UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of: COLLEGIATE BROADCASTERS, INC., Appellant, v. UNITED STATES COPYRIGHT OFFICE, LIBRARY OF CONGRESS, Appellee.	Case No. ____________ Copyright Office Docket No. 2000-9 CARP DTRA 1&2

COLLEGIATE BROADCASTERS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR STAY

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I. TIME RESTRAINTS REQUIRE EMERGENCY CONSIDERATION AND AT LEAST A TEMPORARY STAY WHILE THIS MOTION FOR A STAY IS BEING BRIEFED AND CONSIDERED.

Under the Final Rule of the Librarian of Congress which is the subject of this Petition for Review and Emergency Motion for Stay, fees and royalties for approximately four years were due on Sunday, October 20, 2000. The Final rule was announced on June 20, 2002 and published in the Federal Register on July 8, 2002. Pursuant to this Court's rules, Collegiate Broadcasters' Inc. (CBI) properly brought a Motion for Stay to the Librarian of Congress before bringing this motion. See Declaration of Granick, attachment 1. The Librarian issued an Order denying that Motion on October 18, 2000 at approximately 4:00 PM eastern standard time.

CBI has not filed an appeal of its own but has been cooperating with appellants ioMedia Partners et al. CBI also filed comments in support of the National Association of Broadcasters Motion for Stay in the Copyright Office.

II. INTRODUCTION

Collegiate Broadcasters Inc. ("CBI") is a nonprofit organization of about 100 members who are college radio, television and Internet broadcasters. CBI submits this emergency motion for a stay of the Librarian's Final Rule and Order ("Final Rule"), 67 Fed. Reg. 45240 (July 8, 2002), requiring statutory licensees to make royalty payments, based on stated rates and minimum fees, on October 20, 2002 and monthly thereafter. CBI also petitions for review of the October 18, 2002 Order of the Librarian denying CBI's motion for stay for lack of standing.

CBI requests this stay for very simple reasons. One, without a stay, there will be no webcasting "industry"—only a few companies that are able to finance the royalties set by the Final Order through revenue generated by corporate activities other than webcasting. The irreparable harm that will result without this stay has already been demonstrated the marketplace. Since the Final Rule was announced on July 8, 2002, scores of Internet radio stations have fallen silent. More fall silent every day.[1] Absent a stay pending appeal, college stations are obligated to pay substantial sums to SoundExchange[2] that will put the smallest out of business and will threaten the viability of the most successful.

Two, appellants Live365, IoMedia and others are likely to succeed in their appeal filed with the D.C. Circuit, which will effect the college broadcasters obligation to pay. As Live 365 argues in its brief, the rates set in the Final Order eliminate a new, but powerful, engine of free expression for all but the wealthiest, thereby burdening the First Amendment's right of free speech. Additionally, the rates are arbitrary and capricious in light of the record, clearly frustrate the Congressional intent in establishing a compulsory license for sound recording performance royalties. Further, as CBI argues below, some of its member stations will prevail on Eleventh Amendment grounds, because royalties can not be collected from the state.

Three, both the Copyright Office and Congress recognize that the current system for determining sound recording royalties is broken and intend to overhaul the system in the near future. As the Register of Copyrights stated in recent Congressional hearings,

[1] *See* http://www.kurthanson.com

[2] SoundExchange is one of the agents charged with collecting webcasting royalties and distributing them to the copyright owners.

"the CARP system is far from perfect."[3] Substantive hearings have been held in both the House and Senate,[4] the Copyright Office has solicited suggestions from and held a meeting with legal practitioners in this field to obtain input for CARP reform and corrective legislation has been introduced.[5] It is clear that reform of this rate setting process is imminent. The Court should not allow the Librarian's Final Rule to extinguish an entire industry shortly before that reform takes place.

III. THE COURT SHOULD GRANT A STAY FOR ALL PARTIES BOUND BY THE DETERMINATION, TO PRESERVE THE STATUS QUO PENDING APPEAL.

A. THE STANDARD FOR GRANTING A STAY IS SATISFIED BECAUSE APPELLANTS HAVE A LIKELIHOOD OF PREVAILING ON THE MERITS.

The purpose of a stay pending appeal is to preserve the status quo pending a final determination of the merits of the appeal. *Washington Metro Area Transit Comm'n. v. Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977). Four factors bear on whether the Court should grant a stay of the Order pending appeal: they are 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the

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[3] Statement of Marybeth Peters, Register of Copyrights, Before The Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, 107th Congress, June 13, 2002 (describing problems with CARP system and advocating significant reform measures). *See also* Statement of Congressman Rick Boucher ("The CARP process is badly broken." "We must avoid a repeat of rulings like the most recent one, through which a one-size fits all approach was adopted, and small webcasters that measure annual revenues in the tens of thousands of dollars were saddled with royalty fees in the hundreds of thousands.")

[4] Copyright Royalties: Where is the Right Spot on the Dial for Webcasting, Before the Senate Committee on the Judiciary, 107th Congress, May 15, 2002; The Copyright Arbitration Royalty Panel Structure and Process, Before the House Subcommittee on Courts, the Internet and Intellectual Property, June 13, 2002.

[5] *See* Internet Radio Fairness Bill, H.R. 5287 introduced by Congressmen Inslee, Boucher and Nethercutt on July 26, 2002 and Small Webcaster Amendments Bill, H.R. 5469, introduced by Congressman Sensenbrenner and passed October 7, 2002 in the U.S. House to address small webcasters' concerns about the impact of the royalty rates in the Final Rule. The bill was held from a Senate suspension calendar vote by a single Senator on October 17, 2002 and is considered dead in the Senate.

moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay. *Washington Metro Area Transit Comm'n. v. Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977). *See also Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921 (1958). The Webcasters have a high probability of prevailing on the pending appeal,[6] but need only show that they have more than a mere possibility of success on the merits. *Cuomo v. U.S. Nuclear Reg. Comm'n.*, 772 F.2d 972, 974 (D.C. Cir. 1985). A moving party need not show that it has a high probability of success, if the showing on other factors is strong.

Also, this Court may consider not only the harm to the moving party absent a stay but also harm to third parties interested in the proceedings. For example, in a criminal appeal involving First Amendment issues, Circuit Justice Brennan granted a stay of a gag order in a criminal case, holding that "irreparable injury to First Amendment interests" warranted granting a stay when there was even "a significant possibility" that the Supreme Court would grant review and reverse. *Capital Cities Media v. Toole*, 463 U.S. 1303, 1304 (1983). Among the factors strongly favoring a stay are irreparable harm to webcasters that were unable to participate in the CARP, and irreparable harm to other third parties, such as recording artists, that directly benefit from webcasting. Copyright owners will suffer little, if any, harm from the stay and, indeed, have also appealed the Librarian's Final Rule.

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[6] Live365 was one party to the webcasting CARP proceeding. 67 Fed. Reg. At 45241 (July 8, 2002). On August 7, 2002, a group of webcasters including Live365 ("The IOMedia Group") filed a Notice of Appeal in the U.S. Court of Appeals for the D.C. Circuit, pursuant to 17 U.S.C. § 802(g)(2002). On September 9, 2002, the Librarian moved to dismiss the appeals of all the webcasters in the IOMedia Group except for Live365.com. That motion is fully briefed and pending in this Court. Nothing in this Motion should be construed to concede that any other webcaster appellant lacks standing to appeal the Final Order.

B. CBI MEMBERS HAVE STANDING TO SEEK A STAY BECAUSE THEY ARE BOUND BY THE DETERMINATION AND WILL DIRECTLY BENEFIT IF ANY OF THREE APPEALS PENDING IS SUCCESSFUL

Live365 has undisputed standing to appeal, representing the interests of its Internet network members, including KSBR, KTSW and KXLU. (*See* Live365 Emergency Motion) These stations are also CBI members. Accordingly, are likely to prevail on appeal to the same extent as Live365. Live365 is, itself, a business member of CBI. Therefore, they, and by extension CBI, have standing to seek a stay from the Librarian.

Also, as discussed in the National Association of Broadcasters ("NAB")'s Motion for a Stay of the Register of Copyrights' decision filed September 11, 2002, an appeal pending in the Third Circuit Court of Appeals will determine whether an FCC-licensed broadcaster's simultaneous, nonsubscription, digital transmission over the Internet of its AM/FM broadcast signal is exempt under Section 114(d)(1)(A) of the Copyright Act (17 U.S.C. 101 *et seq.*, from the limited digital sound recording performance right provided by Section 106(6). *See Bonneville et al v. Peters*, Case No. 01-3720 (3d Cir.). If the Bonneville appellants prevail on appeal, all the CBI members that are educational FCC-licensed broadcasters will be exempt from webcasting royalties entirely. Further, CBI's membership overlaps or intersects with that of the National Association of Broadcasters (NAB) and Intercollegiate Broadcast Systems, among other industry groups. On July 8, 2002, IBS filed a Petition for Review, along with Harvard Radio Broadcasting Co., Inc., which is also a CBI member, in the D.C. Circuit. (Docket No. 02-1220). If the Circuit

Court rules that IBS and Harvard have standing for an appeal, then CBI will also have standing and be likely to succeed on the merits.

CBI, like the IBS petitioners, has standing has standing under Section 802(g) of 17 U.S.C. which provides that "any decision of the Librarian of Congress under subsection (f) with respect to a determination of an arbitration panel" "may be appealed, by any aggrieved party *who would be bound by the determination*, to the United States Court of Appeals for the District of Columbia Circuit. (emphasis supplied). CBI hereby adopts and incorporates by reference the arguments in favor of standing made by the IBS petitioners in their Petition for Review. CBI is aggrieved by the Copyright Office decision because it must pay royalties as set under the CARP proceeding. There is no reason to think that Congress intended to limit the right to petition to entities that participated in the CARP proceeding. Accordingly, the IBS petitioners and CBI have standing and are likely to defeat any motion to dismiss on standing grounds by the Librarian.

IV. THE WEBCASTERS WILL PREVAIL ON THE MERITS OF THEIR D.C. CIRCUIT APPEAL

CBI agrees with, and incorporates by reference, the arguments in Live365's Motion for Stay. The rates in the Final Rule violate the First Amendment because they burden webcasters' speech interest in creating radio programs and stations in a way that is not even rationally related to Congress's goals of fairly compensating copyright owners for the compulsory license for the use of the their works. *See* Live365's Motion at 4-9. The rates in the Final Rule frustrate Congress's purpose, in providing for a compulsory license, of encouraging webcasting and other modern ways to bring the public access to a

wide variety of music. *See id.* at 9-12.[7] The Librarian acted in an arbitrary manner by setting rates using the RIAA/Yahoo! Agreement as a benchmark. *See id.* at 12-17. The Librarian's Final Rule also arbitrarily condoned the Panel's ignoring a genuine willing buyer/willing seller license, the NPR/RIAA agreement. *See id.* at 18-19. Similarly, it was arbitrary for the Librarian to condone the Panel's rejection of market rates for musical works copyright licenses as a benchmark. *See id.* at 20-21. Finally, the Final Rule is arbitrary in setting a minimum fee that punishes small webcasters and is not supported by the evidence. *See id.* at 21-23.

CBI also agrees with, and incorporates by reference, the arguments in IBS's Motion for Stay dated October 3, 2002 and filed in the D.C. Circuit Court, Appeal No. 02-1244. The Copyright Office's procedural rulings excluded participation by an entire class of non-profit webcasters affiliated with educational institutions. *See* IBS Motion at 4-5. The Panel even noted that although the National Religious Broadcasters' Music License Committee represents some non-CPB broadcasters, "the record remains virtually barren respecting such broadcasters" presenting the CARP with "an extraordinary challenge." CARP Report at 89. The Panel could not meet this challenge. The failure of the Final Rule to take into account the small size of such webcasters violates the small business policies of the U.S. government and fails to differentiate the small entities from larger entities. *See id.* at 5. It is highly likely that at least one appellant will prevail on an argument that will result in the D.C. Circuit vacating the Final Order. Accordingly, to avoid irreparable harm in the interim, a stay should be granted.

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[7] Congress's dismay at the CARP's ruling is evident from the House's passage of H.R. 5469, the Small Webcaster Amendments Act of 2002 on October 7, 2002.

V. THE LIBRARIAN'S DECISION WAS ARBITRARY

A. THE LIBRARIAN ACTED ARBITRARILY BY ACCEPTING A RECOMMENDATION THAT CONDONED THE PANEL'S REJECTION OF THE MUSICAL WORKS BENCHMARK.

A decision is arbitrary if it fails to consider entirely an important aspect of the problem that it was solving. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). For years, terrestrial radio stations have been paying copyright royalties for the use of musical works (musical works benchmark) that are a fraction of the rates the Librarian set here for webcasting. To music copyright lawyers, the copyright license for the right to perform musical works and the copyright license for the right to stream sound recordings are different and distinct creatures, and thus perhaps should be valued separately. But from the perspective of the webcaster – which is the perspective the CARP was required to take in determining what a willing buyer would pay – these two rights are inextricably enmeshed. Neither the license to perform or the license to stream alone has value to the willing buyer, because neither alone conveys the ability to legally webcast.

Therefore, the Librarian should have determined what a willing buyer would pay for all the rights needed to transmit musical recordings. The musical works model is not merely analogous – it shows the price a willing buyer and willing seller have agreed upon for the bundle of the rights necessary to do the *same* act, namely play a recording and transmit it to any distant listeners who have chosen to tune in – it is identical. In light of the problems with the methodology the panel chose to rely on- voluntary agreements – it was arbitrary for the Librarian to salvage the CARP report when the Panel disregarded such a compelling benchmark. Webcasters are likely to prevail on appeal, and thus a stay is warranted.

B. THE LIBRARIAN ACTED ARBITRARILY BY SETTING A MINIMUM FEE THAT PUNISHES SMALL WEBCASTERS.

That portion of the Librarian's Final Rule setting a $500 annual minimum pursuant to 17 U.S.C. §114(f)(2)(B)] is arbitrary and capricious because small stations, in paying the minimum fee and streaming relatively few "performances," will be paying many times the compulsory royalty rate the Librarian found to be the rate a willing buyer and willing seller would agree to. *See* Willer Decl. at ¶¶20-22. Nor does the Librarian's determination establish a minimum noncommercial fee distinct from the minimum fee applied to commercial entities. The illogical result makes the nominal noncommercial rate purely illusory, with most low-volume college webcasters paying per-performance royalties much higher than commercial entities. *Id.*

The Panel refused to use the minimum amounts that commercial and noncommercial entities pay to the performing rights organizations for performing musical works as a benchmark. Yet it offered no explanation of why the performing rights organizations would agree to lower rates than RIAA, if the minimum fees are mainly intended to cover the rights owners' administrative costs. This lack of explanation is grounds for the appellate court to vacate the Librarian's Final Rule as to the minimum fees.

Like the royalty rates, the $500 minimum amount was derived from negotiated agreements between the RIAA and commercial webcasters. 67 Fed. Reg. at 45262-63. The Panel chose the lowest minimum fee RIAA had agreed to with a webcaster before the CARP convened, even though the Panel had deemed that agreement unreliable for purposes of determining the royalty rates. Fed.Reg. at 45248, 45263. In the willing buyer and willing seller analysis, "the panel determined that RIAA would not have

negotiated a minimum fee that failed to cover at least its administrative costs and the value of access to all the works up to the minimum fee." Fed.Reg. at 45262. But KXUL General Manager Joel Willer's calculates that the minimum fees produce a ridiculous windfall for the copyright owners when applied to most college stations. *See* Willer Decl. at ¶¶ 20-22. It is not surprising a seller would be willing to accept a $500 minimum in light of these figures. But what of buyers? The Panel's only consideration of the perspective of the willing buyer with regard to the minimum fees was that "it assumed than an entity would not agree to a minimum rate that would result in a loss." 67 Fed. Reg. at 45263. An agreement acceptable to an entrepreneurial Internet start-up company is not evidence that a noncommercial webcaster would willingly pay $500 per year in order to undertake some small-scale webcasting for educational purposes or pure self-expression.

The Panel's use of a single agreement as a benchmark for a minimum fee for commercial webcasters was also arbitrary. There was no evidence that this single agreement was representative of what willing buyers would pay. Commercial webcasters sizes, business models and other characteristics vary enormously from start-ups with few listeners, as well as webcasters with many thousands of listeners. As with the royalty rates, a single agreement was arbitrarily chosen as the benchmark because the record was inadequate because so few interested parties could participate. As Congressmen Boucher observed, this "one size fits all approach" is the result of a "broken" CARP. *See* Live365's Motion for Stay, n.3. Appellants are likely to prevail on appeal and a stay should be granted to preserve the status quo.

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C. THE LIBRARIAN'S FINAL RULE IS ARBITRARY BECAUSE BIFURCATING THE DETERMINATION OF RATES FROM RECORDKEEPING REQUIREMENTS WAS A FUNDAMENTAL ERROR.

Here, because of an arbitrary decision to separately determine rates and record keeping requirements, the Panel failed to consider entirely the costs of complying with such requirements in determining the rate a willing buyer and willing seller would agree to. Under the sound recording performance rate determination adopted by the Librarian, the amount sound recording royalties will be based on the number of "performances," which the determination defines as, "each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission." 67 Fed. Reg. at 45273. But the CARP report cites no evidence that accurately calculating such instances is feasible—let alone that a willing buyer would agree to the royalty rate chosen in light of the additional, and often higher, costs of the associated recordkeeping and reporting.

Webcasters like KXUL can technologically only measure Internet streaming connections, not listeners. Willer Decl. at ¶ 23. For each and every month spanning the past two years KXUL has experienced one or more streaming sessions extending for at least 24 hours, and many of these lasted for days on end. Willer Decl. at ¶24. The record generated by KXUL proves the flaw of any royalty rate tied to unverifiable "performances" in this new technological frontier. For low-volume streaming services like many college radio stations, though, just a few such marathon connections each month – these clearly are not listening sessions – dramatically and unfairly skew the "performance" statistics in favor of the copyright owners.

The royalty rates and minimum fees are especially prohibitive in light of the extra costs that stations also will have to incur to comply with the record keeping requirements. The cost of complying with these requirements would far exceed the fees themselves at most college stations. Robedee Decl. at ¶¶ 19-20 . Even if there were a technological solution, it would be prohibitively expensive for college stations to purchase it. *Id.* at 21. Even the developing interim requirements are likely to preclude many educational institutions from webcasting. The Copyright Office has indicated that the final record keeping requirements will be more extensive- and therefore more burdensome- than the interim requirements.

This information was not offered to the Panel because CBI and its members could not afford to participate directly in the CARP proceeding. The noncommercial broadcaster groups that did participate represent stations with resources and needs very different from those of most college stations, and the record keeping rulemaking was separate. The Panel did not consider *any* evidence on the cost or feasibility of the record keeping in making its determination of royalty rates, nor did the Register or the Librarian recognize the error in failing to consider this important factor. The resulting inability of many stations to calculate their actual number of transmission under the compulsory licenses is another reason the Librarian should issue a stay relieving webcasters of the obligation to pay fees on October 20, 2002.

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VI. CBI MEMBER STATIONS OPERATED BY STATE COLLEGES AND UNIVERSITIES WILL PREVAIL ON ELEVENTH AMENDMENT GROUNDS BECAUSE COPYRIGHT ROYALTIES CANNOT CONSTITUTIONALLY BE COLLECTED FROM THE STATES.

State colleges and universities are immune, under the Eleventh Amendment, from suits for money damages in federal court arising under the Copyright Act. *See, e.g., BV Eng'g v. University of California, Los Angeles*, 858 F.3d 1394, 1395 (9th Cir. 1988). Citizens may not bring suit against a state or any instrumentality thereof without the state's consent. *See* U.S. Const. amend. XI; *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (federal jurisdiction over suits against nonconsenting states was not contemplated by the Constitution when establishing federal judicial power); *Rodriguez v. Texas Commission on the Arts*, 199 F.3d 279, 280 (5th Cir. 2000) (state immune from suit for copyright infringement). *See also Lane v. First Nat'l Bank of Boston*, 871 F.2d 166, 176 (1st Cir. 1989) (states continue to enjoy sovereign immunity in regard to damages for copyright infringement). Congress has no power under Article I to abrogate state sovereign immunity. *Florida Prepaid v. College Savings Bank*, 527 U.S. 627, 636 (1999); *Rodriguez v. Texas*, 199 F.3d at 281. State universities and colleges are treated like states themselves for eleventh amendment purposes. *See, e.g., Salerno v. CUNY*, 191 F.Supp. 352, 355 (S.D.N.Y. 2001) (City University of New York treated as instrumentality of New York); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (University of California has same immunity as state of California); *BV Eng'g*, 858 F.2d 1394) (same, in copyright context).

Because state institutions are immune from suit for money damages, in federal court for copyright infringement, and state courts lack jurisdiction in suits arising under

the copyright act, the Librarian's Final Rule will be unenforceable as to state educational institutions that have availed themselves of the compulsory license for webcasting since 1998. Any suit to collect royalty fees from these schools will be barred by the eleventh amendment. Accordingly, the harm to copyright owners from granting a stay is illusory with respect to college webcasters that are operated by state institutions. This factor favors granting a stay the obligation of these schools to pay royalties under the Librarian's Final Rule.

VII. COLLEGE BROADCASTERS WILL BE IRREPARABLY HARMED ABSENT A STAY.

Webcasting has, up until now, been a boon for college broadcasters. KTRU, Rice University's radio and Internet station, and KXUL, University of Louisiana's radio and internet station, are examples of college stations that have benefited enormously from webcasting and will be harmed by the Librarian's Order. In addition to giving students a forum in which to express themselves, they provide means for students to learn how to access a radio station in a traditional setting and to use the technologies available today in the industry. See Robedee Decl. at ¶5. Students' experience gained as the result of KXUL radio's Internet presence and the station's streamed audio programming is therefore a vital part of the students' complete education. Willer Decl. at ¶9.

Webcasting allows KTRU to extend its reach beyond the local area, to expose new genres and artists to a wider audience. See Robedee Decl. at ¶9. Likewise, KXUL's Internet programming is available to a worldwide audience. KXUL has received numerous communications from listeners throughout this country, and has logged listening sessions from 53 nations outside of the United States. Willer Decl. at ¶9.

KXUL views the use of digital technology to retransmit the programming of non-commercial radio stations as a natural extension of these stations' historical service. Noncommercial educational radio stations traditionally strive to program to otherwise underserved audiences with content not typically provided by their commercial counterparts. The distribution of educational and cultural programming via the Internet allows noncommercial radio stations to extend their public service to a geographically diverse audience. *See* Willer Decl. at ¶10.

For some schools, webcasting is the only viable way to reach an audience of any size, due to limited broadcast spectrum or fiscal constraints. Low power FM, cable FM/TV, legal and unlicensed AM, and cafeteria public address broadcast systems all have extremely limited audience potential, a problem solved perfectly by webcasting. Robedee Decl. at ¶5. For a new station, start-up costs for other means of transmitting are much higher than those for webcasting. Webcasting also allows for a second station where, for example, a college wants to have both an NPR station and a student station, or where a college lacks the resources or the spectrum for a second FM station. Robedee Decl. at ¶6.

Most CBI member college radio stations, unlike public radio stations funded by CPB, have to pay their operating costs from student fees or from their meager academic budgets. Robedee Decl. at ¶13; Willer Decl. at ¶5. According to Intercollegiate Broadcast System ("IBS") surveys, the average college station budget is about $9,000. *Id.* Historically, noncommercial radio stations have always paid copyright royalties to the performing rights organizations in the form of a reasonable flat fee, while commercial stations have paid on a percentage of revenue basis. This has enabled college stations to

operate on fixed budgets and avoided penalizing them if they succeed in reaching a wider audience. Robedee Decl. at ¶15. KTRU can afford to pay the back royalties due October 20. But going forward, KTRU may not be able to pay both the royalties, especially as its audience increases. KTRU's audience has been doubling every ten months, as more people get high speed Internet connections and listeners discover KTRU through "surfing" and promotion. Robedee Decl. at ¶18. The fees, combined with the reporting requirements, are also likely to force KXUL to cease its Internet service. Willer Decl. at ¶26.

The University of Louisiana at Monroes's KXUL's nominal royalty for the 2001 calendar year, the station's peak listening period, totals $105.78. Because KXUL will be required to disburse the minimum fee of $500 this year, the station will pay an effective per-performance rate for 2001 of 0.09381¢, or 469% of the nominal noncommercial rate and 134% of the nominal commercial rate.

Unless the court grants necessary and justified relief, on October 20, 2002 college radio station KXUL will have to make payments for all past performances between October 28, 1998 and August 31, 2002. *Id.* at ¶22. The amount of that payment will be $2,500.00, although KXUL's performance and ephemeral copy royalties for the period total only $214.86. *Id.*

The cost of complying with the record keeping and royalty requirements would far exceed the fees themselves at most college stations. Robedee Decl. at ¶¶ 19-20. As a result, many stations have shut their doors. CBI's William Robedee has personally confirmed that 70 stations have already stopped webcasting, and has heard from credible sources that many more have also stopped. Robedee Decl. at ¶¶ 23-24 (listing

casualties). Some of the most severely harmed college stations are those for which webcasting is the only means of "broadcasting" such as UCLA-Radio, which has stopped streaming as result of the Librarian's Order. See *Id.* at ¶ 7. Radio enthusiasts at other colleges, such as the University of Texas at Dallas, had plans to start webcasting, but reluctantly suspended these when they learned of the Panel's decision, because they cannot afford to webcast under the rates and fees in the Librarian's Order. *Id.* at ¶ 25.

RIAA will not even negotiate with college broadcasters about royalty rates or record keeping at this time. Willer Decl. at ¶30; Robedee Decl. at ¶28. Even if stations ultimately reach an agreement with RIAA or if legislation is passed to exempt college stations from the per-performance royalties, **current** students who want to participate in webcasting, at colleges whose stations have ceased webcasting, never started to webcast or have any kind of radio station at all, will be irreparably harmed. *Id.* at ¶27. The harm to college broadcasters and their listeners alone would justify granting a stay.

A. RECORDING ARTISTS WHOSE WORK IS PLAYED ON INTERNET RADIO WILL BE SEVERELY, IRREPARABLY HARMED ABSENT A STAY.

If the vast majority of Internet radio stations close their doors because they are unable to pay the webcasting royalties and fees, musicians such as multiple Grammy winner Janis Ian will suffer severe and irreparable harm. Ian Decl. at ¶4. Commercial terrestrial radio stations are locked into strict genres with narrow playlists. The vast majority of recording artists do not get played on terrestrial radio. As an artist, if your music is not mainstream, and a big record company is not promoting you as one of its hot artists, your songs will not get played. Ian Decl. at ¶ 7. Janis Ian's songs are simply not played anymore on commercial terrestrial radio except on oldies stations. Oldies stations have a limited audience, which does not include many younger listeners. Ian Decl. at ¶8.

The only place most of Ian's songs can be heard is on Internet radio. *Id.* at ¶9. As Ian makes approximately 40-45% of her living from international sources, as do many other artists, silencing Internet radio would have a disastrous effect on their livelihoods. *Id.* at ¶13. Without Internet radio, Ian's ability to reach an audience and to sell her music is irreparably harmed. See *Id.* at ¶11.

Similarly, 22 year- old fantasy rock artist Emilie Autumn's recordings receive little, if any, airplay on commercial terrestrial radio. Autumn Decl. at ¶ 6. Many artists who cannot sign with a record label, or who want more independence, go the do-it-yourself route, paying for their own recording time, arranging and paying for their own manufacturing, and doing all their own promotion and distribution. Internet radio gives these hardworking artists a chance. Ian Decl. at ¶12. This is especially true of local music, which gets little, if any, exposure anywhere else. Robedee Decl. at ¶11.

Emilie Autumn founded Traitor Records, an independent label, for the purpose of releasing her classical and fantasy rock albums without having to answer to major label record company executives. Autumn Decl. at ¶3. Traitor Records offers its entire catalog of recordings to webcasters, royalty-free. Autumn has confirmed that 237 different Internet radio stations are now playing and streaming these recordings.

There is ample evidence that airplay on Internet radio results in sales of CDs. Emilie Autumn receives many fan letters from listeners who say they heard one of her songs on an Internet radio station and liked it and decided to buy the CD. *Id.* at ¶7.

Many record labels give KXUL free sound recordings to encourage students to play them. Willer Decl. at ¶ 29 and Exh. 2. This suggests that the value of promotion from airplay on a college radio station is worth more to the average record label and artist

than a trifling $2.03 in royalties. In short, the Librarian's Order, if not stayed, will cause irreparable harm to recording artists.

B. COMPANIES THAT BENEFIT FROM INTERNET RADIO WILL BE HARMED ABSENT A STAY.

Many technology businesses benefit from Internet radio because it is a compelling reason for consumers to purchase their products or services. XSVoice, for example, is a technology company that has developed a platform which enables mobile access to virtually any type of live and on-demand media content, including Internet based streaming audio, radio, television or other audio source. XSVoice's business plan assumes the existence of large numbers of Internet radio stations, offering a wide variety of different kinds of music. If XSVoice lost all its music listeners, that loss could decrease the number of streams they broadcast by as much as 65%. That, in turn, would make its offering much less attractive to both wireless carriers and the advertisers upon which the company depends for the majority of its revenues. *Id.* at ¶ 11.

If consumers cannot get a wide range of musical content on the Internet, they will have less of an incentive to upgrade their current wireless devices and service plans. All wireless carriers will face even greater obstacles to encouraging consumer adoption of these technologies and, subsequently, recouping their development costs, if they cannot offer access, through wireless devices, to compelling multimedia offerings such as Internet radio. *Id.* at ¶ ¶5, 8. In sum, XSVoice and other services that benefit from the existence of a large and diverse body of Internet radio stations will suffer great harm as a result of the Librarian's Order if it is not stayed pending appeal. *Id.* at ¶ 12.

VIII. COPYRIGHT OWNERS WILL NOT BE HARMED BY A STAYAND MOST WILL BENEFIT FROM THE SURVIVAL OF INTERNET RADIO.

In the unlikely event that the Webcasters do not prevail on appeal, the only harm to owners and SoundExchange will be a delay. The royalties for these licensed performances will be paid; only the amount is in dispute. Time does not affect the amount that will ultimately be due to copyright owners when all the appeals are exhausted. The wait is a minimal inconvenience, compared to the harm that webcasters will suffer by calculating and paying royalties at a rate that will later be found to have been too high, if webcasters prevail. In some cases, because some webcasters simply do not have the resources to pay fees and royalties retroactive to 1998, the harm to owners from a stay is illusory. Indeed, copyright owners' only hope of collecting from some webcasters is that these webcasters stay in business. Thus, the potential harm to the owners is minimal and does not weigh heavily against granting a stay.

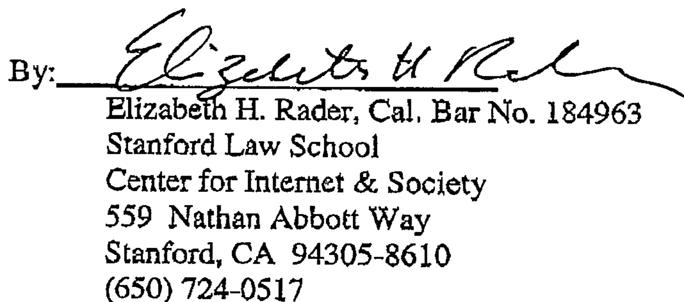
IX. CONCLUSION

For the reason set forth above, the Court should grant this motion and issue a stay relieving all parties bound by the Librarian's Final Rule of the obligation to make any payments under the compulsory license until the Court of Appeals has decided the various pending appeals that will affect such obligations.

Dated: October 21, 2002

Respectfully Submitted,

COLLEGIATE BROADCASTERS INC.

By: 

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