

**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”)¹ submits these comments in the Copyright Office’s Notice of Proposed Rulemaking (“Notice”) in the above-captioned proceeding.² The Notice proposes to require cable operators to submit filing fees along with their semiannual copyright statements of account.

The statutory grant of authority for the Copyright Office to impose filing fees on cable operators in the “Satellite Television Extension and Localism Act of 2010” (“STELA”) expressly requires that these newly-established fees “shall be reasonable and may not exceed one-half of the cost necessary to cover reasonable expenses incurred by the Copyright Office for the collection and administration of the statements of account and any royalty fees deposited with such statements.”³ The Notice sets forth different fee structures for cable operators and for direct broadcast satellite (“DBS”). The proposed fee schedule would have larger cable system filers (Form 3) pay \$500 for each statement of account (“SOA”) filed; Form 2 filers pay \$20 per SOA, and Form 1 filers pay \$15 per SOA. DBS filers would pay \$75 per SOA.

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² 77 Fed. Reg. 18742 (Mar. 28, 2012).

³ 17 U.S.C. § 708 (“Fees established under paragraphs (10) [regarding SOAs for secondary transmissions under the DBS statutory licenses] and (11) [regarding SOAs for secondary transmissions under the cable statutory license]” must adhere to this “reasonableness” requirement).

The Office estimates that cable operators, who currently make royalty payments of around \$213 million per year, would owe an additional \$1.157 million in filing fees; the DBS industry, which pays annual royalty fees of approximately \$95 million, would only incur an additional expense of \$600.⁴ In support of this fee schedule, the Office refers to, but does not disclose or describe in any detail, certain “cost studies” performed in order to ascertain the Licensing Division’s expenses in administering the cable and satellite compulsory licenses.

As described below, because the underlying cost studies which form the basis of the Office’s proposed filing fees have not been publicly released, it is impossible to ascertain whether the Office, as required by STELA, limited its cost analysis to the “reasonable expenses” associated with the review and processing of SOAs. However, some of the information the Office has released suggests that the cable filing fee is based on costs incurred by the Licensing Division for engaging in tasks that go beyond what is reasonably necessary to administer the license and reflects expenses incurred in the past that are unlikely to recur in the future. Furthermore, the stark difference between the large fees imposed on cable filers and the de minimis fees that would apply to DBS in and of itself raises significant doubts as to whether the proposed schedule of fees meets the statutory “reasonableness” standard.

DISCUSSION

A. The Notice and Supplemental Information Published by the Office Fail to Demonstrate that the Proposed Cable Fee Schedule is Based on “Reasonable Expenses”

In calculating the bases of the new fees to be assessed on cable operators and DBS providers pursuant to Section 106 of STELA, the Notice alludes to “cost studies” that have not

⁴ http://www.copyright.gov/docs/newfees/fees_stela.html.

been made available for public review.⁵ The only specific information in the Notice regarding the cost study on which the cable filing fee is based is the statement, with no additional detail, that the Office “took into account the reengineering efforts of the Licensing Division (the purpose of which is to develop an online filing system) and the equities associated with apportioning costs fairly among the licensees.”⁶

After NCTA verbally requested that the Office make those studies available for public review, the Office posted on its website a short statement containing “Additional Information on the New Filing Fees Authorized Under [STELA]” but did not publish or otherwise disclose the studies themselves. In this supplemental statement, the Office explained that it used “an activity based cost methodology to calculate the full cost of each activity for which a fee is set.”⁷ It described generally how the cost study included “the time the Examining Section of the Licensing Division spends reviewing statements, the time spent by the Fiscal Section staff for fee intake, the time spent by the Information Section staff processing statements and answering questions related to filings, and current costs associated with the reengineering of the Licensing Division.”⁸

The Office’s supplemental statement provides no breakdown of any expenses associated with any of the particular tasks studied. Rather, it merely states, in conclusory fashion, that these studies formed the basis for the Office’s estimate that the total annual cost to process statements

⁵ Notice, 77 Fed. Reg. at 18745 (“Proposed fees are based either on a separate cost study related to the budget and expenditures of the Licensing Division or, in the case where the Licensing Division offers services that parallel other services in the Copyright Office, fees are based on the cost study covering the Copyright Office services.”).

⁶ *Id.*

⁷ http://www.copyright.gov/docs/newfees/fees_stela.html. Unlike in this proceeding, it appears that in requesting comment on fee schedules in other proceedings, the Office has made the underlying studies publicly available. See <http://www.copyright.gov/newsnet/2008/355.html> (publishing cost study).

⁸ *Id.*

of account and administer the associated royalties was \$2.414 million for cable, and \$1,256 for DBS. We continue to believe that the Office should provide commenters an opportunity to review the cost studies that form the basis of its proposed fee schedule prior to finalizing any such fees. But even in the absence of review of that particular data, there is substantial evidence that the fees proposed to be assessed on cable filers exceed the statutory boundaries imposed by Congress.

First, some of the expenses the Office suggests were taken into account in formulating the proposed cable fees appear to be based on a review process that strays beyond the relatively limited role for the Licensing Division envisioned in the Office's rules. For example, the Notice cites as part of the justification for the proposed cable Form 3 fee the examiners' consideration of such matters as the "classification of community groups and television stations."⁹ But that level of review is nowhere found in the regulations and raises significant doubt as to the "reasonableness" of including such expenses in the study that formed the basis for the proposed fee.

Specifically, Section 201.17 of the Office's rules describes the following sequence of events after an SOA is filed:

Upon receiving a Statement of Account and royalty fee, the Copyright Office will make an official record of the actual date when such Statement and fee were physically received in the Copyright Office. Thereafter, the Office will examine the Statement and fee for obvious errors or omissions appearing on the face of the documents, and will require that any such obvious errors or omissions be corrected before final processing of the documents is completed.

The regulations further clarify that

completion by the Copyright Office of the final processing of a Statement of Account and royalty fee deposit shall establish only the fact of such completion and the date or dates of receipts shown in the official record. It shall in no case be

⁹ *Notice*, 77 Fed. Reg. at 18745.

considered a determination that the Statement of Account was, in fact, properly prepared and accurate, that the correct amount of the royalty fee had been deposited, that the statutory time limits for filing had been met, or that any other requirements to qualify for a compulsory license have been satisfied.¹⁰

The Notice has made no attempt to justify the inclusion of any expenses that go beyond the cost of performing the limited review provided for in the Office's rules.

Second, the two base accounting periods that the Office selected to determine the costs of cable SOA reviews are likely not reflective of future accounting periods. The Office studied expenses arising from reviews conducted during the second accounting period of 2010 and the first accounting period of 2011¹¹ – periods of atypical activity in administration of the cable compulsory license. Broadcasters completed their transition from analog to digital television in the second half of 2009, which may have led to more changes in cable's carriage of broadcast signals during the 2010 filing periods than the relatively stable complement of broadcast signal retransmission that is the norm. Moreover, post-STELA's passage in 2010, additional modifications to cable SOAs were needed to account for new provisions regarding subscriber groups and multicast carriage, among other things.¹² These uncommon changes represented perhaps some of the most significant events affecting cable copyright filings in decades, and are not likely to be repeated any time soon. Instead, it can be expected that much of the basic information contained in a Form 3 SOA will vary little from one accounting period to the next, resulting in a significantly reduced level of Licensing Division scrutiny than the periods studied.

Finally, the Office acknowledges that a portion of the costs on which the cable filing fee is based are attributable to the Licensing Division's "reengineering efforts." Including expenses

¹⁰ 37 C.F.R. § 201.17(c)(2).

¹¹ http://www.copyright.gov/docs/newfees/fees_stela.html.

¹² See, e.g., <http://www.copyright.gov/fedreg/2010/75fr56868.pdf> (interim rules implementing STELA, released September 2010).

for these activities, which are not required by the Office’s own rules, is particularly unreasonable given the Office’s admission that these are costs that “may decline over time.”¹³ Costs that occurred in the past but that are unlikely to recur in future filing periods should not be included in the filing fee calculation.

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 and without establishing that the costs do not go beyond the level of activity defined by the Office’s own rules.

B. The Gross Disparity Between Proposed Fee For “Form 3” Cable Systems and the DBS Filing Fee is Itself an Indication that the Form 3 Fee is Not “Reasonable”

As noted, STELA specifies not only that the filing fees imposed on cable and satellite should only take into account “reasonable expenses” incurred by the Office, but also that the fees themselves must be “reasonable.” On its face, the disparity in fees imposed on cable relative to DBS strongly suggests that as to Form 3 cable system filers the proposed fee falls short of that standard.

DirecTV, the second largest multichannel video programming distributor (“MVPD”), has close to 20 million subscribers and more than \$27 million in royalties per accounting period. Dish Network, the third largest MVPD, has 14 million customers and pays more than \$18 million in annually royalties. Under the proposed fee schedules, these two MVPDs each will pay \$150 per year in filing fees. By contrast, the smallest cable Form 3 filer, who pays \$5613 in royalties per accounting period (or \$11,226 annually), will pay \$1000 per year in filing fees – nearly 7 times as much as its much larger DBS competitors. Multiple system operators

¹³ Notice, 77 Fed. Reg. at 18745.

(“MSOs”) – some of whom file dozens and in a few cases even several hundred Form 3 SOAs – are likely to pay an even more disparate amount in filing fees. For example, Time Warner Cable, which has 2 million fewer subscribers than Dish Network and 8 million fewer than DirecTV, would pay \$77,000 annually in filing fees, compared to \$150 annually for the DBS providers. The Notice offers no justification for imposing a fee on a cable operator that is more than 500 times the fee imposed on its DBS competitors who offer comparable service to customers.

To be sure, as the Notice suggests, there are differences between the DBS and cable SOAs. But it is not obvious why the review of a cable SOA, even one with multiple subscriber groups, would take so much longer, and involve such a higher level of expense, than the review of a DBS SOA. DBS SOAs contain a significant amount of information, including a listing of every broadcast television station that is carried by the DBS provider on a distant basis anywhere in the country, including call sign, network affiliation (if any) and community of license. Moreover, the Office’s regulations governing review of satellite carriers’ SOAs is in all relevant respects identical to the review of cable SOAs.¹⁴ Yet, as described above, the proposed fee schedule ascribes virtually no costs whatsoever to DBS SOA reviews. This suggests that the Office either is not counting certain costs in calculating the DBS fee or, more likely, is not engaging in the same level of review of DBS forms that it engages in with respect to cable SOAs.

The significant and unexplained disparity between the proposed cable and DBS filing fees makes the cable fees not reasonable as STELA intended. The Office must adopt a better and more equitable approach to determining filing fees for users of statutory licenses -- one that is

¹⁴ 37 C.F.R. § 201.11 (c)(2).

“reasonable” and does not lead to the considerable and unfair differences between the proposed filing fees for companies that pay similar amounts in royalties to the Office.

CONCLUSION

For the foregoing reasons, the Office should modify its fee schedule and reduce the proposed filing fees for Form 3 cable statement of accounts to a level that is reasonable and demonstrably represents no more than one-half of the “reasonable expenses” associated with the collection and administration of those statements of account.

Respectfully submitted,

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