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Proceedings before the U.S. Copyright Office;
Final Rule with request for comments

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On Behalf Of:
College Broadcasters Inc.

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Copyright Royalty Board

Comments to Procedural Rule Amendments of:
COLLEGE BROADCASTERS, INC.

COLLEGE BROADCASTERS, INC. ("CBI") is pleased to submit these Comments in response to the Copyright Office Final Rule with request for comments regarding the procedural regulations for the Copyright Royalty Board (the "Board"). *71 Fed. Reg. 53325 (Sept. 11, 2006)*. For reasons set forth in these Comments, CBI believes that the rule amendment to 37 C.F.R. § 350.2 should not be accepted, and the former § 350.2 should be reinstated.

The previous Rules promulgated by the Board under 37 C.F.R. § 350.2 states that "[p]arties in proceedings before the Board may represent themselves or be represented by an attorney". 70 Fed. Reg. 30905 (May 31, 2005). The new rule under the same section provides that "[i]ndividual parties in proceedings before the Judges may represent themselves or be represented by an attorney. All other parties must be represented by an attorney". 71 Fed. Reg. 53327. Accordingly, unlike the prior rule, which has been in effect since May 31, 2005, the new rule requires representation by an attorney if the party is a legal entity, like a non-profit corporation, membership organization, business, or otherwise.

The amended section 350.2 should not be adopted for several reasons.

First, the new rule is directly contrary to the stated reasons for Congress's creation of the Copyright Royalty Board. For example, in passing the Copyright Royalty and

Distribution Reform Act of 2004 (the "Act"), which created the CRB, Congress specifically noted that

> "[a]mong some of the complaints [about the CARP System], the [Judiciary] Committee heard that ***many small webcasters could not afford to take part in CARP proceedings***, despite their livelihoods hinging on the outcome....The Copyright Royalty and Distribution Reform Act responds to these concerns."

150 Cong. Rec. S 11, 422-03 (Nov. 17, 2004) (Statement of Sen. Leahy) (emphasis added) (also available at 2004 WL 2608102). By enacting the requirement of an attorney to represent all non-individuals in proceedings before the CRB, the Copyright Royalty Judges will effectively silence the voices of those entities ("many small webcasters") that Congress specifically sought to protect when it passed the enabling legislation. This result is exactly contrary to the intent of the Act.

Furthermore, Congress's goal of reducing the financial burden was not an incidental byproduct of the process that the Act created. Rather, the goal of reducing costs was central to the new legislation. In addition to the above stated goal of protecting small webcasters, Senator Leahy also stressed that the Act will replace arbitrators with administrative judges, thereby "***alleviating the massive financial burden*** of taking part in a CARP proceeding... ". *Id.* (emphasis added). He also noted the addition of discovery to the proceedings, and stressed that the Act would ensure that "the costs of discovery will be ***kept to a minimum***." *Id.* (emphasis added) Additionally, the Register of Copyright, Marybeth Peters, has testified to Congress on numerous occasions about the debilitating costs of participation in the statutory license proceedings for some small entities. For example, the Register has testified that:

- "[inflating the cost of participation] results in some interested parties being unable to participate because of the expense." *See* Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary, United States House of Representatives 107th Congress, 2nd Session (June 13, 2002) (available at http://www.copyright.gov/docs/regstat061302.html).

- "There is no question that in some rate adjustment proceedings, some interested parties conclude that they cannot afford the cost of participating. In the recent webcasting proceeding that I just mentioned, the cost of the arbitrators alone exceeded the entire annual budget of the Copyright Royalty Tribunal in its last year of existence" *See* Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary, United States House of Representatives, 108th Congress, 1st Session (April 1, 2003) (available at http://www.copyright.gov/docs/regstat040103.html)

Thus, by requiring the presence of lawyers for all small, noncommercial entities such as CBI, the Board will only increase the financial burdens because the requirement imposes new costs that were not previously necessary to appear before the Board. Accordingly, the amendment to §350.2 should be rejected and the original § 360.2 should be reinstated.[1]

Second, the new rule should not be adopted because the changes to § 350.2 would unfairly prejudice and effectively exclude small, noncommercial entities such as CBI, whose voice in webcast rate-setting and record-keeping proceedings is important, unique and highly relevant. CBI is an association that represents students involved in radio, television, webcasting and other related media ventures in the pursuit of excellence through active involvement in electronic media. Most Educational Stations, like the ones CBI represents, are funded through student activity fees or through limited budgets from academic departments.[2] Indeed, Intercollegiate Broadcasting System (IBS), another noncommercial educational member organization, has testified to the CRB that the average station in their membership has an annual budget of only $9,000.[3] Rather than paid staffers, Educational Stations for the most part are operated by student volunteers and many offer no credit or pay because many stations are considered clubs and lack resources or formal ties with academic departments. Further, as offered in the testimony of Will Robedee to the CRB, "under-developed organizational structure, churn of volunteer staff, institutional issue and the inability to endure the long process of obtaining the license in a competitive environment, are all factors that work against [these types of] stations".[4]

By way of example, CBI is a 501(c)(3) non-profit organization which, until recently participated in the recordkeeping and current rate setting proceedings (Docket No. 2005-01 CRB DTRA) in a pro se capacity. CBI's membership represents a significant portion of the Educational Stations that are now or are seeking to webcast, yet due to its relative youth (being founded in 1998), it lacks significant financial resources to hire counsel competent in such matters to represent its members. It is significant to note that CBI has never been required to file an IRS tax return because its annual Gross receipts have never exceeded $25,000.

As these facts make clear, CBI, its member stations, and other similarly situated noncommercial entities operate on a very limited budget and do not have the means or

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[1] It should be further noted that the enabling legislation draws no distinction between individuals and legal entities and creating such a distinction here does not make sense. *See* 17 U.S.C. 803(b)(6)(A)(2) (referring to "persons" who may participate and making no distinction between an individual or legal entity). Moreover, when the Act was revisited in 2004 to fix various concerns and technical matters, nothing was changed in this section. *See* P. L. 109-303 (Copyright Royalty Judges Program Technical Corrections Act).

[2] Direct Testimony of Will Robedee, Docket No. 2005-1 CRB DTRA.

[3] Docket No. RM 2002-1H (May 27, 2005)

[4] Direct Testimony of Will Robedee, Docket No. 2005-1 CRB DTRA.

ability to raise the substantial funds necessary to pay[5] an attorney to represent them in the rate setting and record-keeping proceedings now before the Board, and likely to be before the Board in the future. Accordingly, the extremely limited budgets and significant cost constraints are very real issues for these small entities, and requiring attorney representation in these proceedings would effectively preclude their participation in future proceedings.

Moreover, CBI and other, small, noncommercial entities, provide an important perspective and voice in these proceedings. Noncommercial Educational Stations are a unique subset of other noncommercial entities and have been recognized as such in 37 C.F.R. 253. Noncommercial Educational Stations are also unique because their purpose is not to simply provide broadcasts for a specific group of people, but to also enrich the academic lives of those students who run the stations. Without Educational Stations, students would be deprived of the opportunity to learn hands-on about a field they might otherwise not have the opportunity to participate in. No other noncommercial entity thus wishes to protect the interests of both its patrons and those who operate their stations in the same manner as entities such as CBI. As such, the likely outcome of such a rule amendment is the exclusion of nonprofit and noncommercial entities such as CBI from these proceedings.

Finally, as has been noted by Judge Sledge in the current proceedings before the Board, it should be stressed that "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." Castro v. United States, 540 U.S. 375 (2003). In the pending and past proceedings before the CRB, the self-represented entities have provided relevant testimony and discovery, in full compliance with all of the Board's governing rules. None of the self-represented entities in past proceedings have hampered the proceedings before the Board by their inability to retain outside counsel. Thus, forcing a noncommercial/nonprofit entity to hire legal representation would not make the proceedings more efficient nor would it ensure that those entities received proper representation. Participants such as CBI are well versed in the rules and procedures of these proceedings because they have been participating since its onset. Requiring them to now hire legal representation from an attorney who may not have the same level of knowledge or familiarity would be patently unfair. Hence, rather than improving the efficiency of these proceedings, new attorneys, who may need additional time to be brought up to speed on the matter at hand, may be an impairment and hamper its overall efficiency. Given that neither the Copyright Royalty Judges, the Board nor the Librarian

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[5] Due to the ongoing nature of the proceedings, CBI does not wish to offer the specific terms that it currently has arranged with counsel now representing CBI, but suffice it to say that CBI is not paying the going rate for counsel experienced in these matters. There is no guaranty that CBI or other similarly situated entities would be able to come to a set of terms in the future with counsel that it or others could afford. In fact, if CBI were paying the normal rates, it would have exhausted every asset for the counsel it has received to date.

of Congress has articulated any reasons to support the new rule, this change in §350.2 should not be accepted.

For the foregoing reasons, CBI respectfully requests that the Board rescind the changes to § 350.2 that requires representation by an attorney for all non-individuals.

Respectfully submitted,

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