

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
in the Library of Congress
Washington, D.C. 20540

In re

Determination of Royalty Rates and
Terms for Ephemeral Recording and
Webcasting Digital Performance of
Sound Recordings

Docket No. 14-CRB-0001-WR
(2016-2020)
(Web IV)

COMMENTS of
INTERCOLLEGIATE BROADCASTING SYSTEM
OPPOSING SX-NPR's PROPOSED SETTLEMENT

These comments are filed by the Intercollegiate Broadcasting System, Inc. (IBS), a Rhode Island non-profit corporation and a party to this proceeding, in response to the Board's notice in 80 Fed. Reg., No. 58, 15958 (March 26, 2015), inviting comments on the rules in *partial* settlement proposed by SX, NPR, and CPB.

I. Action on SX-CPB-NPR's Petition is Premature as a Matter of Law.

IBS opposes as premature any such attempt to prejudice the other non-commercial webcasters remaining in the Web IV proceeding by setting rates for some but not all of the non-commercial class. In Section 114(f)(5)(E) Congress recognized that this class include all such tax-exempt webcasters as all those

operated United States ... for exclusively public purposes” This language was drawn from Section 501 of the Internal Revenue Code defining tax-exempt entities. Congress, rather than issuing a federal charter to CPB, provided in the act establishing the Corporation, 47 U.S.C. § 396, that it should be incorporated under the D.C. Nonprofit Corporation Act, D.C. Code, § 29-501 et seq. Thus, it would appear that CPB’s non-profit status is dependent on Section 501 of the Internal Revenue Code, as Section 6.02 of its articles of incorporation specifically contemplates. It consequently is a “noncommercial webcaster” just as many other webcasters within the statutory definition in Section 114(f)(5)(E). The petition fails to disclose any reason why CPB and NPR should be treated differently from other educationally affiliated webcasters in its class.

The recent report of the Register, “Copyright and the Music Marketplace,” points out at 182 that “By separating out *all* noncommercial uses for consideration under a single framework, the royalty rates for public broadcasters would likely be much more efficiently resolved.” (emphasis supplied). In support of this conclusion, the Report continues:

Experience with the section 112 and 114 ratesetting process for noncommercial entities has shown, for example, that the willing buyer/willing seller standard can adequately account for the limited resources of, and other factors peculiar to, noncommercial users. *See* NRBNMLC First Notice Comments at 11-13 (noting that the CARP and CRB have consistently set lower rates for noncommercial broadcasters).

Id. at 182n.913.

The foregoing position reinforces the Office’s more general belief “that an important element of a robust and fair music marketplace is to treat equivalent uses of sound recordings ... alike, or as can practically be achieved.” Id. at 125.

As the Register observes in her report at 172 n.868:

The CRB ... is free to reject benchmarks that it perceives to be unreasonable or otherwise without merit. *Music Choice v. Copyright Royalty Board*, No. 13-1174..., (D.C. Cir., [slip op. at 15 (decided) Dec. 19, 2014) (“The [CRJs] were within their broad discretion to discount [Sound Exchange’s proposed] benchmarks and look elsewhere for guidance,” as the CRJs’ “mandate to issue determinations ... does not hamstring the Judges when neither party proposes reasonable *or comparable* benchmarks.”) (emphasis supplied).

II. Action on SX-CPB-NPR’s Petition is Premature as a Matter of Fact.

The 530 CPB radio stations that stream their FCC-licensed audio or the Internet digitally under the proposed license are essentially similar to the educationally affiliated, so-called “campus radio stations” on high school, college, and academy campuses. “Public radio” may get that name due to the significant amount of financial support that comes to many of these radio stations from Federal and/or state taxpayer sources. Those that are licensed by the FCC are frequently licensed to a State college or other governmental institution and often are located on State college campuses. These stations often receive free, or at nominal cost, use of governmental buildings, utilities, and even student time. IBS

members most often fit the exact same legal and operating profile (except that IBS members, other than those that are NPR affiliates and CPB-qualified stations, do not have the required five or more full-time employees. IBS member stations most often are student-run, sometimes with a faculty advisor.) *See* IBS' WDT.

Thus, there are few or no legal, FCC licensing, ownership, and locational differences between IBS members and NPR-CPB-qualified public radio stations and webcasters.

III. The Royalty Rates Among Noncommercial Licensees Should be Proportional to Their Respective Uses.

Given the legal and factual similarities among the noncommercial licensees, differences in royalty rates should be a function of usage, *i.e.*, everyone pays the same amount of SoundExchange per each performance covered under their digital music licenses.

That is not the case at the moment for digital music. Under the published SX-CBI proposal, qualifying licensees would pay \$ 600 for up to 159,140 ATH per individual *channel or station* annually. The total aggregate annual license fee for the 530 public radio stations for all website digital music performances by *entities* covered by the SX-NPR agreement would be based on 285,132,065 ATH and priced at \$ 560,000 ($\$ 2,800,000 \div 5$).

Thus, the NPR rate proposed is \$ 1,056.00 per entity (station) for an average of 44,832 ATH per month for 530 entities. Each of the 530 NPR entities may have as many website “channels” as desired. If, for instance, on the average each NPR-CPB funded radio entity had four website channels, then the royalty rate per channel per year would be approximately \$ 260.00 per channel for use of on average 44,832 ATH per month. The “on average” phrasing reflects the provision of the proposed agreement allowing each entity to use 285,132,065 ATH in any year.

In contrast, according to the records in Web II and Web III, IBS members use less than four percent of the ATH allowed them under the minimum annual fee of \$ 500 per channel for use of up to 159,140 per month under Web II and Web III and the proposed SX-CBI agreement. That is, IBS members use an average of 6,366 per month. Thus, a proportionate per entity annual fee for IBS members based on use of ATH per entity per month, using the NPR rate *per entity*, would be \$ 147.92. But on a per-channel basis (assuming an average of four channels per NPR station, the IBS Member annual fee *per channel*, the term used in the instant SoundExchange proposal would be \$ 36.98.

Taking into account, however, that the proposed annual fee of \$ 560,-000 covers “certain internet transmissions by ... American Public Media, Public Radio International, Public Radio Exchange, and certain public radio stations” as well as

NPR, the allocated average rate of \$ 36.98 above to IBS member stations would be reduced to \$ 18.49 per channel.

Another way to computing an IBS-member proportional rate based on the proposed SX-NPR-CPB ATH is shown in the Appendix to these comments. Simpler yet, four percent of the SX-CBI minimum annual rate of \$ 500 is \$ 20 per year.

Thus, the proposed SX-NPR-CPB and SX-CBI annual rates in no way meet the comparability test for noncommercial royalty rates.

This failure may be attributed to the scanty data presented by the proponents of the SX-CBI and SX-NPR-CPB proposals. Based on the “number” of streams or channels that use the statutory digital music performance license, according to the prior Web II and Web III records, huge numbers of noncommercial streams are not parties in Web IV or to the instant SX-NPR-CPB agreement. Therefore, it would be difficult for the CRJs to construct a marketplace rate for those parties that are not parties within the proposed *partial* settlement. It is even more difficult for the Judges to determine if proposed noncommercial settlements reflect a willing buyer—willing seller rate, or if the proposed settlements reflect the legal and political resources available to the supposed “willing” buyer, the noncommercial webcaster, as mentioned in the Register’s Report at 182n.913, quoted above.

For instance, in 2009 and again in 2010 according to the records, Live365 and SoundExchange agreed upon, a flat fee of \$ 50,000 paid by Live365 to SoundExchange to cover all uses of the statutory performance license for a reported 5,000 – 8000 streams in 2009 and 2010. The annual willing seller—willing buyer noncommercial rate therefore would be less than \$ 7.00 per channel/stream in 2010. Live365 is not listed as a party in this proceeding. The marketplace rate for over 8,000 noncommercial webcasting channels/streams is an important component of establishing an orderly economic market.

It is apparent that the comparability issue in these proceedings is that legal resources, or lack thereof, limit huge numbers of users of the statutory licenses from informing the CRJs of their part of the marketplace. This is precisely the result adverted to in the Register’s report at 172 &n.868, quoted above.

Comparability and like treatment among noncommercial webcasters are at war with the SX-CPB-NPR petition to set the rates for the CPB-qualified stations in advance, without reference to the rates for other members of the noncommercial webcasting category. In short, such separate treatment in this proceeding would be premature.

IV. The Non-rate Conditions Do Not Advance the Purposes of the Copyright Clause.

The SX-NPR-CPB proposal is not ready for complete disposition as it were on summary judgment. The Board has admitted that the reporting provisions are in a state of flux. Notice and Recordkeeping for Use of Sound Recordings under Statutory License, Docket No. RM 2008-7, 74 Fed. Reg. No. 196, 42,418-19 (Oct. 13, 2009). Thus, the burden on small licensees would remain uncertain, and they would be faced with the delay and expense of negotiating such terms with an often uncooperative licensor.

Moreover, recent experience with the DMCA shows that, as administered and as embodied in the SX-NPR-CPB proposal, it interferes with student learning in the STEM programs and the like at domestic educational institutions. It does not advance the purposes of United States Constitution, Article I, Section 8, “The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

It is vital to the purposes of the copyright provisions of the Constitution that students of all ages have digital communication skill sets. Knowledge of the modern Internet and audio-video worlds is the future of the United States. It remains unclear that the proposal is consistent with the purposes of Section 8, where educationally affiliated webcasting provides an essential take-away for students.

The Register's Report reflects SoundExchange's recognition that these conditions on webcaster's playback of recorded music are not considered essential. Op.cit., III(B)(3)(b) at 116 ("record labels regularly grant broadcasters waivers of the restriction"). The Board should not allow their burdening effect on educationally affiliated webcasters to continue.

For SoundExchange to divert \$ 8,000,000 from the artists to pay Jenner & Block, as SoundExchange's Form 990 showed for 2012 – a non-rate-case year – does not advance the Constitutional purpose.

Conclusion

For the foregoing reasons, the CRJs should reject the instant proposal as premature and should reject both the rates proposed by SX as not meeting the comparable or proportionality test.

Respectfully submitted,

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Attachment

APPENDIX

Alternative Showing of Non-proportionality of Proposed Rate

Another way of computing an IBS Member proportional rate based on proposed SoundExchange NPR and CPB qualified rate per ATH with IBS proportional usage rate.

The goal of these computations is to show the CRJs/CRB how an orderly noncommercial performance rate market based on an economic model where every NPR and CPB qualified station, and every IBS Member station pays exactly the same to use one ATH of digital music performances. The per ATH rate for all is the established SX-NPR/CPB "settlement" rate for use of an ATH of digital performances, that is then applied to the average ATH usage of an IBS Member.

It is important to remember that the statute is designed for licensee (willing buyer)(IBS or NPR and CPB qualified publically owned and operated broadcast station that has one or more webcast stream per entity.

Use of statute digital performances, to be useful to the copyright holder (willing seller) the performance should be allocated per channel/stream/server.

One of the many reasons that this proposed settlement is premature and the CRJs should not accept the settlement, but instead hear all the evidence, such as the number of NPR/CPB actual streams/channels using digital performances. The proposed SoundExchange noncommercial minimum is \$500 per channel, and, or \$500 annually for a channel or station that does not exceed 159,140 ATH per month. IBS Members, on average, according to the record, use 6,366 ATH per month (4% of 159,140 ATH per month, or at the proposed proportional rate of 4% of \$500 or \$20 per year to use an average of 6,366 ATH per month.

Note:

1. Most NPR and CPB qualified stations have more than one channel/stream per entity.
2. Some, maybe half, of the use of performance digital music performances must be allocated to the four major included networks: NPR, American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX)

Base assumptions, and omissions:

The below numbers attempt to show what an IBS Member per entity, per station, would pay annually based on the NPR/CPB "settlement" rate market place (willing seller/SoundExchange and willing buyer/NPR/CPB/IBS)

The noncommercial market place numbers using SX-NPR/CPB settlement:

1. For \$560,000 annual total royalty rate from CPB to SX there is an allowed usage of 285,132,065 ATH (performances) spread out over up to 530 stations and four broadcast/webcast networks: NPR, American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX).
2. Not including network use of the statutory performance license that computes to an annual average usage for each of the 530 stations of 537,985 ATH per station (entity).
3. Not including network use of the statutory performance license that computes to monthly average usage for each of the 530 stations of 44,832 ATH per station (entity).
4. The record shows that the average IBS Member station/entity uses 6,366 ATH per month. That is 4% of the ATH allowable under the \$500 rate for 159,140 ATH per month. That is also 14% of the average allowed ATH usage for each of the 530 NPR/CPB stations of 44,832 ATH per month. This assumes no payment to the copyright holders (willing seller) by NPR/CPB (willing buyer) for use of the statutory license by the four broadcast/webcast networks: NPR, American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX)
5. The "settlement" rate for NPR/CPB is a total of \$560,000 annually for use of the digital music performances by 530 NPR and CPB qualified stations

and the four networks: National Public Radio (NPR), American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX)

6. On a per station basis that comes to \$1,056.60 annual royalty fee per station ignoring usage by the four networks: National Public Radio (NPR), American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX). For an average ATH usage of 44,832 per month for each of the 530 stations, no matter how many channels, streams, servers, etc.
7. Creating a proportional orderly economic model for a noncommercial market place for IBS, NPR, and CPB qualified stations using the 530 station average monthly usage of 44,832 ATH compared to the average month ATH usage of an IBS Member of 6,366. The NPR/CPB annual royalty is \$1,056.60 per station. IBS has 14% of the per station usage of an NPR/CPB station, therefore the annual rate for an IBS Member would be 14% of 1,056.60, or \$150.00 annually per IBS Member royalty rate. The \$150 annual royalty rate is per entity, not per channel or per stream. The \$150 annual IBS Member royalty rate assumes no payment or ATH digital music performance usage by any of the four large networks covered under the settlement: National Public Radio (NPR), American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX).
8. If for instance we assume a 50% statute performance usage by the four networks, then the annual IBS Member “settlement” rate would be \$75 per year.
9. If we assumed four channels each per NPR/Station, on average, for each of the 530 stations (see #8) and then we proportionately apply the 14% IBS usage rate the resultant orderly, proportionate per channel IBS Member annual IBS Member rate would be \$18.75 per channel per year (\$75 divided by 4).
10. In an orderly economic proportional rate for use of the performance license IBS Members should pay SoundExchange \$18.75 to \$20.00 annually, depending if you use the SX proposed noncommercial rate of \$500 for 159,140 ATH per month, per channel, or the “settlement” rate of NPR/CPB – SX using IBS Member ATH usage versus NPR/CPB plus Network usage assuming four channels per NPR/CPB station.

Both organizations, Corporation for Public Broadcasting (CPB) and Intercollegiate Broadcasting System, Inc., would make a single annual payment to SoundExchange to cover their members approximate annual/monthly usage of ATH (willing seller – willing buyer). That rate would be \$560,000 annually for a usage of 44,832 ATH per month for usage by 530 station and the large four networks, National Public Radio (NPR), American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX).

IBS would pay \$10,000 annually for up to 500 stations; it could be only 250 stations, using 6,366 ATH per month.

In ALL cases the IBS annual royalty rate for actual usage per channel, or per station, is well below the \$500 “minimum” rate.

In ALL cases the NPR, CPB qualified stations and the Networks (National Public Radio (NPR), American Public Media (APM), Public Radio International (PRI), or Public Radio Exchange (PRX), even for huge annual license use of 285,132,065 ATH comes to less than \$500 per station, and much lower than \$500 per stream, or channel.

It is important to note that ownership, location, and primary funding sources are identical for most IBS Members and most NPR and CPB qualified stations. Specifically that is for all using Federal/State taxpayer dollars, facilities, and general support for the station. Most IBS and most NPR and CPB qualified stations hold FCC licenses in the name of our 50 States and entities of the 50 States.

Most IBS and most NPR and CPB qualified stations physically located on college campuses owned by our 50 States.

It is reasonable that IBS Members and NPR and CPB qualified Members, all with like location, ownership, operating support sources, etc., share proportional rates based on license usage in a single noncommercial market place.

Rate Per Actual Performance based on \$500 minimum per year for 159,140 ATH
288 12 performances per hour times 24 hours
8640 one day times 30 equals performances per month per ATH

1909680 159,140 ATH per month allowed for \$500 annual minimum
 22916160 Annual included performance in \$500 min 159,140 x 12 perf x 12 mo
 ##### Royalty Rate per performance incl. in \$500 annual for 159,140 ATH

12 ATH = 12 performances per hour
 105120 ATH times 24 hours times 365 days
 22916160 perf times 218 average per NPR
 #####

		CBI average	Rate F
308333.3333	\$1,850.000 per year for six years 2005-2010		
685.1851852	Assuming 450 streams dollars per stream per year	2011	(
308.3333333	Assuming 1,000 streams	2012	
1414.373089		2013	(
13.7037037		2014	(
0.018073394		2015	(

159140 Min covers 159140 ATH per mon
 1909680 perf per month allowed
 8640 perf in included in continuous stream per month
 8928
 213.8978495 allowed continuous listeners using statutory license per mo (31 days)
 221.0277778 allowed continuous listeners using statutory license per mo (30 days)

55000 Proxy ATH max per month
 660000 Proxy allowed max performances per month
 76.38888889 Max continuous listeners that a proxy can be paid (\$100)

500 min
 0.000261824 price per perf if \$500 min was bulk payment for 159140 ATH

4 av continuous statutory perf
 34560 av statutory performances per month
 9.048636421 royalty fee per year using CBI \$500 as bulk

218
 4
 6365.6 4% (of 159140 ATH per month)

0.141987594 14% of NPR ATH equals IBS ATH per month
 \$147.92

3421584780

285132065 Total ATH allowed for 530 stations and four networks
 537985.0283 Annual ATH allowed per station (entity) without regard for network usage
 44832.08569 Monthly ATH allowed for each of 530 stations without network usage

6366 Monthly ATH for IBS Member at \$20 per year (4% of \$500)
0.141996517 % allowed ATH usage NPR/CPB to IBS (Network uage not included)
\$150.03 IBS station annual rate computed comparing ATH usage/ no network

\$560,000.00

\$560,000.00

\$1,056.60

5.6E+11

1964.00219

0.001964

159140

312.55096

23761005.42

44832.08569 ATH per month per 530 entities for

147.924

36.981