Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re Determination of Royalty Rates and Terms for Ephemeral Recordings and Digital Performance of Sound Recordings (*Web IV*)	Docket No. 2014-CRB-0001-WR (2016-2020)

COMMENTS CONCERNING PROPOSED SETTLEMENT

SoundExchange, Inc. ("SoundExchange") appreciates the Copyright Royalty Judges' prompt publication pursuant to 17 U.S.C. § 801(b)(7)(A)(i) of SoundExchange's settlement with College Broadcasters, Inc. ("CBI") (the "Settlement"). *See* 79 Fed. Reg. 65,609 (Nov. 5, 2014). SoundExchange provides these brief comments to underscore its previous request that the Judges promptly adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible nonsubscription transmissions over the internet made by noncommercial educational webcasters ("NEWs"), and related ephemeral recordings, as more specifically set forth in the Settlement.

I. Description of the Settlement

As explained in the Joint Motion to Adopt Partial Settlement that was filed by SoundExchange and CBI, the Settlement generally continues the current royalty rates and terms for internet transmissions by NEWs (37 C.F.R. Part 380 Subpart C), with certain changes in detail. Most notably, the basic rate structure of $500 for transmissions of up to 159,140 aggregate tuning hours on any individual channel or station in any calendar month, with a $500 annual minimum fee, remains *unchanged*.

Most of the changes that the Settlement would make to the current rates and terms for NEWs are designed more strictly to limit eligibility for those rates and terms to services that remain below 159,140 aggregate tuning hours per channel or station per month. If a NEW exceeds that threshold, the Settlement requires that the NEW both (1) make payment for the relevant month, and the remainder of the relevant year, in accordance with the otherwise applicable noncommercial rates to be determined in this proceeding, and (2) in subsequent years, take affirmative steps not to exceed the 159,140 aggregate tuning hour threshold if it wishes to remain a NEW.

The Settlement also increases the listenership cap for services electing the proxy reporting option provided in 37 C.F.R. § 380.23(g)(1). Currently, NEWs are eligible to elect that option if their usage is under 55,000 aggregate tuning hours per month. Under the Settlement, that cap would increase to 80,000 aggregate tuning hours per month.[1]

II. The Judges Should Adopt the Settlement

Settlements play an important role in the statutory license ratesetting process. *See, e.g.*, H. Rep. No. 108-408, at 30 (Jan. 30, 2004) ("the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates"). Toward that end, Section 801(b)(7)(A) of the Copyright Act creates a presumption that settlements among participants in a rate proceeding will be adopted by the Judges as the relevant statutory royalty rate. Assuming a settlement is consistent with law:[2]

> The Judges "may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the

[1] The Settlement makes a handful of further minor changes to the current rates and terms for NEWs.

[2] Of course the Judges "are not compelled to adopt a privately negotiated agreement to the extent that it includes provisions that are inconsistent with the statutory license." *Review of Copyright Royalty Judges Determination*, 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009). However, neither the current rates and terms for NEWs nor the Settlement raise any apparent issues in that regard.

> agreement," only "if any participant [to the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates."

78 Fed. Reg. 67,938, 67,939 (Nov. 13, 2013) (*Phonorecords II*) (quoting 17 U.S.C. § 801(b)(7)(A)(ii); alterations in original).[3]

SoundExchange does not now know whether any participant in this proceeding might object to the Settlement, but even if one does, it is clear that the Settlement is reasonable and thus should be adopted. At its core, the Settlement simply extends for the period 2016-2020 the same basic rate structure that has been applicable to NEWs for all years since 2006: a $500 royalty fee for transmissions of up to 159,140 aggregate tuning hours on any individual channel or station in any calendar month, with a $500 annual minimum fee. In setting royalty rates for the 2006-2010 period, the Judges found this basic rate not only to be reasonable, but to "most clearly represent the rates . . . that would have been negotiated in the marketplace between a willing buyer and a willing seller" as to all noncommercial webcasters. 17 U.S.C. § 114(f)(2)(B); *see* 72 Fed. Reg. 24,084, 24,097-100 (May 1, 2007) (*Webcasting II*). In subsequent years, the Judges twice reached the same conclusion despite challenges to certain aspects of it by Intercollegiate Broadcasting System, Inc. ("IBS"), which purports to represent webcasters that appear to qualify as NEWs. 79 Fed. Reg. 64,669, 64,670 (Oct. 31, 2014); 75 Fed. Reg. 56,873 (Sept. 17, 2010).

In 2009, SoundExchange and CBI agreed to extend this basic rate structure for NEWs for the 2011-2015 rate period in a settlement that was eventually adopted by the Judges despite opposition from IBS. 79 Fed. Reg. 23,102, 23,120-21 (Apr. 25, 2014) (*Webcasting III*); 76 Fed. Reg. 13,026, 13,038-40 (Mar. 9, 2011). For the 2011-2015 rate period, the Judges also adopted

[3] *See also* 74 Fed. Reg. 4510, 4514 (Jan. 26, 2009) (*Phonorecords I*) ("Only if an objection is received by one or more of the parties are [the Judges] given any discretion over the settlement, and then [the Judges] are limited to rejecting it if [they] determine that the settlement 'does not provide a reasonable basis for setting statutory rates and terms.'" (quoting 17 U.S.C. § 801(b)(7)(A)(ii))).

the same basic rate structure for other noncommercial webcasters. Despite IBS' contrary rate proposal for "small" and "very small" noncommercial webcasters, the Judges agreed with SoundExchange's contention that this rate structure "is objectively reasonable given the average administrative cost per service or channel." 79 Fed. Reg. at 23,123. Reviewing data concerning the number of noncommercial webcasters paying these rates, the Judges also found "strong evidence that noncommercial webcasters are able and willing to pay the proposed fees." *Id*. Subsequent to the closing of the record in *Webcasting III*, the number of NEWs has grown to about 500. Plainly these rates are affordable for NEWs.

Record evidence in this proceeding supports this basic rate structure. As described in the testimony of Jonathan Bender included in SoundExchange's written direct statement in this proceeding, the $500 minimum fee (which for NEWs is also the base royalty) "is consistent with long-established past practice, would require no additional burden on webcasters than they have come to expect in the market, and would ensure that every licensee makes some contribution to the costs of administering the statutory license." Testimony of Jonathan Bender in Docket No. 2014-CRB-0001-WR (2016-2020), at 15 (Oct. 6, 2014).[4] Mr. Bender specifically explained that a "minimum fee of $500 per station or channel is below [SoundExchange's] estimated per station or channel costs." *Id*. at 18-19. Given SoundExchange's costs, it would not be reasonable to set a lower royalty rate for NEWs.[5]

The Settlement's treatment of issues other than the basic rate structure is also reasonable. As described above, most of the changes are directed toward the consequences of a NEW's exceeding the 159,140 aggregate tuning hour threshold. As one would expect given that the

[4] *See also* Direct Testimony of Will Robedee in Docket No. 2014-CRB-0001-WR (2016-2020), at ¶ 15 (Oct. 7, 2014) ("The changes in the proposed rates and terms largely preserve the status quo and are therefore reasonable.").

[5] *See Webcasting III*, 79 Fed. Reg. at 23,123 ("The record does not support a conclusion that, in a hypothetical marketplace, a willing seller would agree to a price that is substantially below its administrative costs.").

Judges originally adopted the 159,140 aggregate tuning hour threshold to approximate the boundary between the noncommercial and commercial markets,[6] it is not a common occurrence for NEWs to exceed this threshold. Of the NEWs currently relying upon the statutory licenses, about 97% have elected the proxy reporting option, meaning that their usage is expected to be under 55,000 aggregate tuning hours per month – less than 35% of the maximum. For 2013, no NEW reported exceeding the threshold in any month. In the very rare case where that might happen, calculating a NEW's royalty payment in accordance with the otherwise-applicable noncommercial services rate determined in this proceeding is necessarily reasonable, because that rate will be determined by the Judges under the same Section 114(f)(2) rate standard applicable to NEWs.[7] Likewise, requiring that a service that has exceeded the threshold take affirmative steps not to exceed the threshold in future years if it wishes to remain a NEW simply ensures that the benefits of the Settlement are limited to the noncommercial services intended to receive them. Services that do not wish to take such steps will be able to rely on other noncommercial rates to be determined by the Judges.

As SoundExchange, CBI and various NEWs have described in the Section 114 notice and recordkeeping proceeding pending before the Judges (Docket No. 14-CRB-0005 (RM)), the proxy reporting provisions in Section 380.23(g)(1) have proven to be a reasonable solution to the problem of distributing on a fair and cost-effective basis the relatively small pool of royalties paid by NEWs. While it is not ideal to pay artists and copyright owners based on a proxy (rather than real usage data), NEWs are largely amateur operations and historically have either not

[6] *Webcasting II*, 72 Fed. Reg. at 24,099-100 (finding 159,140 aggregate tuning hours per month to be "a proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters"); *see also Webcasting III*, 79 Fed. Reg. at 23,122 ("The Judges conclude that it is appropriate to continue this commercial/noncommercial distinction").

[7] Such NEWs could continue to pay such royalties based on an assumed performance of 12 sound recordings per hour, based on proposed Section 380.22(d), which is essentially the same as current Section 380.22(b)(6), but conformed to the payment structure proposed in the Settlement.

reported at all, or done so poorly, so as to require a disproportionate investment of resources to utilize the data they provided. The Settlement would increase the listenership cap for services electing the proxy reporting option from 55,000 aggregate tuning hours per month to 80,000 aggregate tuning hours per month.[8] Because fewer than 20 current NEWs have *not* elected the proxy reporting option under the 55,000 aggregate tuning hour cap, the only initial effect of this increase would be potentially to allow a handful of additional stations to elect the proxy reporting option if they choose to do so. Over the rate period, the change would provide room for growth to the NEWs currently eligible for the option.

Other changes the Settlement would make to Part 380 Subpart C are minor, and generally of a technical or conforming nature. For example, proposed Section 380.22(e) incorporates explicitly the split between performance and ephemeral royalties that has previously applied to NEW royalties by reference to Section 380.3(c). Likewise, the Settlement proposes to move certain certifications currently required by Section 380.23(c) to Section 380.23(f), which collects in one place all the certifications to be included on the Statement of Account form provided by SoundExchange. Those certifications are also permitted to be given by an educational institution staff member (rather than only a faculty member or administrator) who is authorized to provide them. Most aspects of Part 380 Subpart C remain unchanged, including designation of SoundExchange as the collective for collection and distribution of royalties, the timing and manner of payment, and provisions concerning late fees, server log retention, confidentiality, audits and unclaimed funds.

[8] The Settlement also proposes to modify the provisions of Section 380.23(g)(3) concerning the treatment of services not eligible for the proxy reporting option. The purpose of this change is to take into account the changes the Judges made to Section 370.4 shortly after the 2009 SoundExchange-CBI settlement.

III. Conclusion

The Settlement caries forward a basic rate structure that has been applicable to NEWs for all years since 2006, and with relatively minor changes, other aspects of the NEW-specific royalty rates and terms that have been in place since 2011. The Judges have repeatedly found these provisions to be reasonable despite various challenges from IBS. Accordingly, the Judges should act promptly to adopt the Settlement. As explained in the SoundExchange-CBI Joint Motion to Adopt Partial Settlement, the Judges are authorized to adopt settlements reached "at any time during the proceeding," and Congress contemplated that the Judges would act on settlements in the absence of a fully-developed record. 17 U.S.C. § 801(b)(7)(A); H. Rep. No. 108-408, at 24 (2004). Even if the Judges receive an objection to the Settlement, its reasonableness cannot seriously be doubted given the history of the provisions at issue. The Judges should find that the Settlement is reasonable and adopt it promptly as the statutory royalty rates and terms for internet transmissions by NEWs.

Dated: November 26, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 26, 2014, I caused a copy of **COMMENTS CONCERNING PROPOSED SETTLEMENT** to be served via electronic mail and via first-class, postage prepaid, United States mail, to the Participants as indicated below:

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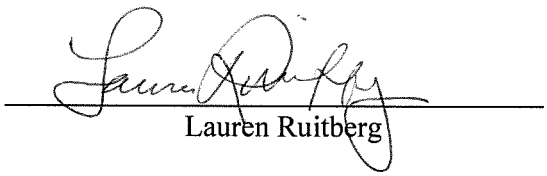

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