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Before the
Copyright Royalty Board
Washington, D.C. 20540

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GENERAL COUNSEL
OF COPYRIGHT

In re	)	
NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	)	Docket No. RM 2005-2

SUPPLEMENTAL COMMENTS OF
INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

The Intercollegiate Broadcasting System, Inc. (IBS), is a Rhode Island non-profit corporation, which represents some 900 of the 1400 student-staffed radio stations affiliated with domestic educational institutions, a substantial number of which stations stream their programming. IBS files these comments in response to three items of the Copyright Royalty Board's Supplemental Request published in 70 Fed. Reg. 43364 (July 27, 2005), viz., specific technical issues, "any matter interested persons might wish to offer",[1] and the legal and policy issues,[2] as they relate to its members' webcasting activities.

The IBS member stations are non-commercial webcasters pursuant to Section 114(f)(5)(E) of the Copyright Act of 1976, as amended by the Small Webcaster Settlement Act, 116 Stat. 2780 (2002). IBS, on behalf of its webcasting members, was a signatory to the non-commercial webcasting agreement with RIAA submitted to the Office, which continues in force

[1] Supplemental Notice, Point II.

[2] Supplemental Notice, Point IV.

by reason of Section 6(b) of the Copyright Royalty and Distribution Reform Act of 2004, 118 Stat. 2344. IBS earlier commented on notice and record-keeping in response to the Notice of Proposed Rulemaking of the Copyright Office[3] and to the notices of inquiry and proposed rulemaking on the topics Docket No. RM 2002-1D published in 68 Fed. Reg. 58054 (October 8, 2003), in Dkt. No. 2002-1H published in 70 Fed. Reg. 21704 (April 27, 2005).

Overview

The proposed record-keeping and reporting requirements should not and cannot lawfully be applied to the campus webcasters, because they are impractical, unnecessary, and disproportionate and would not withstand a fair and objective cost-benefit analysis.

I. THE PROPOSED RECORD-KEEPING AND REPORTING REQUIREMENTS ARE IMPRACTICAL, UNNECESSARY, AND DISPROPORTIONATE IN FACT AND FAIL THE COST-BENEFIT TEST.

Pending the receipt of persuasive information in response to the Board's supplemental request, the record is devoid of any factual evidence "that there is any proportionate benefit to be received from any recordkeeping or reporting by these stations of the magnitude contemplated by the NPRM."[4] To the contrary, from every perspective, the proposals at issue would impose unaffordable burdens while yielding negligible benefit, and they cannot be practically implemented. Here are a few of the reasons:

- The proposals call for more recordkeeping and reporting than can be economically used by the compulsory licensors, i.e., the proposals are not cost-effective. Assuming the

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[3] Docket No. RM 2002-1H, 70 Fed. Reg. 21704, April 27, 2005.

[4] Comments of IBS, dated May 27, 2005, at 3.

present $ 250 annual royalty rate per campus station[5] and (1) allowing SoundExchange ten percent thereof for SoundExchange to process royalty payments ($ 25 annually);[6] and (2), of that $ 25, allowing half of the $ 25 for registration and tracking and half for calculating royalty distributions ($ 12.50 annually), IBS is moved to wonder how much recordkeeping and reporting SoundExchange can process for $ 12.50 per IBS Webcaster per year. The record is devoid of any evidence that the recordkeeping and reporting proposed to be imposed on the campus broadcasters can be utilized consistent with SoundExchange's fiduciary obligations to the beneficiaries of the compulsory license.

- "Total census" recordkeeping and reporting is unnecessarily burdensome. Thirty years' experience with copyright holders like ASCAP and BMI demonstrates that very small samples on hand-written forms are adequate to distribute the small stream of royalties that this class of webcasters could generate.[7]

  SoundExchange has not denied that it has a CPB/NPR contract referred to often, e.g., at the May 10, 2002, hearing before the Register, which imposes no record-keeping and reporting for public radio stations with full-time paid staff of less than five, despite these stations' proportionately larger royalty streams.

- The proposals cannot practicably be applied to this class of webcasters. On at least three occasions since 1998 the Copyright Office has attempted to find out who is webcasting.

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[5] Comments of IBS in Docket RM 2002-1H, filed May 27, 2005, at 3, citing IBS comment and reply comments in Dkt. No. 2002-1D, filed November 24, and December 22, 2003, attached hereto.

[6] Anything more would not be cost-effective and therefore would be an excessive charge by the agent against the statutory beneficiaries of the compulsory license fee.

[7] Comments of Harvard Radio Broadcasting Co., Inc., in Docket No. 2002-1H, dated May 27, 2005 at 3-4.

- Each time the Office was unable to collect accurately a few lines of information on each webcaster and make that available. If the federal government cannot record a few lines of data on each webcaster, then there is no basis for assuming that all-volunteer college webcasters could record that amount of data on every performance 24 hours a day and seven days a week.

- Key requirements of the proposals for on-campus record-keeping are technically impractical. There are no server logs indicating the accurate number of performances available at most college radio stations or any high school stations. Typically campus-wide network systems' server logs, to the extent they exist, inaccurately would inflate the number of listeners. Such server logs cannot accurately separate out who is listening to the radio station stream, the library audio books stream, the distance learning stream, etc., nor can they segregate (e.g. foreign) exempt from (domestic) non-exempt uses. Moreover, they cannot readily discard 24/7 "camp-ons" that do not reflect actual listenership within the meaning of the Act.

- As applied to campus radio stations the proposed record-keeping and reporting requirements are disproportionate to what would be required to be recorded and reported. A large number of campus stations, particularly at smaller institutions of learning, operate only a small number of hours per week only during term-time and probably most often have only 10-20 listeners on average, except for non-music sporting events. Judging from e-mail reaction, quite often many of those listeners are alumni living around the world and not covered by U.S. copyright law. The revenues imputed to SoundExchange from such stations' operations would be negligible compared to the costs of census-type

recordkeeping and reporting by the stations, and SoundExchange has failed to demonstrate that it could cost-effectively process these reports.

II. LEGAL AND POLICY CONSIDERATIONS PRECLUDE THE APPLICATION OF THE PROPOSED RECORD-KEEPING AND REPORTING REQUIREMENTS TO CAMPUS STATIONS.

Notice and record-keeping detail. IBS does not believe that Congress has required the Copyright Royalty Judges "to prescribe particular formatting and delivery requirements" as detailed in the NPRM. The common language of 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(4) says that the Judges

> shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available

by eligible statutory licensees. There are at least three reasons in Section 114(f)(4)(A) why this language does not call for detailed prescription:

- The requirements are displaced if the parties agree to different terms.
- The notice merely must be "reasonable."
- The apparent mandate of "shall . . . establish requirements" is softened by "if new regulations are promulgated."

Sampling. We have referred favorably above to the "small samples on hand written forms" permitted for the past thirty years in reporting to ASCAP and BMI. Reserving our objection to any change in the status quo at this time, we believe that these three decades of experience demonstrate that an analogous system would be "reasonable" for webcasting statutory licenses with these characteristics.

Assignment of burden. The burden on a college or high school radio station with a small, volunteer staff and almost no budget should be balanced against its capacity. As we have sought to show above and in prior comments, however, record-keeping of the detail proposed in the NPRM arbitrarily burdens licensee and copyright holder (or its representatives) alike, without demonstrated benefit. The *AMOA* decision of 1982, cited at 43368, provides little or no guidance here, in our opinion. The marginal profitability of commercial jukebox operators has almost nothing to do with the cost burdens imposed on non-profit radio stations, particularly where the record here thus far has failed to establish any nexus between more detailed reporting and net increased payments to copyright holders. The essential point of difference is that the small webcasters affiliated with educational institutions do not exist to make a profit; they exist to educate students and listeners. Campus webcasting is essentially a means to develop students' skills in management techniques, programming techniques, applied engineering, music, etc. That inheres in the statutory definition of "noncommercial webcaster." 17 U.S.C. § 114(f)(5)(E)(i).

SoundExchange's formatting proposals should be rejected by the Board as so rigid as to be impractical for the small non-commercial webcasters. While SoundExchange is not subject to the policies of the United States embodied in Section 2 (Congressional Findings and Declaration of Purpose) of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt, the Board is. Similarly, Congress has forbidden the collection of "unnecessary" information by government agencies, i.e., information lacking "practical utility." See Government Paperwork Elimination Act, as amended, 44 U.S.C. § 3508. For the reasons stated in the comments of IBS, WHRB, CBI, and the National Religious Broadcasters' Music License Committee in Docket Nos. 2002-1 then, the Board should adopt small-entity-specific recordkeeping and formatting requirements.

Congress did not intend that the Board adopt notice and record-keeping formats and procedures that are impractical of accomplishment by a substantial body of compulsory licensees. That would defeat the Congressional purpose of making compulsory licensees available to webcasters. The proposed rules are impractical, not only for the small webcasters, but even for some of the larger webcasters, as pointed out above. Specifically:

(1) Most small webcasters affiliated with educational institutions don't have access to server logs that break out audience data,

(2) Even for those who do, there is no satisfactory means to count listeners for the purpose of computing "performances."

(i) With respect to whether a performance is foreign or domestic, in many cases the small webcasters -- and even more sophisticated webcasters -- cannot practicably determine whether even the intermediary ISP is foreign or domestic;

(ii) The formula improperly attributes multiple performances to subscribers of ISPs who, for whatever reason, "lock onto" the web stream on a 24/7 basis, without any reason to assume that any real person is listening at all, thereby falsely inflating audience numbers;

(iii) Accurate measurement is complicated, if not impossible, where the webcaster, as many educationally affiliated webcasters do, uses multiple streams with various formats and multiple servers.

The pure economics of the SoundExchange proposal are just not "reasonable." The bulk of the non-commercial webcasters are paying $ 250 per station per year. If one assumes that a ten percent overhead to distribute the royalties is reasonable and that that ten percent is split half

to processing usage data and the other half to disbursement of royalties to copyright owners and performers, there is only a limited amount of data processing that can be done for $ 12.50 per year per station. The burden is on SoundExchange, which is in possession of the cost information, to show that it can economically process all the information it's insisting it wants from the educationally affiliated webcasters for $ 12.50 per year or less. An uneconomic plan does not meet the statutory test of reasonableness. SoundExchange has a fiduciary duty to the copyright owners and performers not to spend more than a reasonable amount on processing apportionment data. Certainly it exposes itself to liability to its beneficiaries for waste if it spends more.

In the end, imposition of such disproportionate record-keeping and reporting requirements on student stations would frustrate their public interest rôle. Students are trying to learn the latest techniques in digital communications. It is vital to the future of the country that our nation's students know technology. College radio/webcasting provide incentives and the means for American youth to acquire necessary skills in modern communications. To make the regulations impossible or uneconomic[8] for volunteers to comply with is to force hundreds of college webcasters back into the dark age of analog communications. Much of the programming on these stations is itself educational. Moreover, to the extent these student-run stations feature non-standard musical programming, non-mainstream composers would be denied significant, if not vital, public exposure for their music. Imposition of inappropriate record-keeping and

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[8] As IBS has previously pointed out in its comments in Dkt. No. RM 2002-1H, supra, the average campus station operates on an annual budget of $ 9,000, and many operate on annual budgets of as little as $ 500. The economic burden placed on these stations should be limited to a reasonable proportionality of their total operating budgets.

reporting requirements would be contrary to the interests of the smaller beneficiaries of the compulsory licenses, to whom SoundExchange as their agent owes a fiduciary duty.

III. THE BOARD SHOULD ADOPT SOUND AND APPROPRIATE STANDARDS SPECIFIC TO EDUCATIONALLY AFFIIATED WEBCASTERS.

The key players -- the Board, SoundExchange, and the non-commercial webcasters -- have each recognized that burdensome record-keeping and reporting requirements should not be blindly imposed on compulsory licensees by fiat. See Supplemental Notice at 43365 ("these issues do [] not draw upon ... agency expertise") and at 43368 ("Government regulation ... is an undesirable substitute for industry agreement").

SoundExchange itself has recognized that requirements that might be practical for larger entities to meet are not practicable for the smaller non-commercial webcasters to meet. Under the agreement for 2005-06 that was tendered to the Office for publication in August, 2004, the non-commercial webcasters have been paying fifty dollars per station per year to SoundExchange to devise a form of formatting that would be practical for these stations to implement. A joint task force was created to devise such a format. The signatories early-on designated representatives to the joint task force. So far as we have been informed, the task force has never met in person and has not met electronically for a year-and-a-half.

What has happened, SoundExchange's comments in Docket No. 2002-1H tell us, is that

> *SoundExchange* developed *its* proposal for format and delivery specifications with the input of several statutory licensees....

(*Op. cit.* at 3-4 [emphasis supplied]). Although SoundExchange's comments do not identify specifically any of these "several statutory licensees," so far as we aware none is a non-

commercial webcaster, as defined in 17 U.S.C. § 114(f)(5)(E)(i). Although Congress recognized them as a distinct class of compulsory licensees, they have been virtually ignored in the formulation process to date. Instead, SoundExchange's comments seem to say that the licensees not invited to participate in these private negotiations should accept, unexamined, SoundExchange's "development of delivery requirements with input" from -- so far as appears -- a non-representative subset of webcasters as constituting "marketplace acceptance." *Id.* Certainly this sort of behind-the-scenes standards-adoption process is not consistent with the spirit, if not the letter, of the antitrust laws[9] and is not how Congress intended in the 2002 Act for the non-commercial webcasters to be treated.

What is not at all clear is why either SoundExchange or the Board should choose to construct a burdensome new scheme, when a more practical and reasonable scheme has performed satisfactorily in royalty distribution for over three decades by BMI and ASCAP. The royalty rates and numbers generally are quite comparable. ASCAP has been able to distribute royalties with music logs -- even handwritten -- of one week annually from a sampling of small stations. BMI has been able to satisfy its needs with a seventy-two hour music log for each

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[9] While the Board is not charged with enforcing the Sherman Act, 15 U.S.C., ch. 1, it is obliged to conform to the policies of the United States as reflected therein and in the Regulatory Flexibility Act. See NAACP v. FPC, 425 U.S. 662, 669-71 (1976) (Point II[B]). Standard-setting is a very touchy subject under the antitrust laws. See Radiant Burners v. People Gas Light & Coke Co., 364 U.S. 656 (1961); BMI v. CBS, 441 U.S. 1, 24 (1979) (remanding for trial of reasonableness). The Supreme Court warned in Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492, 509-11 (1988), that "an economically interested party [who] exercises decision-making authority in formulating a product standard for a private association that comprises market participants ... enjoys no Noerr immunity...." and may not lawfully "bias the process by ... stacking the private standard-setting body with decision-makers sharing their economic interest in restraining competition." See also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Even government-sponsored advisory committees are subject to tests of representativeness and transparency under Sections 5(b)(2) ("fairly balanced" membership) and 10 of the Federal Advisory Committee Act, 5 U.S.C., App. Public policy does not allow the Board to accede to SoundExchange's plea that it rubber-stamp reporting proposals emanating from its non-representative aggregation of privately interested parties.

station annually. SoundExchange has failed to demonstrate why anything more would be reasonable here as to this class of station.

If the Board were going to adopt notice and requirements binding on the educational webcasters, then their peculiar interests must be considered by the Board itself and by SoundExchange. Perhaps the coőperative task force needs a revitalization by the Board, either by way of an order withholding application of the formatting requirements to the educational webcasters pending conclusion of negotiations or by formal incorporation of the coőperative effort structured in accord with the Federal Advisory Committee Act of 1972, as amended, 5 U.S.C App.2.

Conclusion

For the reasons discussed above, with the distinctive position of the college stations in mind, IBS continues to believe that the record in this series of proceedings warrants no new record-keeping or reporting beyond that currently in practice. This has been the status quo since 1998. To change it without supporting evidence would be arbitrary. The Board is precluded by Congressionally adopted policies from trying to apply inappropriate, "one-size-fits-all" requirements to the campus webcasters, and -- one way or another -- it should insist on the concerned parties' formulation of requirements for the college stations that are consistent with these public policies and with the public interest in educating the next generation of Americans.

Respectfully submitted,

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by _____

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August 26, 2005

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Certificate of Service

I hereby certify that I have caused to be mailed this day a copy of the foregoing to:

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