

Before the  
COPYRIGHT ROYALTY JUDGES  
Library of Congress  
Washington, DC 20540

_____	)	
In the Matter of	)	
	)	Docket No. 2009-1 CRB DTRA
Adjustment of Rates and Terms for	)	
Digital Performance Right in Sound	)	Webcasting III
Recordings and Ephemeral Recordings	)	
_____	)	

REBUTTAL TESTIMONY  
of Frederick J. Kass,  
Chief Operating Officer  
Intercollegiate Broadcasting System, Inc.

I am Frederick J. Kass, Chief Operating Officer of the Intercollegiate Broadcasting System, Inc. I am the same Frederick J. Kass who testified here earlier this year on April 22d and May 5th.

Alleged Misrepresentations on IBS Website

1. On April 22nd Mr. Freedman cross-examined me at some length concerning the accuracy of the representations at various times in the past by IBS on its website and on special invoices and on the endorsement on membership certificates issued to certain IBS members. (TR 806-848.) In particular he led me through the following exhibits, which were admitted over objection of IBS' trial counsel, viz.:

- |                |   |
|----------------|---|
| SoundEx Exh. 8 | Application for IBS Membership (2/2010) (TR 817)                      |
| SoundEx Exh. 9 | IBS 2006-07 Special Membership Certificate to Station 88.KUR (TR 817) |

- SoundEx Exh. 10 Pages from IBS website 8/25/08 (TR 833-34)
- SoundEx Exh. 11 Infringement letter from Jenner & Block to IBS dated April 8, 2008 (TR 833-4)
- SoundEx Exh. 12 Ltr from Jenner & Block dated October 7, 2008 (TR 833-4)

2. Without waiving IBS' objections to their admissibility, SX Exhibits 8 and 9 simply do not reflect what appears more currently on IBS' website and on IBS membership certificates. IBS Rebuttal Exh. 1 for identification reflects the same membership application form as of April 2010, and IBS Rebuttal Exh. 2 for identification reflects the only form of membership certificate currently being issued by IBS.

3. IBS Rebuttal Exhibit 3 for identification shows selected comparable pages currently on IBS' website, reflecting various changes in the website since the pages of August 2008 shown in SoundEx Exh. 10.

4. SoundEx Exhs. 11 and 12 are two letters written in a chain of letters pertaining to SoundEx Exh.'s charge that IBS has exacerbated these foregoing misleading statements by not "correcting them following demands by SoundEx by making changes in IBS' website." IBS Rebuttal Exhs. for identification 4, 5, 6, and 7 demonstrate IBS' responses to the SoundEx's demands from Jenner & Block. Without these letters the sequence of correspondence is incomplete and does not give a clear picture of the seriousness of IBS' attempts in good faith to respond to Jenner & Block's position. Further, the chain of correspondence is full of cross-references that would not be understood without the omitted ones.

5. The sequence of the correspondence may be set forth in tabular form to aid the bench in better understanding the sequence, *vis.*:

April 8, 2008	Demand letter from Jenner & Block to IBS (SoundEx Exh 11)
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April 23, 2008	IBS' Reply dated April 23d (IBS Rebuttal Exh. 4), seeking clarification of SoundEx's objections in its April 8 <sup>th</sup>
June 5, 2008	SoundEx's letter to IBS (IBS Rebuttal Exh. 5)
June 16, 2008	IBS' reply dated June 16 <sup>th</sup> to SoundEx's letter of June 5 (IBS Rebuttal Exh. 6), offering SoundEx equal time)
October 7, 2008	SoundEx's reply (SoundEx Exh. 12)
October 14, 2008	IBS' reply (IBS Reply Exh. 7), reiteration of IBS' offer of "equal time" to SoundEx to post contrasting views or link readers of IBS' website to SoundEx's own.

From examination of the foregoing chronology, it becomes apparent (i) that the discussion between counsel moved to a conclusion with reasonable expedition, and (ii) that SoundEx did not convey to IBS any dissatisfaction with the state in which the discussion ended on October 14, 2008.

Sound-Ex's Proposal for a Minimum Rate Unrealistic  
for Small Educational Webcasters

6. SoundEx, through its witnesses Barrie Kessler and W. Tucker McCrady, advocates a uniform minimum annual license fee of \$ 500 for all educational webcasters. Five hundred dollars is at such a high level that it (i) is disproportionate to their use of digitally recorded music and (ii) is for many smaller webcasters or would-be webcasters a barrier-to-entry. As such it contravenes what I understand to be the statutory requirement in Section § 114(f)(2) that there be "*a minimum fee for each such type of service*, such differences in minimum fees to be based on criteria including, not limited to, the quantity and nature of the use of sound recordings" made by each type of service.

7. The instantaneous listening to the small and very small educational webcasters' webcasts of licensable music is so small, that substitutional effect on record sales is *de minimis*.

IBS would argue that the statute does not purport to protect other webcasters as such from substitutional effect but protects only “the purchase of phonorecords by consumers.” The term phonorecord, as I understand it, requires fixation of sound in a tangible object, and that seems to be the way Congress defined it in Section 101 of the Copyright Act. It does not seem to extend protection to competing streams.

8. The agreement between SoundEx and CBI is not an appropriate benchmark to use in setting a minimum fee for the overwhelming majority of the small and very small educational webcasters.<sup>1</sup> While CBI has not placed its membership rolls on the public record in this proceeding, it is generally understood among those who have been involved in college radio over the years that the CBI is an organization representing primarily campus stations that are large enough to operate in part with paid staffs. So far as I am aware, CBI does not have conventions of its member stations other than in conjunction with conventions of College Media Advisers. College Media Advisers is not an organization devoted just to college broadcasters, but includes college advisers to collegiate journalistic media across the spectrum – print, audio, television, etc.<sup>2</sup> As suggested by its name, Collegiate Broadcasters, Inc., CBI focuses on serving the larger collegiate webcasting operations.

9. The SX-CBI agreement is not an agreement signed on behalf of any particular educational webcaster. Technically it may not be an agreement at all within the meaning of

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<sup>1</sup> Under IBS’ restated rate proposals in Web II and Web III, a *small educational webcaster* is defined as a noncommercial webcaster whose performances of digitally recorded music aggregate less than 15,914 ATH per month or the equivalent. A *very small noncommercial webcaster* is a noncommercial webcaster whose performances of digitally recorded music aggregates less than 6,365 ATH per month or the equivalent.

<sup>2</sup> Under Article I (Membership), section 2, of CMA’s by-laws, as currently posted on CMA’s website, “Active members shall be restricted to individuals who are performing duties as advisers, supervisors or directors of editorial, business or technical phases of student media operations in colleges or universities, or not-for-profit student media corporations.”

either Section 114(f)(5) or 801(b)(7)(A), but only an offer by SoundExchange, since only one party, *viz.*, Sound Exchange and those copyright owners it represents, was bound by it at signing. So far as appears of record in this proceeding, CBI as signatory did not represent any particular webcaster using licensable music represented by SX. Indeed, IBS' Interrogatory to CBI in this proceeding seeking to evoke "on behalf of which non-commercial educational and commercial webcasters did CBI (a) seek to negotiate and (b) sign on behalf of," CBI responded<sup>3</sup>

CBI negotiated and signed the agreement on behalf of its recent, current, and potential future membership in CBI[,] and any Noncommercial Educational Webcaster can elect whether to be covered under its rates and terms or other available rates and terms. Attached to this statement as Attachment A is a list of all currently eligible potential member stations CBI has identified.

10. The substantive objection to extending the SX-CBI rates and terms to smaller educational webcasters is that CBI represents primarily large educational webcasters having a very different profile from the more numerous small and very small entities. Such small entities do not have a staff that is in part paid by the entity or by the educational institution of which it is a part. In contrast IBS has the larger membership and represents a broader spectrum of users and would-be users in high schools, academies, universities and colleges, etc. The hours-of-operation of individual IBS members likewise covers a wide spectrum, ranging from (i) a college station simulcasting 24/7/365 to (ii) a high school webcasting-only entity that operates one or two hours each weekday during the school year. A back-of-the-envelope calculation would be that such a smaller entity could program at a max no more than 600 works per month.<sup>4</sup>

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<sup>3</sup> CBI's response to IBS' sole interrogatory will be offered here as IBS Rebuttal 8 exhibit, except that Attachment A to CBI's interrogatory, which I am informed by counsel seems to be a list of approximately 1225 station names and associated institutions of higher learning, as to which restricted status was claimed by CBI, is omitted.

<sup>4</sup> This figure is calculated as follows: 2 hours per month times 12 performances per hour (ATH conversion figure) = performances per day. Twenty-four performances times 25 week-days per month equals 600 works per month.

11. This estimate tends to overstate the amount of licensable listening to these smaller operations. IBS' experience and the best figures from Webcasting II and III suggest that the average instantaneous listenership is just under four. Many smaller stations program recorded music directly licensed to them or through a clearinghouse arrangement, which further reduces the instantaneous listenership for performances licensable by SX. Considering that many educationally affiliated webcasters attract their peak listening audiences with varsity sports coverage and on-campus lectures and instructional programming, the actual number of performances involving digitally recorded music would be proportionately less. To the extent that the primary purpose of some such webcasting operations is for course credit or as an extra-curricular activity – “learning by doing” – their instantaneous audiences for digitally recorded music is yet smaller. These are truly “small businesses” as defined by the Small Business Administration and entitled to the protection of the Small Business Regulatory Fairness Act, Title II of P.L. 104-121, 110 Stat. 857-62, 5 U.S.C. § 857-62, 5 U.S.C. 601n.

12. Taking into account the distinctive use of, and audience for, digitally recorded music by the small and very small educational webcasters, SX's proposed \$ 500 minimum is disproportionate to the actual usage of licensable music by the small and very small educational webcasters. Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type of service in accord with the general public policy favoring small businesses. This disproportion exists not only in rates but in cost-benefit analysis of prescribed recordkeeping and reporting prescribed.<sup>5</sup>

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<sup>5</sup> I am informed by counsel that such analysis is required in laws appearing in the U.S. Code, title 5, ch. 6, implementing Congress' legislative intent to protect small businesses from “unnecessary burdens” and that this purpose is made explicit in Section 2 of P.L. 96-354.

13. Congress, in enacting the DCMA itself, took pains to indicate that “such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of sound recordings affected by this paragraph” (§ 114[f][2][A, B]), giving due weight to substitution for CD sales. IBS’ position is that SX’s proposed minimum is not tied in any meaningful way to substitution for CD sales.

SX’s Proposed Rates are not Justified as Cost-Based

14. Even assuming that a minimum fee could be justified on a cost-basis, SoundEx has made no showing that any rate structure that is cost-effective would be supported by its showing as to costs. Only by positing a cost-structure for administrative costs that make such a structure that not cost-effective as to the small and very small webcasters could SX generate administrative fees that recovered a minimum rate of \$ 500. SX’s own figures show that their administrative costs per reported performance are on the order of \$ 0.000001658.<sup>6</sup> Again assuming that a small educational webcaster would generate no more than 2,291,616 performances per year, that would generate proportional costs of \$3.80 --far less than the \$ 500 per year minimum rate. For a very small webcaster the figure is \$ 1.52, even more disproportionately falling on the very small webcaster. Without scaled rates a five hundred-minimum would leave the small educational webcaster paying for a large number of performances he couldn’t use.

15. Anything other than a cost-effective rate structure would run counter to Congress’ intention in replicating in Section 114, as amended by DMCA as nearly as possible, the action of a competitive buyer-seller market. If a supplier could not service the needs of a

small buyer profitably on at least marginal basis, then there would be no sale at that price for want of a willing buyer. In a perfectly competitive market only as forced by governmental regulation would a seller agree to sell for less than his marginal costs.

16. Because the deficiencies in SoundEx' proposed rates and terms have become more evident as testimony have piled up in the record, IBS on May 21<sup>st</sup> submitted a new proposal for rates in Web III pursuant to Section 351.4(c) of the Rules, *viz.*:

In view of (i) the direct testimony heard so far and (ii) the CRJs' rate determination published in the Federal Register of May 1, 2007, IBS herewith respectfully submits a superseding restated rate proposal in Web III pursuant to Section 351.4 of the Rules.

The general principle driving IBS' proposal is that small, noncommercial webcasters should pay only for the performances of music subject to statutory license that they actually webcast. The proposal consists of three parts:

- (i) Definitions that identify small, noncommercial webcasters as those whose small listening audiences and hours of operation are such as would result in *de minimis* use of music under statutory license;
- (ii) Flat annual rates;
- (iii) An exemption from recordkeeping requirements and reporting requirements.

#### Rate Proposal

**Definition:** *A small, noncommercial webcaster* is a noncommercial webcaster whose total performances of digitally recorded music is less than 15,914 ATH per month or the equivalent.

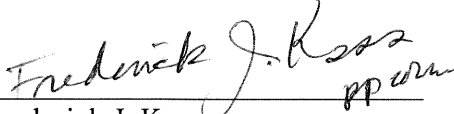
*A very small noncommercial webcaster* is a noncommercial webcaster whose total performance of digitally recorded music is less than 6,365 ATH per month or the equivalent.

**Royalty Fees:** *Small non-commercial webcasters* shall pay \$ 50 per annum; *very small noncommercial webcasters* shall pay \$ 20 per annum.

**Reports of use...** *Small noncommercial webcasters* and *very small noncommercial webcasters* are not required to keep records of, or to file reports of, digitally recorded music webcast..



17. The respective minimum annual rates of \$ 50 and \$ 20 are derived in the following fashion: These are based on usage measured in ATH or equivalent performances based on the determination of May 2007 and the record evidence there (and here) of the average number of instantaneous listeners, *vis.*, four.<sup>7</sup> For the small webcaster I calculated that its usage factor would not exceed about ten percent that of an educational webcaster, *i.e.*, that its usage would not exceed ten percent of the flat-rate limit of 159,140 ATH per month or approximately 21 continuous statutory performances;<sup>8</sup> for the very small webcaster I calculated that its usage would not exceed four percent that of an educational webcaster, *i.e.*, that its usage would not exceed four percent of the flat-rate limit of 159,140 or 6365 ATH per month or approximately nine instantaneous listeners.<sup>9</sup> Applying those percentages to the \$ 500 minimum yields proportional fees of \$ 50 and \$ 20.

  
Frederick J. Kass  
Chief Operations Officer

Newburgh, New York  
June 7, 2010

I affirm that the facts stated in the foregoing written testimony are true and correct to the best of my knowledge and belief.

  
Frederick J. Kass

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<sup>7</sup> For various reasons, which are already detailed in the record and briefly alluded to above, these are overstatements due to the webcasters' audiences being higher for non-recorded-music programming, such as varsity athletics, before adjustments for school vacations.

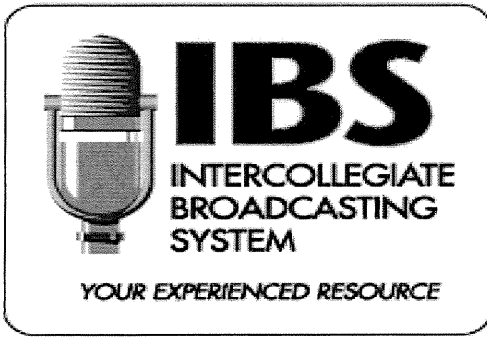
<sup>8</sup> 15,914 ATH x 12 performances per ATH x 12 months = 2,291,616 annual statutory performances.

<sup>9</sup> 6365 x 12 performances per ATH x 12 months = 916,560 annual statutory performances.

April 2010

# INVOICE

No. 11-3076 A



**367 Windsor Highway, New Windsor, NY 12553-7900**  
**E-mail: [ibs@ibsradio.org](mailto:ibs@ibsradio.org) Ph (845) 565-0003 FAX (845) 565-7446**

*If required by your Business Office:*

Purchase Order # \_\_\_\_\_

Date of PO \_\_\_\_\_

Please note any address changes:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Radio Station

## Join IBS Radio Station - Webcast Membership

Through December 31, 2010, Payable by check, or credit card - **VISA - MasterCard - Discover**

Intercollegiate Broadcasting System Membership Dues for One Year	<b>\$125.00</b>
--	-----------------

Radio Station Membership in IBS includes:

- IBS 24/365 Radio Information (<http://www.collegeradio.tv>) ([ibs@ibsradio.org](mailto:ibs@ibsradio.org))**
- Save \$80 on registration for 71st Annual IBS NY City Conference: March 4-6, 2011**
- IBS Assistance with YOUR FCC FM license renewal starting soon!**
- IBS Assistance with YOUR Webcast/Streaming.**

- Coast to coast IBS Fall Conferences- registration \$25/person including lunch**
- IBS Publications, Music service assistance, engineering/ technical assistance
- FCC Info on License Assistance, Public File, Underwriting, Ownership & LPFM

**Annual Subscription to IBS Newsletter printed in color and mailed**

**Includes First (1<sup>st</sup>) delegate FREE registration. Save \$80 - IBS International Radio Conference. IBS International Conference - Friday - Sunday, March 4 - 6, 2011 - NY City at Hotel Pennsylvania 70th annual with over 115 seminars by top academic, broadcasting and government professionals!**

**Reduced (\$25/person registration) IBS Conference- Oct. 9, 2010, Boston/Brookline, MA**

**Reduced (\$25/person registration) IBS Conference- Oct. 23, 2010, Chicago. IL**

**Reduced (\$25/person registration) IBS Conference- Dec. 4, 2010, Los Angeles/Claremont, CA**

**IBS is a not for profit education corporation, association, and foundation with 70 years of continuous service to the over 1,000 IBS Members Worldwide!**

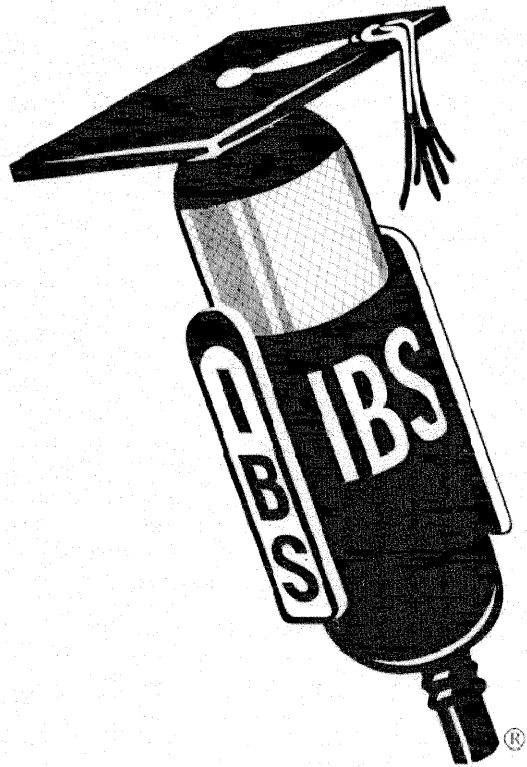
**Intercollegiate Broadcasting System, Inc. Federal ID is: # 23 705 9805**

Please enclose with your check either the top portion of this invoice or IBS invoice number and mail to:

### IBS

367 Windsor Highway

New Windsor, NY 12553-7900



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# IBS

Intercollegiate  
Broadcasting  
System

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This is to Certify that

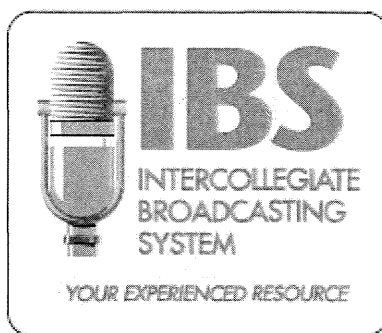
## WHRB - 95.3 FM

Harvard University  
Cambridge  
Massachusetts

is an IBS Member in good standing of the  
Intercollegiate Broadcasting System, Inc.

### 2009 - 2010

Fritz Kass  
Treasurer and Chief Operating Officer



Intercollegiate Broadcasting System (IBS), your trusted experienced resource for 70 years!

IBS - college radio, TV, webcasting, podcasting, streaming, and high school radio!

IBS - trusted resource for college radio, TV, webcasting, streaming, and podcasting



## News for YOU, the IBS Member!

July 10, 2009 - Case 07-1123: IBS v. CRB/SoundExchange  
 (Intervenor) (US Court of Appeals- DC Circuit)  
 \$500 Minimum Webcasting Fee (2006 - 2010) is vacated back to  
 January 1, 2006!

## The US Court of Appeals (DC Circuit) Case requesting review (Appeal), decides that the \$500.00 minimum webcast fee to SoundExchange is unjustified!

### IBS Position:

1. There is not sufficient basis to support a \$500.00 minimum payment for noncommercial webcasters.
  2. Smaller, educational, government owned/operated (State Colleges/Public Schools) should be able to pay for only their direct use of the statutory license to stream music, not the often much larger minimum (\$500.00).
  3. Many PUBLIC Education webcast entities could be forced off the Internet (No Webcast). Other PUBLIC Education entities are being prohibited from using the Internet/Webcasting to teach America's Sons and Daughters about digital communications. Students would not be allowed to learn/practice vital digital communication/Internet SKILL Sets required by them to survive in the Global World Economy!
  4. Copyright Holders (SoundExchange/RIAA) have signed agreements in the Webcast II (2006 - 2010) CRB Record for rates of approximately \$100 per year per entity covering the most listened too (average of over 200 USA listeners on the Internet)(\$80,000 Federal Tax Dollars covering 798 NPR/CPB Entities). Clearly the majority of all NPR, and CPB qualified, webcast entities are owned by States (Colleges/Universities)(Public Schools). Very clearly the legal ownership of CPB Qualified and NPR webcasters is often IDENTICAL to the legal ownership of IBS - Intercollegiate Broadcasting System, IBS Members (State and Local Government). The ONLY difference between IBS and NPR webcasts are the staffs. IBS webcasts are student webcasts used to train, learn, and practice digital techniques. IBS Webcast have very low listenership levels. NPR webcasts are professionally produced. They are widely listened to and are audience, not training focused.
  5. The Corporation for Public Broadcasting (CPB) receives annually from US Taxpayers, by Congressional Authorization/Appropriation over \$400,000,000.00 (\$400 Million Dollars). CPB pays, using Federal Taxpayer dollars the SoundExchange copyright royalty fees for all NPR and CPB Qualified, webcasters. State and local taxpayers often must pay SoundExchange webcast royalty fees. Federally funded high visibility mass audience (over 200 continuous listeners) are given preferential rates. State and Local Government funded training entities often with very low listenership (5 or less listeners per minute), due to the minimum must pay the \$500.00 minimum rate even though their pay per performance rate is less. Often the use of the statutory music license is only 3% of the federal funded NPR webcasts.
  7. The US Court of Appeals after review of the CRB Record vacated the minimum (\$500.00) for noncommercial webcasters, allowing the CRB record rates for noncommercial IBS Member State and Local Government Webcasters to be the CRB Rate for 2006 - 2010.
-

## What is IBS's position on Webcasting?

1. IBS believes there is tremendous educational and operational value for educational stations to stream their audio (and video) signal over the Internet.
2. IBS believes every educational station should continue to stream their audio signal digitally on the Internet (Webcast)!
3. IBS believes the benefits of streaming/webcasting are so great that your radio station should continue to stream on the Internet even with DMCA copyright uncertainties.
4. IBS believes that every station that is not now streaming should start streaming! Learning the techniques and technology of digital communications is vital for today's graduates. Competitive knowledge of Internet/ Webcasting communications is an important skill set in the world of today.

The value of streaming for an IBS Member Radio Station is:

### Education-

To learn and practice the techniques and technology of digital communications. America's Sons and Daughters must compete in a global digital world. Vital communication skills are being learned by webcasting at USA schools and colleges.

### Operations-

To be able to reach out to alumni, parents, friends and other audiences with information and programming that cannot be provided by other broadcasting technology.

### Constitutional FREEDOM-

The right to free speech and expression of views by American Education Entities and their faculty and students is vital to a FREE United States of America. Our GREAT NATION cannot long endure if we allow uncertainty to shut down school and college webcasts due to impossible to meet recordkeeping and unrealistic rates that apply to music and NON-MUSIC programming.

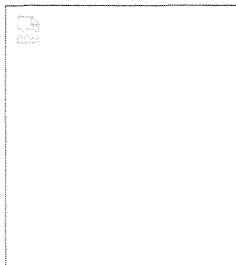
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Keep webcasting, learning and reaching out to a wider audience!

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[Go to IBS First Website Page - click here!](#)

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Links and content being added - stop back and visit again.  
Please send us your comments, suggestions and critiques.

*Contents of this site copyright 1996 - 2010, all rights reserved by the*

**Intercollegiate Broadcasting System, Inc.,**

**367 Windsor Highway, New Windsor, NY 12553-7900**

**Phone: 845-565-0003**

**Fax: 845-565-7446**

*Web site design and content by*

*Jeff Tellis, September 15, 1941 -- March 14, 2006*

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IBS Rebuttal Exhibit 4

**M I L L E R   &   V A N   E A T O N**  

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**P. L. L. C.**

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April 23, 2008

Thomas J. Perrelli, Esq.  
Jenner & Block  
601 Thirteenth Street, N.W., # 1200-S  
Washington, D.C. 20005

Re: IBS Website

Dear Tom:

Your letter of April 8<sup>th</sup>, though “follow[ing]-up on the various conversations you have had with SouthExchange regarding some of the statutory licensing information posted on the IBS website (<http://frontiernet.net/~ibs/DCMA.html>)” introduces on page 2 in the fourth-from-last paragraph a point that was, to the best of my recollection and Fritz’, not discussed in our prior individual or joint conversations with the SoundExchange staff.

So before attempting a comprehensive response to your letter, I thought it advisable to seek clarification of your contentions with respect to the new point. As to the legal basis of your objection, may I take it to be confined to domestic registrations numbers 2913178 for the dotted swoosh design and 2639580 for SOUNDEXCHANGE in typewritten form, both registered to SoundExchange, Inc., at its former Connecticut Avenue address, for collection and distribution of royalties relating to electronic transmission and distribution of copyrighted music and sound recordings? No. 2999089 for PLAYS in typewritten form for financial information, also registered to SoundExchange, I take to be irrelevant.



Inspecting the ten pages or so associated with the web address in your letter, they appear to constitute a newsletter-like item reciting various persons and events concerning "IBS – college radio, TV webcasting, podcasting, streaming, and high school radio." Various individuals involved in each topic are identified graphically in the respective topic headings. The first topic is IBS services, and it is identified by a composite graphic characteristic of IBS. The second topic appears to describe IBS' activities vis-à-vis specific legal players in Washington, D.C. milieu, and those players (IBS, SoundExchange, and the U.S. Copyright Office) are identified by graphics. The next topic appears to be IBS' appeal to the D.C. Circuit, and the graphics identify IBS and, somewhat erroneously, the Federal Circuit, as the players. The next topic appears to involve the proceeding before the Copyright Royalty Judges, and the graphic identifies the CRB as the player. The next topic appears to describe negotiations between IBS and SoundExchange, and graphics identifying IBS and SoundExchange as players. The final topic appears to report decisions by the Copyright Royalty Board, and the graphic identifies the Board as the player.

At the risk of being considered obtuse, I seek clarification of your contention and its basis(es), since the identification of the "players" in the news items is reasonably accurate – certainly within the limits of ordinary editorial license --, and there is no confusing indication of a source of services within the registered use.

Sincerely yours,

A handwritten signature in black ink that reads "Bill Malone". The signature is written in a cursive, flowing style.

William Malone

cc: Mr. Frederick J. Kass

JENNER & BLOCK

June 5, 2008

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Re: False Information on IBS Website

Dear Fritz and Bill:

It has been well over a month since I initially sent a cease-and-desist letter to you regarding the false and misleading information you have posted on your website. Yet you have done absolutely nothing to remove the information from the site or to remedy the situation. Your April 23, 2008 response avoids SoundExchange's primary contention that IBS has posted -- and indeed continues to post -- deceptive information that encourages your members to break the law.

Your letter seeks a "clarification" about SoundExchange's trademarks, but -- as you appear to concede -- SoundExchange is the lawful owner of the trademarks at issue and you are using those trademarks in conjunction with the false and deceptive information on your website. Fundamentally, however, our dispute is not about SoundExchange's logo -- it is about the false and deceptive information on the IBS website. In my letter of April 8, I clearly explained this concern -- "SoundExchange also finds problematic IBS's posting of this inaccurate information on a website that . . . contains -- without permission -- SoundExchange's trademarked logo. This juxtaposition wrongfully gives the impression that the advice you impart -- authorizing your members to violate their statutory obligations -- is sanctioned by SoundExchange. Nothing could be further from the truth, as your numerous discussions with SoundExchange have made clear."

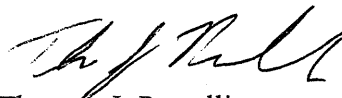
There is nothing confusing or complicated about this language. You cannot possibly contend with any credibility that you need "clarification" to understand what SoundExchange is demanding. Your attempt to skirt the issue by asking questions about trademark registration

Fritz Kass  
William Malone  
Page 2

numbers while you refuse to correct false statements on your website is transparently a delaying tactic.

I once again reiterate SoundExchange's demand that you correct the information on IBS's website. Please do so as soon as possible and inform me when it has been accomplished. Failure to remove this information may leave SoundExchange with no choice but to contact IBS's members directly to inform them that IBS is providing misleading information and advice that, if followed, may expose them to liability for copyright infringement.

Sincerely,

A handwritten signature in black ink, appearing to read 'Th J Perrelli', written in a cursive style.

Thomas J. Perrelli

cc: Michael J. Huppe  
Colin Rushing

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June 16, 2008

Thomas J. Perrelli, Esq.  
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1099 New York Avenue, N.W.  
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Re: Information on IBS Website

Dear Tom:

If we are not over-reading your letter of June 5<sup>th</sup>, I find it very clarifying. IBS still feels that the changes it made in good faith to the news posting in response to your prior letter represent a fair statement of the matter. The newsletter's readers are, after all, by-and-large college and high school students who grapple with William Shakespeare, so reading the IBS posting for what it says shouldn't be too difficult.

The "news" here, though, is that SoundExchange disagrees with the views expressed in IBS' revised posting. As you are aware, IBS has regularly invited and welcomed speakers from SoundExchange to bring their views to the station staff members in attendance at its annual radio conference and at an occasional regional conference? Their views are considered important to station staff members, even if IBS itself may not agree with them one hundred percent. Exposure to contrasting views is itself an important learning experience, lest our society become a victim of political correctness run amok.

Your letter in effect argues that IBS' editor has not fairly presented SoundExchange's contrasting views. Indeed, in the last sentence you suggest that SoundExchange's remedy would be to state its position directly in correspondence to IBS members. IBS respectfully suggests it

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October 14, 2008

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1099 New York Avenue, N.W., # 900  
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Re: IBS Website

Dear Tom:

Your letter of October 7<sup>th</sup> reached Fritz in Saturday's delivery, and he has asked me to drop you a note with regard to your client's continuing objections to the series of postings of current information about developments in the webcasting rights controversy on the IBS website.

As you can appreciate the recent passage of the Webcaster Settlement Act of 2008 has resulted in another update of the relevant postings on the IBS website.

I hope that the most-recent revision will have obviated your objections.

IBS' earlier offer to post any relevant views by SoundExchange remains outstanding.

Sincerely yours,



William Malone

Attorney for  
Intercollegiate Broadcasting System, Inc.

cc: Mr. Frederick J. Kass

Before the  
**COPYRIGHT ROYALTY BOARD**  
**LIBRARY OF CONGRESS**  
 Washington, DC

In the Matter of  Digital Performance Right in Sound Recordings and Ephemeral Recordings	) ) ) ) ) ) ) )	Docket No. 2009-1 CRB Webcasting III
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**College Broadcasters, Inc.'s Supplemental  
 Response to Intercollegiate Broadcasting Systems, Inc.'s Interrogatory**

College Broadcasters, Inc. ("CBI"), by and through its attorneys, hereby supplements its response, in accordance with 37 C.F.R. § 351.5 and the Judges' Order of April 1, 2010, to the interrogatory by Intercollegiate Broadcasting Systems, Inc. ("IBS") as follows:

**GENERAL OBJECTIONS**

CBI incorporates the General Objections raised in its response of December 21, 2009 into its response set forth below. CBI does not waive any of these General Objections in its response to the specific interrogatory propounded.

**RESPONSE TO INTERROGATORY**

**INTERROGATORY NO. 1.**

At various points [under the heading "Proposed Settlement" within Mr. Robedee's prepared testimony filed September 29, 2009] he refers to negotiations between SoundExchange and CBI leading up to the agreement between CBI and SoundExchange filed with the Office at the end of July, 2009, published in the Federal Register on or about August 12, 2009, and filed under your joint petition to the CRJs on August 13, 2009. On behalf of which non-commercial educational and commercial webcasters did CBI (a) seek to negotiate and (b) sign on behalf of, indicating in your answer as to each such entity named whether (a) or (b), or both, tabulating entries in categories (a) and (b) by their annual budgets or estimates thereof and indicating as to each entry the numbers

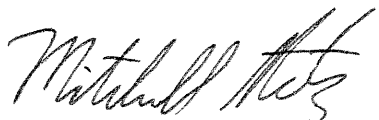
of, or estimates of, paid, non-teaching-faculty staff? For the purpose of this interrogatory, non-teaching-faculty staff excludes faculty appointees and employees of the parent institutions currently teaching regular in-classroom courses for which academic credit is awarded.

**RESPONSE TO INTERROGATORY NO. 1.**

Subject to and without waving the previously raised objections, CBI responds as follows:

CBI negotiated and signed the agreement on behalf of its recent, current and potential future members; however, eligibility under the negotiated agreement is not predicated on a station's membership in CBI and any Noncommercial Educational Webcaster can elect whether to be covered under its rates and terms or other available rates and terms. Attached to this statement as Attachment A is a list of all currently eligible potential member stations CBI has identified.

CBI does not collect or possess information on the annual budgets or staffing levels of its recent, current, or potential members, nor does CBI possess sufficient information to estimate the annual budgets or staffing levels of these entities.

By:   
\_\_\_\_\_  
Mitchell L. Stoltz (DC 978149)  
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1301 K Street N.W., Ste. 1050 East  
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Phone: (202) 204-4523  
Fax: (202) 204-3501  
mstoltz@constantinecannon.com


*Counsel for College Broadcasters, Inc.*

Dated: April 14, 2010

AFFIRMATION

Will Robedee, under penalty of perjury under the laws of the United States of America, says he is Executive Director of College Broadcasters, Inc., that he has read the foregoing response to Intercollegiate Broadcasting Systems, Inc.'s Interrogatory, and that based on information presently available to him, he believes it to be true and correct.

COLLEGE BROADCASTERS, INC.

By:   
Will Robedee  
Executive Director

Date: 4/14/10



Certificate of Service

I hereby certify that I have caused to be e-mailed and by Overnight Mail this day copies of the foregoing Rebuttal Testimony of Frederick J. Kass to the following persons.

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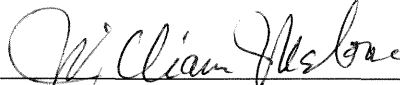
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Washington, DC

June 7, 2010