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June 10, 2009

Copyright Royalty Board
Library of Congress
Washington, D.C. 20559

Re: RM 2008-7

Honorable Sirs:

Submitted herewith are corrected supplemental reply comments of Intercollegiate Broadcasting System, Inc. Therein the minor corrections are set in italic type. You are requested to substitute the corrected version for the uncorrected version filed June 8th.

Respectfully yours,

William Malone

Attorney for
Intercollegiate Broadcasting System

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

In re	)	
	)	RM 2008-7
NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	)	

CORRECTED SUPPLEMENTAL REPLY COMMENTS of INTERCOLLEGIATE BROADCASTING SYSTEM

These supplemental reply comments in response to the NOI are filed on behalf of the over one thousand members of the Intercollegiate Broadcasting Systems, Inc. (IBS), the nation's first and largest association of academically affiliated broadcasters and webcasters. IBS Member Webcasters are mostly State and local taxpayer supported governments operating high schools, community colleges, colleges, and universities. All IBS Members have as their principal purpose the education of America's Sons and Daughters.

There is a surprising lack of factual conflict among the first round of comments in response to the NOI that –

- the small, non-profit, educationally affiliated webcasters as a classification find themselves in diverse sets of circumstances as to financial resources, volunteer staffing resources, programming, and technical ability and resources.
- if the recordkeeping and reporting requirements are not tailored (or "scaled") to their circumstances many small webcasters will not be able to comply and some will simply stop programming music instead. Discontinuance of music programming is in the interests of neither the labels nor the artists.

- impractical recordkeeping and reporting requirements will increase, rather than decrease, *non*-compliance.
- improperly tailored recordkeeping and reporting requirements would represent an intrusion on pedagogical and programming objectives of their operations, which are largely antithetical to automation.
- a very sizable proportion of the recordings played by these stations is not accompanied by the identifying data required to fill out the cells that SoundExchange seeks to have populated, and yet SoundExchange declines to provide access to a comprehensive database to provide the data voluntarily omitted by the labels. SX Comments at 26 n.22. Such deliberate omission of the required data by the label should be taken as a waiver of any claim to royalties under the Act.
- volunteer labor is a relatively inelastic input into their operations, so that compliance with inappropriately sized recordkeeping and reporting requirements would at best divert limited volunteer labor sources from the central educational mission of these stations and/or would hobble effectuation of their educational purposes.

I. SoundExchange's Argument for Census Reporting is Not Internally Consistent, and Census Reporting Will not Materially Improve the Allocation to Artists.

SoundExchange argues that sampling rather than complete census-reporting by those small webcasters programming eclectic music will result in under-allocation to these artists. See SX Comments under point II.

A. Later, however, SX admits that a substantial percentage of the royalties it has collected cannot be paid out because of its inability to identify and remit to the artists. *See* SX Comments at point IV(A), especially at 29-30. Anyone engaged in programming chamber music from off-brand or unbranded CDs from Eastern Europe is well-acquainted with the archetype of a group of players' informally getting together to make a one-time recording. Realistically, the likelihood of SoundExchange ever being able to pay over royalties to whoever is entitled to them is pretty slim.

Thus, it is apparent that a prominent cause of non-payment is not incomplete reporting by the webcasters, as SoundExchange contends, but rather the artists' failure to provide adequate identification and payment information. SoundExchange's well-publicized efforts to reach out to

small artists to ameliorate this situation have been met with indifference. *Id.* at 29-30. Further, that percentage would likely increase, rather than decrease, as a result of census reporting by small webcasters, which will sweep more such small artists into the process. Thus, there is no assurance that census reporting by small, non-commercial webcasters would make payments to the small artist beneficiaries of the Act more accurate or comprehensive, and the small artists are not interested, so far as the record shows, in allocation – and some may be, from SoundExchange's comments, even to payments. To the extent that SoundExchange's inability to pay out royalties to these artists results from their failure to accompany their discs with the prescribed data, the percentages of royalties paid out can only be further depressed by inclusion of additional infrequently played discs, of which lack of accompanying data seems to be characteristic.

B. As a practical matter census recordkeeping and reporting by small webcasters would make no perceptible increase in the amount of SoundExchange's remittances to small artists. As it is, from year-to-year on the order of sixty percent of the royalties that might be allocable to artists are pro-rated to overhead anyway. (*Id.* at 27-28) Significantly, SoundExchange already assigns minimum fees collected by proration, *id.* at 26, and SoundExchange says that its processes would not change as a result of census recordkeeping. (*Id.* at 27). After all, as SoundExchange admits under heading III(A), "statutory royalty payments are overwhelming made by a minority of usage-intensive services, while a large number of webcasters pay relatively little in royalties", and those are allocated by proration anyway.

SoundExchange candidly admits at the outset of its Comments, *op. cit.* at 2, that a balancing of conflicting goals is needed. The foregoing considerations strongly point toward not imposing census recordkeeping and reporting on the small webcasters, who are peculiarly affected, at relatively higher costs, *ibid.*, to no benefit to anyone.

II. "Small Entities" for Recordkeeping and Reporting Purposes Should be Defined as those Webcasters Paying Non-Usage-Sensitive Royalties.

"Small entities" for recordkeeping and reporting purposes should be defined with an eye to the purposes and practical effects of SoundExchange's collection of royalties. If the royalties

paid by them are so small as to be allocated to overhead by SoundExchange and not worthy or capable of being allocated by performance usage data, *i.e.*, flat-annual-rate, then imposing such requirements on the small entities is unnecessarily burdensome and without point.

The present situation is not likely to change in the remaining months of the present licensing term and the next. It would be difficult if not impossible to project further in a sector that is undergoing as rapid change as webcasting. The Board's actions should not be governed by speculation about eventual possibilities rather than by present facts.

Consequently, IBS proposes that the rules provide no recordkeeping and reporting requirements on those noncommercial webcasters (within the statutory definition of Section 114(f)(5)(E)(i), which operate largely with student and volunteer staffs (five or less fulltime-equivalent-employees).

III. The Board Should Reject SoundExchange's Proposal to Impose Requirements on Small Webcasters by Contract Instead of Regulations.

SoundExchange's comments admit that some exemption for small webcasters is necessary and fair. It urges that these exemptions be established by contract rather incorporated in regulations promulgated by a neutral government arbiter after due process. So far, in the history of the Digital Millennium Act, these contracts have not reflected bargains arrived between equal parties in the free market. Rather they have been contracts of adhesion offered by a statutory monopoly. The Constitution does not allow a governmental agency to delegate its governmental powers to a private entity.[1] SoundExchange is hardly an impartial balancer of the public interest. The Board has an inescapable duty to set the rules and determine their applicability based on a balancing of the record before it. Here the record does not support the imposition of a blanket, one-size-fits-all requirement.

If, after the Board has acted, SoundExchange wishes to waive the rules for whatever reason, then that is permissible under the conditions elaborated in the act.

[1] The key cases through the end of the last century are analyzed in 1 Tribe: American Constitutional Law 991-93 (Foundation Press, 3d edition, 2000).

IV. The Board Should Apply a Balancing Test

Inasmuch as the statute requires – and SoundExchange admits in its comments that it requires – a balancing (or "scaling") of recordkeeping and reporting requirements, the Board should factor into its balancing test all the relevant facts.

The first round of comments, especially from SoundExchange, indicate that:

- SoundExchange collects the vast majority of its revenue (75 % - 90 %) from a very *small* number of copyright users, less than 50. All of these entities can and probably do provide SoundExchange with all the legally defensible use data necessary to disburse the royalty revenues received to copyright holders. There is no need to require any usage report – much less 56-day, or 365-day census reports – from small not-for-profit educational and governmental webcasters.

- SoundExchange states that it costs more to process the limited (56-day) reports of use from noncommercial webcasters than the $ 500 minimum fee. What is worse, the $ 500 minimum fee is five- to twenty-times the actual, correct royalty rate, for noncommercial webcasters if they were charged at the CRB-prescribed per unit rate, computed on actual use under the statutory license SoundExchange administers.

- When costs exceed revenues, there is no legitimate benefit to artists, or copyright holders of receiving and processing any data, much less more data.

- SoundExchange is not processing some, or all, of the reports of use it is receiving from noncommercial webcasters, yet it is requesting 365-day reports of uses v. 56-day reports, quite possibly to gather dust, anyway.

- SoundExchange is not disbursing substantial amounts of royalties received going back to January 1, 2006.

- Substantial, if not a majority, of educational not for profit webcasting involves non-statutory musical license programming.[2] Education webcasters stream sports, talk, and direct licensed music from the creative commons to a very large extent. Some educational webcasters stream only this type of programming. If reporting of use of the SoundExchange-administered

[2] Their use of licensable music is – to employ SoundExchange's terminology (SX Comments at 3n.1) – "non-intensive," a fact which SoundExchange admits at 19.

license were limited to only the use of that license, reporting would be substantially less than census, and in some cases, be no reporting at all.

Conclusion

WHEREFORE, IBS urges the Board to not impose technologically or financially impractical conditions in recordkeeping and recording that would force changes in, or curtailment or abandonment of, the nature and purposes of the small, non-commercial, academically affiliated webcasters' programming and operations. IBS urges the Board never to require any reporting of use of non-SoundExchange-administered copyrights or of recordings unaccompanied by the data required in recordkeeping and reporting.

The Board should implement the Congress' policy for protection of small entities, giving all due weight to avoidance of disproportionate impact on the small, educational affiliated webcasters and to avoid economic inefficiencies.

Respectfully submitted,

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June 8, 2009

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