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

In the Matter of *Copyright Fees*	Docket No. 2012-01

FURTHER REPLY COMMENTS OF DIRECTV, LLC

DIRECTV, LLC ("DIRECTV") hereby responds to comments filed by a collection of copyright holders concerning filing fees to be paid for cable and satellite statements of account ("SOAs"). While a step backward from its original proposal,[1] the Copyright Office's revised fee proposal for satellite carriers[2] covers "reasonable expenses" associated with the administration of SOAs—just as the law requires.[3] By contrast, the copyright holders' proposal would hold satellite carriers responsible for dramatically and impermissibly overstated costs. Accordingly, the Copyright Office should implement its latest proposal notwithstanding the complaints of the copyright holders.

---

1 Notice of Proposed Rulemaking, Docket No. 2012-1, 77 Fed. Reg. 18742 (Mar. 28, 2012) ("*First Notice*").

2 Notice of Proposed Rulemaking, Docket No. 2012-1, 77 Fed Reg. 72788 (Dec. 6, 2012) ("*Second Notice*").

3 17 U.S.C. § 708 (as amended by the Satellite Television Extension and Localism Act of 2010 ("STELA"), Pub. L. No. 111-175, 124 Stat.1218, 1245 (2010)).

Introduction

Unlike the famously complicated cable statutory license, the satellite distant signal license is "simple" to administer.[4] DIRECTV generates very straightforward SOAs by multiplying a fixed number of subscribers by a fixed royalty rate. Under the Copyright Office's rules, processing this form involves nothing more than checking this single calculation and cashing a check. This is why the Copyright Office much prefers the satellite regime to the cable license. This is why the Copyright Office originally proposed filing fees of only $75 for satellite carriers.[5] And this is why, even after complaints by the copyright holders, the Copyright Office raised the figure only to $725, which is itself almost certainly too high a number.[6]

The copyright holders, however, want DIRECTV to pay nearly ***$50,000*** to cover processing of each semiannual SOA.[7] This is nearly seventy times the Copyright Office's current proposal, and more than 650 times its original proposal. This truly striking position does not comply with the law.

The copyright holders argue that satellite and cable filing fees should recover the "full operating costs" of the Licensing Division, which are deducted from the royalty fees they receive from satellite carriers and cable operators. But the two—filing fees paid by copyright users and royalty fee deductions assessed against copyright owners—are different, and governed by very

---

[4] Section 109 Study on the Cable and Satellite Statutory Licenses under the Copyright Act, at 117, *available at* http://www.copyright.gov/docs/section109-final-report-pdf (citing *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights, at 60 (Aug. 1997), *available at* www.copyright.gov/reports ("The Office also concluded that a flat fee [for cable] would eliminate the time-consuming and complex calculations necessary for reporting subscriber groupings.")).

[5] *First Notice*, 77 Fed. Reg. at 18745-18747.

[6] *Second Notice*, 77 Fed. Reg. at 72790.

[7] Copyright Owners' Comments on Filing Fees for the Sections 111 and 119 Licenses at 10, Docket No. 2012-1 (filed Jan. 7, 2013) ("Copyright Owners' Further Comments").

different statutes. Under the law, *filing fees* are to be based solely on the costs of processing SOAs and royalties, while *royalty fee deductions* are to be based on all Licensing Division operating costs.

The copyright holders also propose to base satellite filing fees on the satellite industry's specific *share* of "full operating costs." Even setting aside the fact that filing fees are not to be based on full operating costs in the first place, this proposal cannot possibly reflect satellite's share of SOA processing costs. The Copyright Office does not generate $50,000 in costs each time it checks DIRECTV's multiplication.

DISCUSSION

I. FILING FEES CANNOT BE BASED ON THE SAME COSTS AS ROYALTY DEDUCTIONS

In 2010, Congress directed the Copyright Office to collect filing fees for cable and satellite statements of account for the first time.[8] In doing so, it provided that such 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*."[9] Under this statutory standard, therefore, filing fees must cover only "reasonable" expenses. More specifically, they must cover only reasonable expenses "for the collection and administration" of SOAs and royalty fees.

This is exactly what the Copyright Office proposed in its *First Notice*. It conducted a fee study, in which it 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,

---

[8] 17 U.S.C. § 708.

[9] 17 U.S.C. § 708(a)(11) (emphasis added).

and current costs associated with the reengineering of the Licensing Division."[10] It then based the filing fees on those costs, as apportioned between the cable and satellite SOAs.

After complaints from the copyright holders, however, the Copyright Office conducted a second study. In reexamining questions of costs, the Copyright Office found that additional staff time is spent processing SOAs.[11] While, as discussed below, DIRECTV does not believe that this time is spent processing *satellite* SOAs, it is willing not to contest the results of this reexamination. Even this increase was not enough for the copyright holders, however, who demand much higher fees—in the case of satellite carriers, many multiples higher.

The copyright holders argue that the Copyright Office used the wrong base from which to calculate the costs to be covered by royalty fees. In particular, they point (explicitly in their Initial Comments and less explicitly in their Further Comments[12]) to separate "royalty deduction" provisions of 17 U.S.C. § 119(d)(3) and 17 U.S.C. § 111(d)(2), under which the Copyright Office deducts the "full operating costs" of the Licensing Division. Such fees total roughly $4.4 million annually, with $350,000 deducted annually from satellite royalties and $4 million deducted annually from cable royalties.[13] This is roughly $650,000 more annually than "costs" used by the Copyright Office to calculate filing fees.[14] Because the *fee filing costs* do not

---

[10] Additional Information on the New Filing Fees Authorized under the Satellite Television Extension and Localism Act of 2010 (STELA), *available at* http://www.copyright.gov/docs/newfees/fees-stela.html.

[11] *Second Notice*, 77 Fed. Reg. at 72790.

[12] Copyright Owners' Initial Comments at 2; Copyright Owners' Further Comments at 4.

[13] Copyright Owners' Further Comments at 3.

[14] *Id.*

cover half of the *full operating costs*, or so the copyright holders argue, the proposed fees are not "reasonable" in violation of the filing fees statute.[15]

This is wrong as a matter of law. In choosing a different cost base for filing fees than for royalty deductions, the Copyright Office did no more than follow the explicit instructions of Congress. Fee filling costs are different than rate deduction costs because they are governed by two separate and very different statutory provisions. The *filing fee* statute directs the Copyright Office to recover "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*."[16] The *rate deduction* statutes direct the Copyright Office to deduct "the reasonable costs incurred by the Copyright Office *under this section*."[17] The broader rate deduction language can be read as requiring the Copyright Office to deduct that portion of the full operating costs of the Licensing Division allocable to the particular statutory license at issue.[18] By contrast, the much narrower filing fee language precludes such a broad cost base.

Congress's choice to use narrower language for its filing fees statute than it did for its royalty fee deduction statutes suggests strongly that it intended a different result.[19] Moreover, it is implausible to suggest that every cost generated by the Licensing Division can be "reasonably"

---

[15] *Id.* at 4.

[16] 17 U.S.C. § 708(a)(11) (emphasis added).

[17] 17 U.S.C. § 119(b)(3)(satellite fees) (emphasis added); *see also* 17 U.S.C. § 111(d)(2)(same language for cable fees).

[18] If the Copyright Owners wish to argue that the amount deducted from their royalty fees is too high, rather than that the amount of filing fees satellite carriers should pay are too low, they should make this argument directly. Such an argument, however, would be inapposite to the issues raised here.

[19] *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (noting that "the usual rule [is] that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended'").

allocated to statutory licensees. To take just a few examples from the Licensing Division's operating costs, "transit subs," "personal benefits," "transportation of things," "postage," and "books and library materials"[20] are not "incurred by the Copyright Office for the collection and administration of the statements of account and any royalty fees deposited with such statements."[21] Nor, for that matter, are the management costs of the Fiscal Section cited by the Office, all of which deal with management of fees *after* they have been "deposited with" royalty statements.[22] As the Copyright Office found, post-deposit management of royalty fees while copyright owners wrangle among themselves about division of such fees—often for years at a time—cannot "reasonably" be placed at statutory licensees' feet.[23]

The Copyright Office did nothing more than follow Congress's explicit instructions in setting a filing fee schedule using a narrower cost base than used for royalty fee deduction. By contrast, were it to use the *same* cost base, as demanded by the copyright holders, its actions would be arbitrary and capricious.

II. THE FEE SCHEDULE MUST REFLECT THE PROFOUND DIFFERENCES BETWEEN CABLE AND SATELLITE STATEMENTS OF ACCOUNTS

The cable and satellite statutory licenses could not be more different. The Copyright Office itself recently began a description of the statutory licenses by describing the cable regime as "a highly complex statutory license that relies on, *inter alia*, former and current FCC rules and

---

[20] *See* Licensing Division Operating Costs, *attached to* Copyright Owners' Initial Comments at Ex. A.

[21] 17 U.S.C. § 708(a)(11).

[22] *Second Notice*, 77 Fed. Reg. at 72789; 17 U.S.C. § 708(a)(11).

[23] *Second Notice,* 77 Fed. Reg. at 72790 (noting that much of the Fiscal Section's work "is dedicated to royalty management functions that serve copyright owners").

regulations as the basis upon which a cable operator may transmit distant broadcast signals."[24] It used similar terminology repeatedly in the past.[25] This helps explain why the cable long-form "SA-3" and its instructions comprise thirty pages. On the other hand, the Copyright Office has repeatedly described the "flat-fee" approach used in the satellite SOA as "simple."[26] Indeed, it recommended to Congress that the cable fee be replaced with something more akin to the satellite fee precisely because it is simple.[27] In doing so, it described simplicity as a benefit specifically with respect to reducing the cost of processing SOAs:

> The system is also easy to administer. With a flat fee, there are no interpretations that need to be made and no ambiguities that need to be resolved. *Statement of Account processing would be less costly and more efficient under a flat fee approach and both the users and the copyright owners save expenses under this system.*[28]

Unlike the complicated cable SOA, the satellite SOA form, including instructions, is only eleven pages long.[29] It requires only one calculation—merely taking the number of subscribers to each individual distant signal and multiplying that figure by the applicable royalty rate. Processing the satellite SOA plainly requires less time, effort, and expense than processing the cable form.

---

[24] Report on Marketplace Alternatives to Replace Statutory Licenses, at 34 (Aug. 29, 2011) *available at* http://www.copyright.gov/reports/.

[25] Section 109 Study on the Cable and Satellite Statutory Licenses under the Copyright Act, at 117, *available at* http://www.copyright.gov/docs/section109-final-report-pdf/ ("In the 1992 Report, the Office stated that the highly complex method of calculating royalties for distant signals for larger cable systems should be dramatically simplified.").

[26] *Id.* (citing *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights, at 60 (Aug. 1997), *available at* www.copyright.gov/reports ("The Office also concluded that a flat fee [for cable] would eliminate the time-consuming and complex calculations necessary for reporting subscriber groupings.")).

[27] *Id.* at 118.

[28] *Id.* (emphasis added).

[29] Statement of Account for Secondary Transmissions by Satellite Carriers of Distant Television Signals, *available* at http://www.copyright.gov/forms/form SC.pdf.

Reflecting these differences in filing fees is thus not merely "reasonable" under the statute, it is the *only* reasonable outcome.

On this score, the Copyright Office's new proposal is less "reasonable" than its original one. The Copyright office now proposes identical fees of $725 for large cable operators and satellite carriers. In doing so, it explains that "managing the cable and satellite SOAs is a major program of the Office and comprises the greatest portion of staff time and related resources in comparison to administering the other statutory licenses."[30] This may be true with respect to "cable and satellite SOAs" taken together. But the *Second Notice* does not specify how the Copyright Office allocated this "additional staff time" *as between* cable and satellite SOAs. Given the differences between the two licenses, it cannot be the case that the additional staff time is evenly divided among cable and satellite SOAs. That said, while the Copyright Office's proposal is legally deficient, the amount at issue—$750 every six months—is insignificant in the larger scheme of things.

The copyright holders' proposal suffers from similar legal deficiencies, but with much greater consequences. As noted above, they believe the proper cost base for statutory licensees in general is half of the total administrative costs of the licensing division deducted from royalty fees. They also argue that the proper cost base for *satellite carriers* is half of the roughly $350,000 deducted from *satellite royalty fees*, or roughly $175,000 annually.[31] This is how they arrive at a semiannual fee of nearly $50,000 for DIRECTV.

DIRECTV has never had reason to inquire why $350,000 is deducted from satellite royalty fees each year—representing roughly 13 percent of all royalty fee deductions. Perhaps, if one applies those portions of total operating costs having nothing to do with SOA administration

[30] *Second Notice*, 77 FCC Rcd. at 72789.

[31] Copyright Owners' Further Comments at 9.

equally across satellite and cable operators (such as the Fiscal Section), this represents the correct figure.

It is simply not plausible, however, that the handful of satellite SOAs generate 13 percent of the "reasonable" costs dedicated to the "collection and administration" of all SOAs.[32] To begin with, the Copyright Office must process thousands of cable operators' SOAs while it must process only one SOA for each satellite carrier. This alone more than sufficiently justifies a fee schedule that treats DIRECTV differently than, say, Time Warner Cable. Under the statute, filing fees are meant to recover costs.[33] It is perfectly "reasonable" to conclude that a sector that files thousands of SOAs generates hundreds of times more costs than a sector that files a handful.

Even setting this aside, the fact is that processing and administering *each* satellite SOA is "simple" and "easy to administer." Under the Copyright Office's rules, the Licensing Division does exactly two things with a satellite SOA: note the date it was received, and "examine the statement and fee for obvious errors or omissions appearing on the face of the documents."[34] While the latter might have some meaning in the cable context, where cable operators are required to classify stations as local or distant and make other complex factual and legal determinations, it means almost nothing for satellite SOAs. For satellite SOAs, the only possible "obvious errors" are those of multiplication.

What the copyright holders really suggest, then, is that the Licensing Division generates $50,000 in costs every time it confirms that DIRECTV has correctly multiplied the number of distant signal subscribers by the appropriate royalty rate. Such an implausible suggestion fails to comport with the law, and the Copyright Office should reject it out of hand.

---

[32] *Id.* at 4.

[33] 17 U.S.C. § 708(a).

[34] 37 C.F.R. § 201.11(c)(2).

*   *   *

The Copyright Office has proposed a filing fee schedule reflecting both the cost base specified in the governing statute and the well-understood differences between the cable and satellite statutory licenses. While this schedule is not quite as “reasonable” as the one originally proposed, DIRECTV does not challenge the results and the Office should not change it.

Respectfully submitted,

/s/______________________________

Susan Eid
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, LLC
901 F Street NW, Suite 600
Washington, DC 20004
(202) 383-6300

William M. Wiltshire
Michael Nilsson
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, LLC

February 22, 2013