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Public Works for a Better Government

July 28, 2015

Honorable Darrell Issa, Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
House Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa:

I am writing to you today about the Public Access to Electronic Court Records (PACER) computer system. PACER is the only important federal database that uses a “pay-per-click” financial model, charging for access to our federal judiciary at the rate of \$0.10/page. PACER provides access to the dockets, orders, briefs, and other materials that make up the workings of our U.S. District Courts and the U.S. Court of Appeals.

When the Barons wrote into Magna Carta the words “we will sell to no man...either Justice or Right,” they established a long-standing principle that the workings of our courts shall take place in the light of day. Magna Carta, *1297 c. 9, Regnal. 25 Edw 1*. In the United States, it has long been held that “the courts of this country recognize a general right to inspect and copy public records and documents.” *Nixon v. Warner Communications, 435 U.S. 589, 98 S. Ct. 1306, 55 L.Ed.2d 570, April 18, 1978*.

The principle of public access has also been by congressional mandate: “[T]he Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible.” *U.S. Senate, S. Rept. 107-174, E-Government Act of 2001, Committee on Governmental Affairs, June 24, 2002*.

In this day and age, the light of day means the Internet. Public access to the workings of our judiciary means public access to PACER. Yet, despite my trying since 2008 to have a discussion about why PACER is so antithetical to the workings of an open judiciary in our democratic system, that discussion has not happened. Having essentially exhausted my administrative and judicial remedies, I am petitioning the Congress and asking you to review this matter.

My Work on Privacy Audits

My work on PACER began in 2008 when I worked with my colleagues Aaron Swartz and Stephen Schultze to do a comprehensive audit of privacy violations in the PACER system. We identified thousands of documents with shocking privacy violations, and the audits were **submitted to the Judicial Conference** of the United States and to 32 Chief Judges of U.S. District Court. A similar audit was done of published opinions of the U.S. Court of Appeals and **submitted to the Judicial Conference** and the Chief Judges of five Circuit courts.

The matter was extensively debated in the Judicial Conference. *See, e.g., Minutes of Fall 2008 Meeting of Advisory Committee on Appellate Rules, November 13 and 14, 2008; Minutes of Committee on Rules of Practice and Procedure, June 1-2, 2009.* The matter was the subject of **an inquiry from the U.S. Senate**, and in response **the Judicial Conference wrote** to Senator Joseph I. Lieberman on March 26, 2009, to assure him that “the Federal Judiciary has been in the forefront of protecting privacy interests” and that our audit results were “disturbing and must be addressed.”

Despite all that attention, I was thus shocked that the U.S. Courts had posted an unredacted copy of our audit on their web site, complete with the Social Security Numbers of the affected parties. Even worse, before **writing to the Hon. Judge Lee H. Rosenthal** to alert her to this careless and negligent action by the Administrative Office, I double-checked our audit results in the PACER system and was shocked to find that many of the specific privacy violations we identified in 2008 were still live on PACER in 2015.

The specific work that I wish to conduct on PACER is an audit of the system for privacy violations. In addition to privacy audits of the U.S. Courts, I have conducted a similar **audit of the Congressional Record** and have recently conducted a series of systematic **audits of the IRS Exempt Organizations database** which led to a change in IRS policies and increased protection of privacy.

Given my track record in helping the government find and fix privacy breaches, I was disappointed that my proposals to continue my examination of the U.S. Courts has met with considerable resistance and an insistence that I raise millions of dollars to pay the PACER access fees. We recently **filed a formal request** in the U.S. Court of Appeals for the Ninth Circuit asking for a fee exemption in order to carry out that work, but the request was summarily denied without even a hearing.

It would be impossible for me to do a comprehensive privacy audit of a U.S. District Court without a fee exemption. The cost would be prohibitive. The proposal I submitted to the Ninth Circuit offered to furnish the Court with a report on the effectiveness of their privacy rules, and also to notify the litigants and their attorneys of documents file in their cases with privacy breaches. I believe this is clearly a beneficial use of PACER, one I offered to conduct at no cost to the government.

Other Beneficial Uses Are Also Prohibited

Privacy audits are not the only beneficial uses precluded by the current fee structure. In our fee exemption request, we submitted affidavits from distinguished researchers who explained in detail the types of work they would like to conduct to examine the operations of our federal courts. Empirical analysis of real filings is an example of the emerging field of “big data,” and our federal judiciary is a perfect place to apply such analysis. However, under current rules, the PACER fees would be prohibitive.

The Administrative Office is quick to state that they have made provisions for public access, in particular if a user has less than \$15 in charges per quarter, fees are waived for that quarter. The problem with this is that one cannot conduct any serious legal research with \$15 in fees. This point was underscored by affidavits from law school librarians and public law library librarians in our fee exemption request.

It is important to understand that before one can avail oneself of the \$15/quarter in “free” PACER, one must still register with the system and furnish a valid credit card. The PACER service center also insists on a valid U.S. tax identification number because “in the event that federal debt collection is necessary, the tax ID may be used in that effort.”

The problems with PACER go far beyond cost. When asked, the Administrative Office of the U.S. Courts paints a picture of happy users. In 2013, **the Administrative Office reported** that “90 percent of users saying they are satisfied or highly satisfied with the internet-based public case information system” and that “only 3 percent of users consider themselves ‘dissatisfied.’”

Those results strain credulity. There have been numerous pieces in the press with titles such as **“Why the federal court record system PACER is so broken, and how to fix it”** and **“Why Pacer should (and should not) be like Edgar.”** The lack of full-text search, the inability to search across districts, a user interface that is poorly designed, and a user interface that does not meet modern standards of accessibility are just some of the issues pointed out in these articles, and any search of the Internet will find those comments frequently echoed.

The technical problems in PACER are numerous, and even extend to their billing interface. While the **PACER user manual** states that for a docket retrieved as an HTML file should be charged at the rate of 4,320 bytes = 1 billable page (e.g., \$0.10), my PACER bills showed I was being consistently overcharged by a factor of 2x-6x. My billing audit showed that this overcharging extended to all users and had been in place for several years, resulting in millions of dollars in excess charges.

I documented the errors and **submitted a formal request** to the Administrative Office and Mr. Robert Lowney, the official who supervises the system was kind enough to meet with me. He explained that if I measured the number of bytes in the docket results, the numbers did not make sense, but they measured their billing charges using an intermediate file that I did not see, which presumably had 2x-6x as many bytes as the data I received.

How Much Money Are We Talking About?

The Administrative Office of the U.S. Courts is funded through 3 sources. Each year, Congress appropriates operating funds, which for FY2015 is \$84.399 million for the Administrative Office. The overall funding for the Federal Judiciary is \$6.697 billion in congressional appropriations. *Pub. Law No. 113-235*.

The other two sources of funds for the Administrative Office are court filing fees and the revenue from the PACER system. However, nowhere on the U.S. Courts web site can we find a regular statement of these revenues or of the expenses the administrative office incurs. This is particularly troubling for PACER, since **28 USC § 612** requires an annual report on the Judiciary Information Technology Fund, but the last report that has surfaced for public examination is from 2008.

After repeated queries to the Administrative Office for PACER revenues, I was directed to an interview the office granted to a reporter which revealed \$146 million in revenues for the fiscal year that ended on September 30, 2013. The news report also states that providing records to the public only costs \$20.2 million annually and the resulting “profit” is used for a variety of expenditures such as \$31.5 million spent on courtroom technology such as large-screen televisions. In its **long-range information technology plan**, the Administrative Office projects PACER revenues will remain fairly steady with projected revenues of \$159.1 million in FY 2019.

The other source of revenue are filing fees. Some of the fees are fixed by statute, such as the \$350 filing fee for a district court civil action established under **28 USC § 1914**. To that \$350 filing fee is added a \$50 administrative fee, making the cost for bringing a civil action \$400. The Judicial Conference is also empowered to establish **other miscellaneous fees**.

The fees collected are not all available for the use of the judiciary. A case docketing fee for a U.S. Court of Appeals action, for example, is \$505. Of those funds, **31 USC § 3302(b)** mandates that \$100 be put in the Treasury General fund. **Pub Law No. 109-171** mandates that an additional \$200 be placed in the Treasury General Fund, leaving \$305 available for use by the judiciary.

The accounting of filing fees between the Judiciary and the Treasury General Fund is complicated, and is detailed in accounts maintained by the Bureau of the Fiscal Service of the U.S. Department of the Treasury. Information on account balances can be found in the Combined Statements of Receipts, Outlays, and Balances. For 2014, **Receipts by Source Categories** details four categories of filing fees, with receipts offset against outlays of over \$109 million and a **current fund balance** of \$296 million.

Because a simple statement of total revenue and expense is not available, it is hard to know the total revenue the Judiciary gets from filing fees. I am therefore pleased that the Administrative Office shared with me their justification for the Fiscal Year 2016 request, which notes that the total filing fees estimated to be made available to the Judiciary will be \$192.9 million.

A Proposal for PACER

In summary, the 3 sources of revenue available are roughly:

- Congressional appropriation: \$84 million
- PACER revenues: \$150 million
- Filing fee revenues: \$190 million

The reason the Administrative Office charges for PACER access is because they can: The U.S. Congress mandated that the Judicial Conference “prescribe reasonable fees,” though the act was very clear that these fees “may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees in order to avoid unreasonable burdens and to promote public access to such information.” *Pub. Law No. 102-140*.

When you think about the costs to the judicial system of litigation in U.S. District Court, \$400 as a filing fee is absurdly low. I would propose that Congress mandate that the PACER dissemination fees be dropped and that filing fees be raised to more reasonable levels. For a multinational corporation filling a commercial suit, suits that often have a dozen lawyers listed on the docket, raising fees will not be a burden.

Raising filing fees should of course be done with care. Public interest litigation, pro se filings, and numerous other categories of users of our courts should not be overburdened and we must make sure that access to the courts for these people is easy and cheap. But, for those corporate users, it would be a drop in the bucket to increase the fees and it is only fair that they for the resources they are using.

If PACER fees are eliminated, one must remember that the Congress appropriates considerable funds to agencies such as the IRS, the Department of Justice, and other heavy users of our courts, all of which must pay the \$0.10/page fees. Eliminating PACER fees will thus reduce congressional appropriations as well as permitting a raft of beneficial uses that are prohibited by current pay-per-click model.

How much one should raise filing fees is of course a matter for further study, but it is important that we remember that part of the filing fee revenue goes into the Treasury General Fund and that the Administrative Office will face transitional costs as it ramps up to meet increased demand and begins to pay closer attention to issues such as privacy breaches. Filing fees should thus be raised by more than the current PACER revenue stream in order to provide a smooth transition and continuity of service.

How much the filing fees should be raised and in which specific categories is a subject that the Administrative Office or the Federal Judicial Center could provide input, and is also a subject that outside experts could provide valuable contributions as well as the professional staff in the legislative branch.

Conclusion

The specifics of my proposal for addressing the revenue shortfall that would arise from eliminating PACER fees may not be the only or even perhaps the right answer. However, it is clear that the issue of public access to court records must be revisited.

The last time the Administrative Office held a public comment period on PACER was in 2007. Public input into the PACER NextGen system has been minimal. Just as importantly, Congressional attention to this matter has been lacking. I cannot recall the last time a Congressional Hearing examined the operation of the PACER system.

I hope that the Subcommittee on Courts, Intellectual Property, and the Internet can find some time to hold hearings or at least detail professional staff to look into the existing situation. The question of public access to our courts is too important to ignore.

Thank you very much for your attention to this matter.

Sincerely,



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