice*, the Office’s revised filing fee proposal was formulated by starting with a “three-year average” of the Licensing Division’s non-personnel costs.¹⁵ However, NCTA’s understanding from the February 7, 2013 staff briefing is that the Office used the Licensing Division’s operating costs for fiscal year 2011 as the starting point.¹⁶ In either case, the Office then made certain adjustments to these costs in making its filing fee calculation. For example, the Office excluded 75 percent of the salaries for staff who work in the Fiscal Section of the Licensing Division based on the theory that “much of the work of these employees is dedicated to royalty management functions that serve copyright owners.”¹⁷ The staff briefing also indicated that the Office reduced the base operating cost level to account for staffing cuts that the Office does not expect to be reversed and to reflect a three-year average of costs related to the “reengineering” project.

The Owners’ January 7, 2013 Comments complain that the Office made these reductions before calculating the proposed filing fees.¹⁸ According to the Owners, these adjustments reduce the revenues that will be produced by the proposed fees to \$1.77 million, an amount described by the Owners as being “significantly below 50 percent of the aggregate operating costs that the

¹⁵ Copyright Office Fees, 77 Fed. Reg. 72788, 72790 (Dec. 6, 2012).

¹⁶ The lack of clarity as to what portion of the Office’s cost estimate were based on a single year and what portion was based on a three-year average is just one more reason why the Office should release the actual cost studies.

¹⁷ Copyright Office Fees, 77 Fed. Reg. 72788, 72790 (Dec. 6, 2012).

¹⁸ *Copyright Owners’ January 7, 2013 Comments* at 4-5.

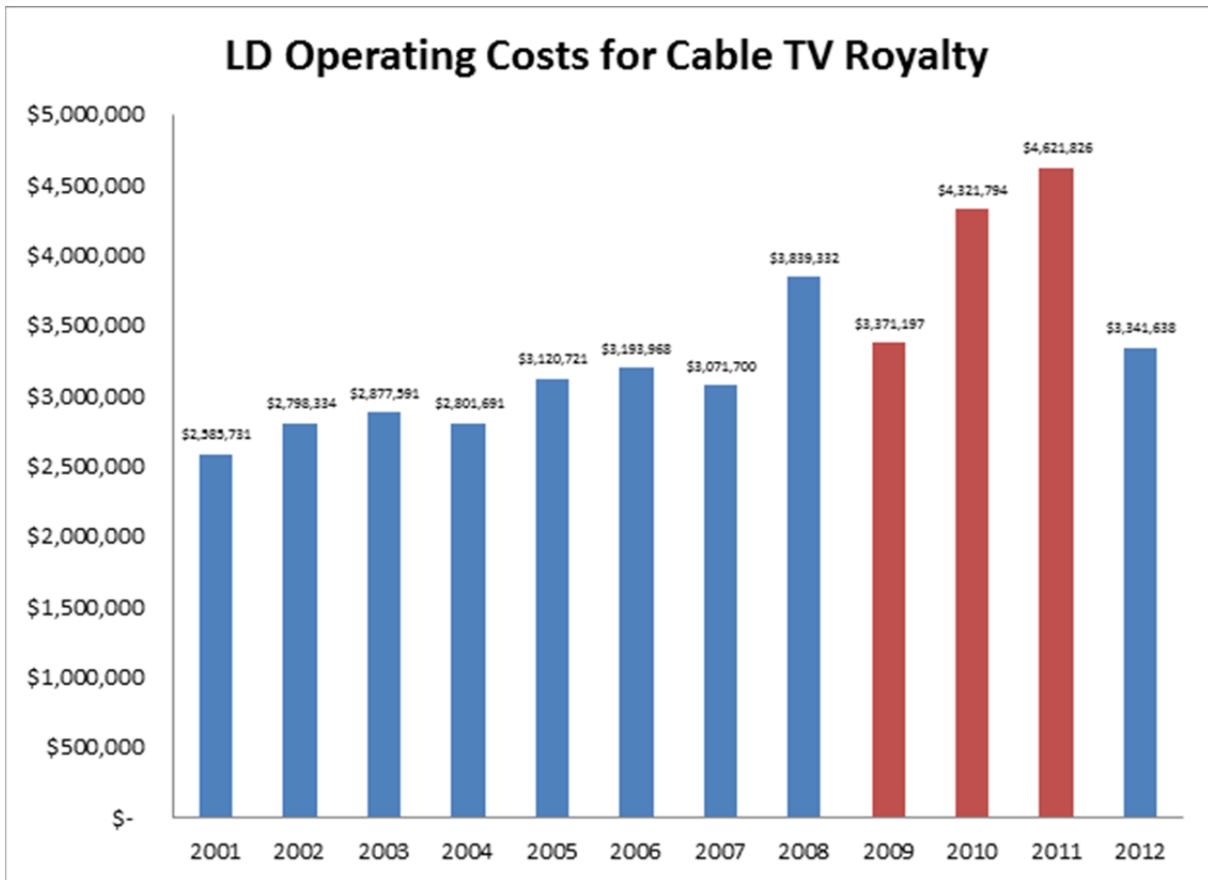
Office has deducted from the Section 111 and Section 119 royalty fund.”¹⁹ The Owners estimate that to recover an amount that more closely approximates one-half of the total deductions from the royalty pool, the filing fee for Form 3 cable operators should be set at \$950 per form – a fee level that (together with the other fee levels the Owners proposed) will produce \$2.2 million in fee payments.²⁰

The Owners’ Form SA3 filing fee calculation is based on an average of the Licensing Division’s Operating Costs for Fiscal Years 2009 through 2011.²¹ The Owners’ decision to use the 2009 through 2011 period is not surprising – it yields the highest three year average over the past twelve years, as shown by the data in the following chart:

¹⁹ *Id.* at 3-5.

²⁰ *Id.* at 11.

²¹ *Id.* at 3. While the Owners use a three-year average to establish the recoverable base of Licensing Division operating costs, they rely on the number of Form 3 filings from a single accounting period (2011-2). The Owners argue that the Office’s higher estimate of the number of Form 3 filings per year does not reflect the decline in Form 3 filings in the past few years. However, while it is true that the number of Form 3 systems is not static, neither is the number of Form 2 systems. For example, the number of Form 3 systems could increase as Form 2 systems obtain higher revenues. CableData Corp. estimates that more than 100 Form 2 systems are relatively close to the Form 3 threshold.



The three years chosen by the Owners as the basis for their calculation – Fiscal Years 2009, 2010, and 2011 – are an aberrational period during which the Licensing Division was incurring extraordinary costs. In particular, during the years focused on by the Owners, the Office was incurring additional costs associated with its reengineering project and with the implementation of STELA. The Owners’ approach does not take into account the extraordinary and non-recurring nature of these costs. In addition, it does not take into account other necessary adjustments, such as an adjustment to reflect personnel cut-backs that will reduce the Office’s costs on a going forward basis.

While the approach taken by the Owners is patently unreasonable and should be rejected by the Office, the Office’s own approach is not without significant problems. As described above, it is our understanding that the Office started with the Licensing Division’s costs for

Fiscal Year 2011 – the year with the highest level of costs of any for the past twelve years – and made various adjustments. NCTA has no quarrel with certain of those adjustments. For example, the Office’s decision not to make fee payers shoulder a substantial portion of the Fiscal Section’s costs was entirely appropriate. The Fiscal Section is responsible for a variety of tasks that go beyond the “collection and administration” of the SOAs and any associated royalty fees on which the SOA filing fees are supposed to be based. As described by the Office, “The Fiscal Section performs all accounting, budgeting, and investing functions of the division in conjunction with the Office of the Chief Financial Officer of the Library of Congress and the U. S. Treasury. This section is also responsible for the ascertainment of funds available for distribution by Copyright Royalty Judges.”²² Once cable operators have deposited their SOAs and related royalty payments, it is only “reasonable” to relieve operators of responsibility for costs that the Fiscal Section incurs associated with investing the royalties and distributing them at such time in the future when the Owners settle or otherwise resolve how the pool is to be divided.

Notwithstanding the adjustments made to account for the Fiscal Section’s costs and certain staffing reductions, the Office’s filing fee proposal continues to reflect the inclusion of a significant level of extraordinary – i.e., not “reasonable” – costs. Even with the information orally provided by staff at the February 7, 2013 briefing, it cannot be determined precisely which Licensing Division costs were included and which were excluded from the Office’s calculations. However, according to staff, approximately \$660,000 was deducted from the FY 2011 base operating cost amount in order to reflect the fact that the Office incurred higher than usual reengineering project costs over the 2009-2011 period. But the Office has made no effort, and

²² *Licensing*, Copyright.gov, <http://www.copyright.gov/licensing/> (last visited Feb. 22, 2013).

offered no evidence, to establish the “reasonableness” of requiring cable operators to cover any of the reengineering costs in future filing fees.

The amount of the Office’s budget for Fiscal Year 2011 attributable to reengineering project costs was considerably higher than \$660,000. Part of the Office’s FY2011 budget request “sought an additional one-time authorization of \$500,000 to cover any unforeseen reengineering expenses.”²³ The Office also noted that its increase “is offset by non-recurring costs of (\$1.1 million) for the initial reengineering initiative.”²⁴ Thus, reducing the FY 2011 expenses by only \$660,000, as the Office apparently has done, still leaves nearly \$500,000 that is attributable to reengineering project costs that are non-recurring and should not be included as a basis for filing fees that will occur at the earliest in FY 2013.

Second, inclusion of these reengineering project costs – on top of the on-going operating costs also incurred due to administration of the licenses – leads to double counting and overestimating future costs. As the Register of Copyrights testified, “The goals of this reengineering effort are to (1) decrease processing times for statements of account by thirty percent or more; (2) implement an on-line filing process; and (3) improve public access to office records.”²⁵ Thus, the reengineering project is intended to decrease costs of processing and reviewing statements of account – cost reductions that the Office apparently has not taken into account in its proposed filing fees. To be sure, as the staff explained at the February 7, 2013 stakeholders’ meeting, there may be some on-going costs related to rolling out the new software.

²³ Statement of Maria A. Pallante, Acting Register of Copyrights, Fiscal Year 2012 Budget Request, Before the S. Subcomm. on Legislative Branch Committee on Appropriations, (Mar. 31, 2011) *available at* <http://appropriations.house.gov/files/031111copyrighttestimony.pdf> .

²⁴ Library of Congress, Fiscal 2011 Budget Justification at 140 *available at* <http://www.loc.gov/about/reports/budget/fy2012.pdf>.

²⁵ Statement of Maria A. Pallante, Acting Register of Copyrights, Fiscal Year 2012 Budget Request, Before the S. Subcomm. on Legislative Branch Committee on Appropriations, (Mar. 31, 2011) *available at* <http://appropriations.house.gov/files/031111copyrighttestimony.pdf>.

But the Office has offered nothing to suggest that the level of those expenses will come anywhere near the extraordinary costs now being incurred, or that those costs will come close to equaling any projected cost savings. Under these circumstances, it is not reasonable to include both reengineering costs and current operating costs in projecting filing fees for FY2013 and beyond.²⁶

CONCLUSION

For the foregoing reasons, and for the reasons stated in NCTA's May 14, 2012 and January 7, 2013 comments, the Copyright Office should adopt a conservative approach in establishing SOA filing fees. Specifically, the Office should reject outright the Owners' proposal to set the Form SA3 filing fee at \$950. That proposal is based on the Owners' mistaken belief that the amendment to Section 708(a) authorizing the Office to establish cable and satellite SOA filing fees sets a target for those fees when in fact it sets a ceiling considerably below half of the amount withheld from distribution to the owners. Rather, the Office should establish a Form SA3 filing fee that is less than the \$500 per form fee that the Office initially proposed.

This cautious approach is warranted since the Office has no prior experience with setting filing fees for cable and satellite SOAs. It also is consistent with the fact that interested stakeholders have been hampered by a lack of information from analyzing and commenting on the reasonableness of the Office's proposals or its decision to abandon its original approach and substitute it with one that produced a 45 percent increase (from \$500 to \$725) in the proposed Form 3. And, finally, it is more consistent than the Office's revised proposal with the CBO estimate that the filing fees authorized by STELA will produce \$1 million per year in revenues.

²⁶ As discussed above, another category of costs that the Office apparently has unreasonably included in its filing fee calculation is attributable to certain rulemaking proceedings conducted by the Office to implement STELA. The major rulemakings associated with the implementation of STELA have been completed and there is no basis for assuming that such costs will continue at prior levels into the future.

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