

Before the
COPYRIGHT ROYALTY BOARD
in the Library of Congress
Washington, D.C. 20559

_____))
In re)
NOTICE AND RECORDKEEPING FOR) Docket No. RM 2008-7
USE OF SOUND RECORDINGS UNDER)
STATUTORY LICENSE)
_____)

**SUPPLEMENTAL REPLY COMMENTS
of HARVARD RADIO BROADCASTING COMPANY**

I. Introductory Statement

Harvard Radio Broadcasting Co., Inc., an eleemosynary Massachusetts corporation and licensee of student-operated FM broadcast station WHRB (FM), Cambridge, Massachusetts (“WHRB”), respectfully offers these comments in reply to supplemental responses filed by interested parties in Docket No. RM 2008-7 on May 26, 2009.

The Board, in its NOI, published in 74 Fed. Reg. No. 66, 15901 (April 8, 2009), solicited further information as to the impact of census-based reporting on small webcasters. Based on the supplemental comments from SoundExchange, the services, and technology providers,¹ it is clear that in the case of noncommercial webcasters, the sum of the costs imposed on noncommercial webcasters in preparing census reports and on SoundExchange in processing census reports are unreasonable when compared with the possible benefits.

WHRB’s instant reply comments address the following issues:

¹ Supplemental comments of Tom Worster / Spinitron in Docket RM 2008-7, filed May 26, 2009.

1. SoundExchange agrees with WHRB that an exemption to census reporting is appropriate in response "to the needs of certain well-defined groups."²
2. SoundExchange's objection that an exemption to census reporting cannot be properly "tailored"³ via the regulation process is immaterial given the reasonableness standard under which the Board is required to promulgate final rules.
3. Comments from other services confirm WHRB's estimates for the costs associated with preparing census reports and that these costs are well in excess of the \$ 500 minimum annual royalty.
4. SoundExchange admits that the processing of census data from noncommercial webcasters "likely would not cost less"⁴ than processing sample-based data.
5. In the absence of methodology and information from SoundExchange concerning its costs for processing data, the Board should adopt the well-defined methodology and processing cost information provided by WHRB which shows SoundExchange would eat up \$ 228.27⁵ of the minimum royalty payment of \$ 500 in processing costs alone.
6. Contrary to assertions from SoundExchange, reports of use from noncommercial webcasters "historically have included poor quality data"⁶ not because of incompetence on the part of webcasters but because of the intrinsic obstacles faced by creating reports manually in real-time with human DJs and the extremely diverse playlists used by noncommercial webcasters featuring sound recordings with difficult-to-parse metadata, if any.
7. Having shown that it is unreasonable to require census reports from noncommercial webcasters, WHRB concludes that the CRB has two options:
 - a. Exempt noncommercial webcasters that pay the minimum \$ 500 annual royalty from census reporting and allow sample-based reporting with ATH methodology, or
 - b. Adopt SoundExchange's counter proposal and allow noncommercial webcasters that pay the minimum \$500 annual royalty to pay an additional \$100 annually in lieu of any reporting obligations, dedicated toward the development of a scaled, practical recordkeeping and reporting system.

² Supplemental comments of SoundExchange at 3 in Docket RM 2008-7, filed May 26, 2009.

³ Ibid.

⁴ Supplemental comments of SoundExchange at 7 in Docket RM 2008-7, filed May 26, 2009.

⁵ Supplemental comments of WHRB at 13 in Docket RM 2008-7, filed May 26, 2009.

⁶ Supplemental comments of SoundExchange at 21 in Docket RM 2008-7, filed May 26, 2009.

While either proposal satisfies the need for reasonable reporting regulations, WHRB would support regulations which would allow noncommercial webcasters to simply pay the additional \$ 100 annually in lieu of all reporting obligations.

II. Replies

A. **SoundExchange agrees with WHRB that an exemption to census reporting is appropriate in response "to the needs of certain well-defined groups."**⁷

WHRB has demonstrated in its previous filings in Docket No. RM 2008-7⁸ that the Board must apply a reasonableness standard when determining proper recordkeeping regulations. No parties in the proceeding have offered arguments as to why the reasonableness standard should not guide the Board's decision-making process.

WHRB urged that the Board follow the guidance of Second Circuit Judge, Learned Hand, by adopting a classic "balancing test" which requires a calculus comparing the costs of census recordkeeping with the benefits.⁹ SoundExchange agrees with WHRB that a balancing test should be used to determine reasonableness. From their Supplemental Comments:

As the Judges' questions and the answers thereto in these Comments make clear, the dual goals of accuracy and efficiency of distributions are not entirely aligned... Thus, the approach ultimately taken by the Judges in this proceeding will necessarily need to depend upon a balancing of these goals.¹⁰

Based on direct comments by SoundExchange and negotiated agreements cited by SoundExchange, it is obvious that SoundExchange believes it is reasonable to offer exemptions from census recordkeeping in certain circumstances. For example, according to SoundExchange they have "reached agreements with small commercial webcasters and the National Association

⁷ Supplemental Comments of SoundExchange at 3 in Docket RM 2008-7, filed May 26, 2009.

⁸ WHRB Comments filed January 29, 2009 and WHRB Supplemental Comments filed May 26, 2009.

⁹ WHRB Comments at 7 in Docket RM 2008-7, filed January 29, 2009.

¹⁰ Supplemental Comments of SoundExchange at 2-3, filed May 26, 2009.

of Broadcasters ("NAB") concerning special alternative notice and recordkeeping provisions."¹¹

Furthermore, they state:

Accordingly, while SoundExchange still believes that census reporting on a performance basis should be the default reporting required under the notice and recordkeeping regulations, SoundExchange has recognized that limited transitional exceptions responsive to the needs of certain well-defined groups could appropriately be recognized through negotiation.¹²

While SoundExchange has provided caveats to their statement concerning both the types of entities which can qualify for an exemption to census reporting¹³ and the means by which the entities can use to apply for the exemptions,¹⁴ the Board must conclude that SoundExchange believes exemptions to census reporting are entirely reasonable.

B. SoundExchange's objection that an exemption to census reporting cannot be properly "tailored" via the regulation process is immaterial given the reasonableness standard under which the Board is required to promulgate final rules.

WHRB agrees with SoundExchange's contention that an exemption to census reporting must be for a well-defined class of webcasters. We have defined this class as noncommercial webcasters¹⁵ which pay the minimum annual royalty of \$ 500.¹⁶

SoundExchange's other main objection to sample-based reporting for noncommercial webcasters is that non-census reporting should only be allowed via negotiations and not in regulations.

¹¹ Supplemental Comments of SoundExchange at 2, filed May 26, 2009.

¹² Supplemental Comments of SoundExchange at 3, filed May 26, 2009.

¹³ According to SoundExchange, the class of webcasters must be "well-defined."

¹⁴ According to SoundExchange, the exemption should only be granted via negotiation and not regulations.

¹⁵ The term "noncommercial webcaster" is used as defined in 17 U.S.C. § 114(f)(5)(E)(i).

¹⁶ Supplemental Comments of WHRB at 7, filed May 26, 2009.

First, this argument is completely immaterial to the decision the Board must make as to whether a well-crafted exemption to census reporting is reasonable. Whether sample-based reporting is allowed via negotiated agreements or regulations does not affect the substance of its reasonableness—the only factor by which the Board should promulgate recordkeeping regulations.

Next, if SoundExchange has decided *a priori* that exemptions to census reporting should not be allowed via regulations, what is the entire purpose of the Board's NOI? Since even SoundExchange recognizes the reasonableness of granting an exemption to census reporting for noncommercial webcasters, they are attempting to introduce a line of reasoning to render the Board's factual-based decision moot. If the Board were to accept SoundExchange's argument, then we must also conclude the entire NOI and rounds of Supplemental Comments were a waste of time.

SoundExchange's only argument for why regulations are not suitable to reporting exemptions is that regulations are "less tailorable than agreements."¹⁷ While WHRB has actively noted that regulations are not the best means to set technical standards, SoundExchange has not demonstrated why in this specific case a narrow exemption from census based reporting for noncommercial webcasters is somehow not tailorable via regulations. WHRB has already provided a very straightforward method to identify qualifying stations for an exemption: noncommercial webcasters which pay the minimum \$ 500 annual royalty fee. Both the concept of 'noncommercial webcasters' and a 'minimum annual royalty' appear in the preexisting regulations. It should be easy for the Board to identify this "well-defined" subclass of stations via regulations.

¹⁷ Supplemental Comments of SoundExchange at 3, filed May 26, 2009.

Maybe SoundExchange believes that it will be difficult to precisely "tailor" the type of reporting exemption which should be granted to this subclass of stations? If the Board feels these stations should use a sample-based reporting methodology, then all the Board need do is extend the current interim reporting regulations to the final regulations for noncommercial webcasters. Since the Board was able to properly define these sample-based reporting regulations in the interim regulations, they should surely have the same ability in the current Docket.

Alternatively, if the Board decides to adopt SoundExchange's proposal that small noncommercial webcasters be given a waiver of all reporting requirements in exchange for paying an additional \$ 100 annual "proxy" fee,¹⁸ WHRB sees no additional difficulty in sufficiently defining this in the regulations.

C. Comments from other services confirm WHRB's estimates for the costs associated with preparing census reports and that these costs are well in excess of the \$ 500 minimum annual royalty.

As WHRB has argued, the Board must look to balance the cost of census recordkeeping with the benefits. WHRB estimated that it would cost the station a total of \$ 13,024.60 in additional labor and supplies to comply with census reporting instead of sample-based reporting.¹⁹ This amount is 2604 % more than the \$ 500 annual royalty payment owed by WHRB.

Comments from other noncommercial webcasters confirm the gross imbalance of costs, and benefits calculated by WHRB. Based on a survey of its members, Collegiate Broadcasters Inc. concludes that costs to comply with census reporting range "from \$ 1,500 to more than \$

¹⁸ Supplemental Comments of SoundExchange at 20, filed May 26, 2009.

¹⁹ Supplemental Comments of WHRB at 20, filed May 26, 2009.

50,000 annually."²⁰ WSOU estimates that its annual cost for complying with census recordkeeping to be "tens of thousands of dollars."²¹ WTBU reports that the total cost of complying with census reporting could be "as high as \$100,000."²² Comments from the American Council on Education reference the case of webcaster WESS which "would be required to spend at least \$30,000—150 percent of its budget—in staffing, software, and other equipment to provide year-round census reporting."²³ Based on comments filed in this Docket, the Board must conclude that the costs to the noncommercial webcasters in complying with census reporting will well-exceed the \$ 500 annual minimum payment.

D. SoundExchange admits that the processing of census data from noncommercial webcasters "likely would not cost less" than processing sample-based data.

As WHRB has pointed out in its previous comments, the Board must also consider the additional processing costs faced by SoundExchange when deciding whether it is reasonable to exempt noncommercial webcasters from census reporting.²⁴ This cost must be calculated because any additional costs faced by SoundExchange will come directly out of royalties owed to copyright owners and artists. SoundExchange admits that this is a cost to include in the balancing calculus and that it is indeed more expensive to process census reports than sample reports by stating:

Because SoundExchange distributes royalties "based upon the information provided under the reports of use requirements," 37 C.F.R. §§ 380.4(g)(1), 382.3(c)(1), 382.13(f)(1), SoundExchange's processing of more data likely would not cost less

²⁰ Supplemental Comments of Collegiate Broadcasters Inc. at 7, filed May 26, 2009.

²¹ Supplemental Comments of WSOU at 2, filed May 26, 2009.

²² Supplemental Comments of WTBU at 2, filed May 26, 2009.

²³ Supplemental Comments of American Council on Education at 3, filed May 26, 2009.

²⁴ Supplemental Comments of WHRB at 11, filed May 26, 2009.

(assuming a comparable data quality, distribution methodology, and other circumstances).²⁵

- E. In the absence of methodology and information from SoundExchange concerning its costs for processing data, the Board should adopt the well-defined methodology and processing cost information provided by WHRB which shows SoundExchange will eat up \$ 228.27²⁶ of the minimum royalty payment of \$ 500 in processing costs alone.**

It is Supplemental Comments, WHRB proposed a methodology which SoundExchange could use to calculate data processing costs and provided an estimate based on data from MediaUnbound as to the amount of these costs. WHRB concluded that SoundExchange would spend an additional \$ 228.27 annually per noncommercial webcaster to process census reports instead of sample reports.

SoundExchange admits that processing census data will cost more than processing sample data, but that

SoundExchange has not at this point found a satisfactory way to quantify the relative costs of processing census versus sample-based reports, SoundExchange believes that its incremental costs of processing otherwise comparable census versus sample reports are only modestly higher.

²⁵ Supplemental Comments of SoundExchange at 7, filed May 26, 2009.

²⁶ Supplemental comments of WHRB at 13 in Docket RM 2008-7, filed May 26, 2009.

³⁴ Supplemental Comments of SoundExchange at 8, filed May 26, 2009.

Without a method to quantify its costs, SoundExchange has no basis to conclude that the costs for census reporting versus sample are "modestly higher."

Since SoundExchange did not provide a methodology to calculate data processing costs, WHRB urges the Board to rely on its methodology. WHRB provided clear and reproducible instructions on how it made its estimates. While WHRB utilized cost estimates based on work from MediaUnbound, SoundExchange is free to update these estimates with its own numbers. If SoundExchange fails to provide updated costs, the Board should adopt WHRB's findings that processing costs will be \$ 228.27 annually.

We should welcome receiving additional data from SoundExchange on its per record processing costs in order to update these calculations for their operations. If SoundExchange can provide its "processing cost per record" (where a record is the listing of a single sound recording performed by a webcaster), then we can very accurately project the additional amount of royalty dollars that would go to data processing instead of royalty distribution under a census-based reporting regime.

F. Contra to assertions from SoundExchange, reports of use from noncommercial webcasters "historically have included poor quality data" not because of incompetence on the part of webcasters but because of the intrinsic issues faced by creating reports manually in real-time with human DJs and the extremely diverse playlists used by noncommercial webcasters featuring sound recordings with difficult to parse metadata, if any.

In multiple places throughout its Supplemental Comments, SoundExchange has asserted that noncommercial webcasters who submit sample-based reports include lower quality data. For example,

SoundExchange's experience suggests that licensees that implement processes for census reporting are generally more diligent about the quality of the data they report than licensees who report on a more ad hoc basis.³⁴

WHRB wishes to forcefully rebuke any implication that noncommercial webcasters purposely submit inaccurate or incomplete reports of use. Instead, the following reasons create structural problems in creating reports of use for webcasters which utilize human DJs for real-time programming with physical media:

- **Humans are not robots!** Stations which use automated playlist technology do not need to rely on humans for real-time data entry. Computers are close to infallible in moving digital data from a database to an output file. Humans, on the other hand, are quite fallible in tasks such as manual data entry—especially when under the time pressure of programming a musical show in real-time. Regardless of their best efforts, noncommercial webcasters which use human DJs will inevitably submit reports of use with textual errors.
- **Noncommercial webcasters play more diverse sound recordings.** Noncommercial webcasters such as WHRB broadcast a much larger selection of sound recordings than larger, commercial webcasters. Because many of these sound recordings are self-produced by artists more interested in the artistic aspects of a vinyl record or CD packaging and not the usual commercial tenets of easy readability, proper metadata is often lacking. Without easy to discern data on physical sound recordings, noncommercial webcasters will not be able to submit accurate reports of use.

III. Conclusions

Based on the Supplemental Comments filed in this Docket, the Board should conclude that adopting census reporting for noncommercial webcasters is unreasonable. Given this conclusion, the Board currently has two possible alternative to promulgate in final regulations:

- c. Exempt noncommercial webcasters that pay the minimum \$ 500 annual royalty from census reporting and allow sample-based reporting with ATH methodology, or
- d. Adopt SoundExchange's counter proposal and allow noncommercial webcasters that pay the minimum \$500 annual royalty to pay an additional \$100 annually in lieu of any reporting obligations, dedicated toward development of a scaled practical recordkeeping and reporting system.

While either proposal satisfies the Board's mandate to promulgate reasonable standards, WHRB currently supports SoundExchange's counter proposal. We believe the additional \$ 100

fee could help the webcasting industry as a whole develop more sophisticated and accurate royalty distribution without threatening the distinctive characteristics of noncommercial webcasters. But there must be a public accounting for the expenditure of these funds. They must not be allowed to become a slush fund for other purposes. In the meantime, a waiver of all reporting obligations will allow stations like WHRB to continue fulfilling their non-profit missions while webcasting.

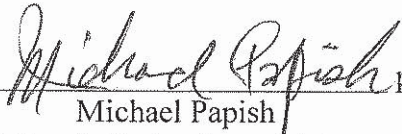
IV. Prayer

In response to the Board's request for participants to provide cost and savings information to determine whether it is reasonable to exempt certain webcasters from both census and ATP reporting, commenters have shown that an individual station will face additional costs of \$ 13,024.60 to comply with census reporting. Furthermore, we find that of the \$ 500 annual royalty payment made by WHRB, SoundExchange would spend an additional \$ 228.27 processing census data instead of sample-based reporting. This is simply not cost-effective, and it would simply be impracticable for many small educational webcasters. More importantly such a requirement would adversely affect the quality of WHRB's programming and its staff-educational mission. The problem of recordings with incomplete or unreconstructable metadata is particularly acute for the age and genre of music recordings aired by many small educational, non-commercial webcasters.

Accordingly, WHRB urges the Board to adopt our proposal granting an exemption appropriately tailored to noncommercial webcasters which qualify for the minimum royalty payment from year-round census reporting and to allow continued use of ATH methodology for those quarterly reports of use, if any, that may be required.

Respectfully submitted,

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June 8, 2009

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³⁶ Required to be served under P.L. 89-332, 5 U.S.C. § 500(f).