

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

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

**COPYRIGHT OWNERS' COMMENTS ON
FILING FEES FOR THE SECTIONS 111 AND 119 LICENSES**

Pursuant to the Notice of Proposed Rulemaking, 77 Fed. Reg. 72,788 (Dec. 6, 2012) (“NPRM”) in the captioned docket, 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 comments concerning the modified fee schedule related to filing statements of account (“SOA”) by cable systems and satellite carriers as authorized by 17 U.S.C. § 111(d)(1)(G), § 111(d)(2), § 119(b)(1)(c), and § 708(a)(10) and (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

The Copyright Office’s (“Office”) modified fee schedule results from a supplemental cost study (“Second Study”) conducted by the Office, a study necessitated by the Office’s recognition that its earlier cost study (“First Study”) was “not as successful in determining the cost of a more complex task, such as the processing of an entire SOA.” NPRM at 72,789. As a result, the Second Study used “a revised methodology to more precisely capture the cost of providing the services in question.” *Id.*

Copyright Owners' initial comments raised the concern that the First Study yielded a cost estimate far less than the amount of Licensing Division operating costs ("LD operating costs") that the Copyright Office deducts from the royalty funds; therefore, the basis for the proposed filing fees did not adequately reflect 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." 17 U.S.C. § 708(a). Although the Second Study, and the modified fee schedule it produces, represent an improvement over the Office's initial proposal, the Second Study still fails to incorporate a significant portion of the LD operating costs that the Office deducts from the royalty funds. In addition, the filing fee revenue calculation relies on faulty assumptions regarding the number of Form 3 cable systems that will pay filing fees. Therefore, the revised filing fees fail to accomplish the congressional objective of dividing the administrative costs of the Section 111 and 119 licenses evenly between statutory licensees and copyright owners. The problem is most apparent with the fees charged to satellite carriers, which, under the Office's proposal, would pay only about 2 percent of the expenses that the Office routinely deducts from the Section 119 royalty funds payable to copyright owners.

To fulfill Congress's objective, the Office must calculate the proposed filing fees using all LD operating costs, including the costs related to the Fiscal Section. The Office also must use the most recent data regarding the number of Form 3 cable systems. The filing fees should result in a more equal division of the cost of administering the statutory license between copyright owners and statutory licensees.

DISCUSSION

1. The Office's Second Study Fails to Account for Significant Expenses Incurred in the Administration of the Cable and Satellite Royalty Funds, As Mandated by Congress.

The Office's proposed filing fees for cable and satellite would generate aggregate fees that fall significantly below 50 percent of the aggregate operating costs that the Office has deducted from the Section 111 and Section 119 royalty funds. During each of the past three years, the Office has deducted from the combined cable and satellite royalty funds an average of approximately \$4.4 million for the LD operating costs. Based on the Cable TV Royalty Fees Financial Statement and Satellite TV Royalty Fees Financial Statement (both as of 09/30/2012), and using a three-year average (per NPRM at 72,790), the average LD operating costs deducted from the royalty funds have been:

3-Yr. Average LD Operating Costs

<u>Years Averaged</u>	<u>Cable</u>	<u>Satellite</u>	<u>Total</u>
2010-12	\$4,095,086	\$346,857	\$4,441,943
2009-11	\$4,104,939	\$347,724	\$4,452,663
2008-10	\$3,844,107	\$301,459	\$4,145,566
2007-09	\$3,427,410	\$148,120	\$3,575,530

The Office projects that the 2009-2011 averages best represent the costs that will be deducted going forward. See NPRM at 72,790 ("The Office expects these types of administrative and technical upgrades to continue to occur during the life of the SOA program.").

By contrast, the estimated program costs used by the Office to determine the amount of the filing fee total approximately \$3.74 million. *Id.* This differential of approximately \$650,000 per year appears to result from the Office's decision to exclude "75 percent of salaries for staff who work in the Fiscal Section of the Licensing Division" on the ground that "much of the work

of these employees is dedicated to royalty management functions that serve copyright owners.”

Id. Nothing in the Copyright Act justifies that exclusion.

Section 708(a) of the Copyright Act provides that the “[f]ees established [for statutory licensees under Section 119 and 111] 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.*”

17 U.S.C. § 708(a) (emphasis added). The “administration of . . . royalty fees” under the NPRM plainly includes “royalty management functions,” such as the “production of financial statements, reconciliations, investments, and distributions.” NPRM at 72,790. Regardless of whether these activities “serve copyright owners,” *id.*, they are an integral part of the Office’s administration of royalty fees necessitated by a compulsory license that places an intermediary (the Copyright Office) between market participants.

Royalty fee administration is delegated to the Office under § 111(d)(2), “Handling of Fees,” and under § 119(b)(3), “Investment of Fees.” Those provisions require the Office to deposit royalty fees in “interest-bearing securities of the United States for later distribution with interest.” *Id.* The production of financial statements, reconciliations, investments, and distributions are all integral parts of the “administration” of royalty fees, within the meaning of § 708(a). *See* Copyright Office Circular 75 (“The Licensing Division . . . administers the compulsory and statutory licenses. * * * The division . . . invests the balance in interest-bearing securities with the U.S. Treasury for later distribution.”).

Moreover, even to the extent any functions performed by the Office, including administrative expenses related to statements of account, might be said to “benefit” copyright owners, they do so only in the sense that those services mitigate some of the harm to copyright

owners whose works are exploited without their authorization. By the same token, these services also benefit cable operators and satellite carriers by providing them with a mechanism for obtaining programming through statutorily established rates without the transaction costs that are incurred in free market negotiations. The Office's proposal to cordon off a portion of its administrative payment mechanism from filing fee recovery on the ground that the mechanism purportedly benefits copyright owners exclusively is wrong as a matter of both law and fact, and would be arbitrary and capricious.

If the Office were to replace its aggregated \$3.74 million cost estimate with the cable and satellite actual LD operating costs of approximately \$4.4 million per year, the Office's projected 47 percent cost recovery from the proposed filing fees (NPRM at 72,790) would decline to approximately 40 percent, well below the 50 percent target contemplated by Section 708(a). However, even that estimate overstates the amount of administrative costs that the proposed filing fees would recapture. The reason is two-fold. First, the Office's projection of \$1.77 million in annual revenue is based on a faulty assumption regarding the number of Form 3 cable systems that will pay the proposed fees and fails to take into account the fact that the number of cable systems filing separate statements of account has continued to decline because of the ongoing trend of consolidation in the cable industry (*see infra*, Section 2.A.). Based upon the most recent data concerning the number of Form 3 cable systems, the Office's proposed fee would net only about \$1.56 million, rather than \$1.77 million; thus, the amount of fees collected under the revised proposal would be closer to 35 percent of the aggregate LD operating costs for cable and satellite. Second, because LD operating costs have historically increased over time, the proposed filing fees would likely result in recovery of an even smaller percentage of the Office's operating costs in the future.

No statutory basis exists for excluding any costs related to functions that are integral to the administration of royalty fee deposits. The Office's decision to exclude from consideration 75 percent of the Fiscal Section's salaries reflects a fundamental misunderstanding of Congressional intent. The Office should reverse the exclusion and include all the Fiscal Section costs as part of the starting point for determining appropriate filing fees. The appropriate starting point should be the most recent three-year average of actual LD operating costs of \$4.4 million—approximately \$4.1 million for cable and \$350,000 for satellite.

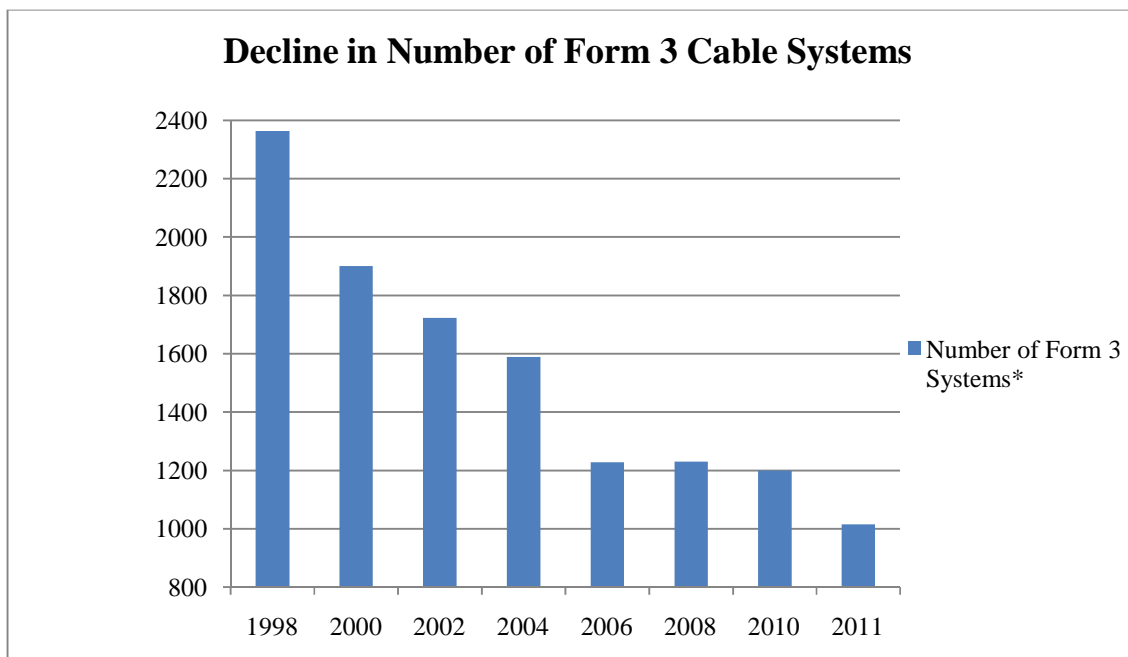
2. The Filing Fees for Form 3 Cable Systems and Satellite Carriers Must Be Increased To Achieve the Congressional Objective of Allocating the Administrative Costs Evenly Between Statutory Licensees and Copyright Owners.

It is evident that to approximate 50 percent filing fee recovery of the LD operating costs as Congress intended will require an increase in the filing fees for cable systems and satellite carriers.

A. Cable Filing Fees

To approximate a 50 percent recovery of the LD operating costs for administering the Section 111 license, the per system filing fee for Form 3 cable systems must be increased from \$725 per accounting period to \$950. The Office projected that its proposed fee schedule would result in aggregate fees of approximately \$1.77 million. NPRM at 72,790. In addition to wrongly excluding Fiscal Section costs, the Office's proposed fee also incorporates faulty estimates about the number of Form 3 systems that will be responsible for paying filing fees under the revised schedule. In projecting revenues from the modified fee schedule, the Office

apparently assumed that there are approximately 1,152 Form 3 cable systems.¹ However, the most recent data indicates that there are only about 1,015 Form 3 cable systems.² The Office’s proposed fee schedule would thus result in aggregate fees of only about \$1.56 million (more than \$200,000 below those projected by the Office) because there are far fewer Form 3 systems than the Office assumes in its projections.³ The decrease in the number of Form 3 systems is part of a long-term trend illustrated in Table 1 below:



* Based on Cable Data Corporation data reflecting the number of Form 3 cable systems during the second accounting period of each year.

Table 1: Decline in Number of Form 3 Systems Since 1998

¹ Assuming that Form 1 and Form 2 systems generate approximately \$90,000 in annual filing fee revenue, as current data suggests, approximately 1,152 Form 3 systems would have to pay the Office’s proposed \$725 filing fee on a semi-annual basis in order to reach the Office’s proposed revenue target.

² Based on Statement of Account data compiled by Cable Data Corporation for the 2011-2 accounting period.

³ Based on data from Cable Data Corporation, which reflects approximately 1,015 Form 3 filings in the second accounting period of 2011.

Given the historical trend toward increasing consolidation among Form 3 cable systems, the number of Form 3 systems is likely to decrease further over time, which means that the amount of fees collected will continue to decline relative to the cost of administering the license.

To address this problem, the Office should recalculate the proposed fee and establish it at a level that is likely to generate a figure approximating 50 percent of the LD operating costs for administering the Section 111 license. A fee of \$950 would achieve such a result, at least in the near term. This change would yield annual cable filing fees of \$2,013,010, or approximately 49.04 percent of the average \$4,104,939 in annual operating costs that the Office deducted from the Section 111 royalty fund during the 2009-2011 period.⁴ And when assessed against the most recent data from 2012, where the Office deducted approximately \$4,266,097.26 from the FY 2012 Cable Fund, the proposed filing fee of \$950 would yield filing fees that are 47.19 percent of LD operating costs for administering the Section 111 license.

B. Satellite Filing Fees

The inadequacy of the Office's proposed filing fees as a means to recover roughly half of the Section 111 and 119 expenses is exacerbated by the exceedingly small filing fee proposed for satellite carriers, which will produce less than \$6,000 in annual fees, or barely a dent in the LD operating costs that the Office has deducted from the Section 119 royalty funds. During the past three years, for example, the Office deducted from the Section 119 royalty fund approximately

⁴ According to Cable Data Corporation, in the second accounting period of 2011, no more than 1,015 cable systems filed as Form 3 systems. Even if that number remained constant in future years—and historical evidence suggests it will inevitably decline—that number of systems would produce approximately \$2,013,010 in filing fee revenue. That projection is based on:

- Form 3 filing fees of \$1,928,500 (1,015 Form 3 systems X \$950 per Statement of Account X 2 Statements Per Year)
- Form 2 filing fees of \$34,200 (855 Form 2 systems X \$20 per Statement of Account X 2 Statements Per Year)
- Form 1 filing fees of \$50,310 (1,677 Form 1 systems X \$15 per Statement of Account X 2 Statements Per Year)

\$350,000 annually in LD operating costs. A \$725 filing fee for the four satellite carriers will annually yield less than \$6,000, or less than 2 percent of the LD operating costs deducted by the Office. By way of comparison, under the Office’s modified fee schedule, cable operators would pay approximately 38 percent of the LD’s annual operating costs (\$4,104,939) related to the Section 111 license.⁵ This disparity is illustrated in Table 2 below:

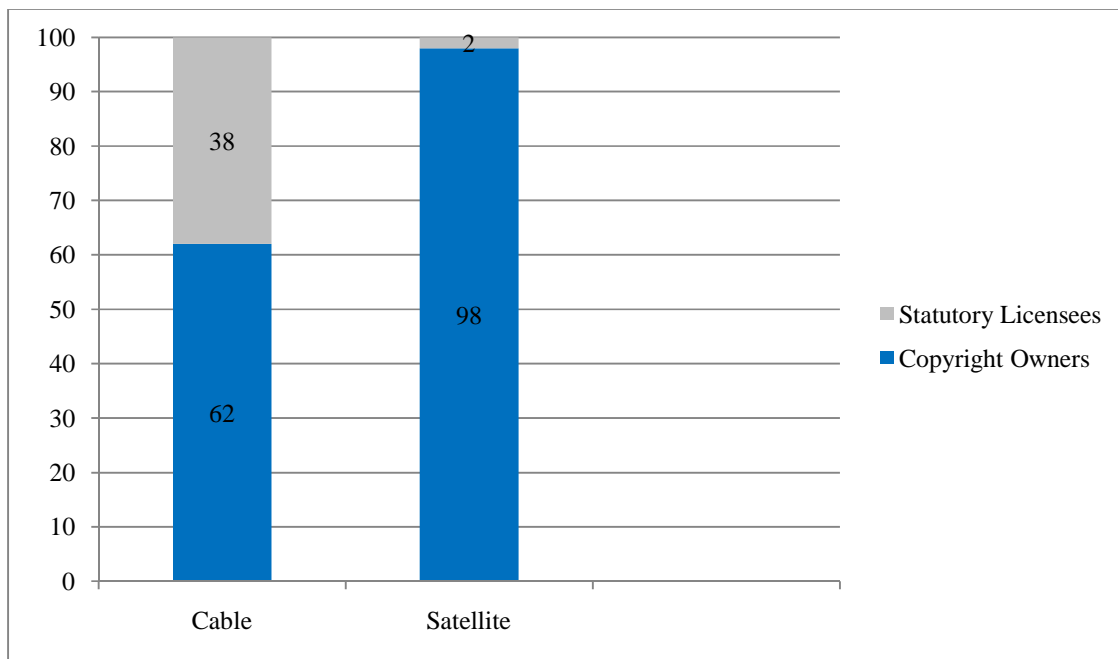


Table 2 - Relative Burdens of Copyright Owners and Statutory Licensees (% of total operating costs absorbed)

The proposed \$725 fee for satellite carriers would not result in satellite carriers bearing a roughly equal share of the administrative costs of the Section 119 license, as Congress intended. Fifty percent of those costs would amount to approximately \$174,000; as noted, the Office’s proposed filing fees would amount to approximately \$6,000. Copyright Owners thus propose that the Office replace the proposed \$725 satellite filing fee with a filing fee tied to the number

⁵ As noted *supra*, although the Office projects \$1.77 million in annual fee revenue, the amount of revenue produced by the Office’s fee schedule will total something closer to \$1.56 million due to the fact that there are fewer Form 3 systems than the Office assumed in its estimate.

of subscribers served by each satellite carrier. The filing fee under this methodology would be calculated as follows:

1. Divide “grand total non-network subscribers (private home viewing)” reported on Space D, Part 1 of the Statement of Account for satellite carriers by 6 to derive average monthly non-network subscribers;
2. Divide “grand total network subscribers (private home viewing)” reported on Space D, Part 1 of the Statement of Account for satellite carriers by 6 to derive average monthly network subscribers;
3. Add results from steps 1 and 2;
4. Multiply total from step 3 by \$0.00282 (.282 cents) to determine filing fee.

Aggregating the number of subscribers reported by the four satellite carriers on a monthly basis results in a total of 30,760,345 subscribers for 2011. When that aggregated monthly subscriber number is multiplied by \$0.00282 (step 4), it results in semi-annual filing fees of \$86,744, and annual filing fee revenue of \$173,488, or approximately 49.9 percent of the \$347,724 in annual operating costs deducted from the satellite fund from 2009 to 2011.⁶

DirecTV and Dish Network, given their significant subscriber levels, would—and should—pay substantially higher royalty fees than the NPRM’s proposed \$725 filing fee for satellite carriers.⁷ DirecTV, for instance, with its 2012 aggregated monthly subscribers (step 3) of approximately 17 million, would pay a semi-annual filing fee of approximately \$47,940. That fee would be commensurate with the filing fees proposed for cable MSOs that are comparable in

⁶ Copyright Owners note that the Office deducted approximately \$279,000 from the satellite fund in 2012, less than in the previous three years. Copyright Owners do not object to adjusting the fee schedule they have proposed for satellite carriers to account for the reduced costs in 2012 so long as the Office continues to deduct comparable amounts from the satellite fund going forward.

⁷ In contrast, the two smaller satellite carriers, Dish Network Puerto Rico and Distant Networks, LLC, would, under this methodology, have filing fees that are lower than the Office’s proposed \$725 fee.

size to DirecTV.⁸ Time Warner Cable, for instance, which reported gross receipts of approximately \$1 billion for its Form 3 systems in 2011, would be required to pay aggregate semi-annual filing fees of approximately \$77,000 under the Copyright Owners' proposal.⁹

CONCLUSION

For the reasons stated, Copyright Owners urge the Office to reverse its exclusion of 75 percent of the Fiscal Section's salaries from the cost recovery estimate, to use the actual LD operating costs deducted from the royalty funds as the measure of the reasonable expenses for the administration of the statutory licensing plans, and to adopt a revised fee schedule that increases the aggregate fees collected from approximately 40 percent of LD operating costs to a level closer to 50 percent. Setting a per subscriber filing fee for satellite carriers and increasing the Form 3 filing fee, as more fully described above, would meet and satisfy Congressional intent and more fairly allocate LD operating costs as between copyright owners and the users of their copyright works. This approach would ensure that the costs of administering the statutory licenses under Sections 111 and 119 of the Copyright Act are borne equally by copyright owners and statutory licensees.

In aggregate, Copyright Owners' proposals would yield \$2,186,498 annually, or about 49.11 percent, of the combined annual cable and satellite LD operating costs of \$4,452,663. The proposal represents a fair and equitable balancing of the LD operating cost burden now imposed entirely on copyright owners and is, in addition, fully consistent with Congressional intent that the filing fees recover roughly half of the "cost necessary to cover reasonable expenses incurred

⁸ Subscriber estimates for the major MSOs are available at the National Cable Television Association website. *See* Top 25 Multichannel Video Programming Distributors as of September 2012, <http://www.ncta.com/Stats/TopMSOs.aspx> (last visited Jan. 5, 2013).

⁹ In 2011, Time Warner Cable had 81 Form 3 cable systems. The aggregate semi-annual filing fee for Time Warner Cable, under the Copyright Owners' proposal, would be equal to \$950 x 81, or \$76,950. That does not include fees for Form 1 or Form 2 systems owned by Time Warner.

by the Copyright Office for the collection and administration of the statements of account and any royalty fees deposited with such statements.” 17 U.S.C. § 708(a).

Respectfully submitted,

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