

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

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

COMMENTS OF COLLEGE BROADCASTERS, INC.

College Broadcasters, Inc. (“CBI”), hereby respectfully submits these comments in response to the Notice of Inquiry (“Notice”) soliciting comments regarding the Copyright Royalty Judges’ (“CRJs”) proposal to revise its “final interim regulations” for recordkeeping and reports of use of sound recordings under two statutory licenses. 74 F.R. 15901 (April 8, 2009).

As a national membership association of non-profit, student-staffed electronic media outlets, many of which are making or plan to make transmissions subject to the relevant statutes and regulations, CBI is an interested party. CBI has extensively participated in the webcasting proceedings recordkeeping and reports of use since their inception, as documented in our initial comments in this proceeding. *See CBI footnote 1 in CBI’s original RM 2008-7 Comments (January 29, 2009).*

BACKGROUND

In October of 2006, the CRJs published interim recordkeeping regulations. 71 F.R. 59010-59019 (October 6, 2006). Those regulations primarily addressed the *format and delivery* of reports of use, believing that the issues concerning the *content* of the reports of use had been settled by the Copyright Office’s issuance of Interim Regulations. 69 F.R. 11515 (March 11, 2004). The history of the development of the 2004 interim regulations is rich and we will not repeat that history here; however, CBI previously stated – and continues to maintain – that those regulations are beyond the capabilities of many Educational Stations.¹ The 2006 rules issued by the CRJs did

¹ CBI uses the term “Educational Stations” to refer to all webcasters that are directly operated by, or are affiliated with and officially sanctioned by, and the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that is not a “public broadcasting entity” (as defined in 17 U.S.C. § 118(g)) qualified to receive funding from the Corporation for Public Broadcasting

not attempt to address any of the prior controversies concerning the content of the reports of use stating “it is not the Board’s intention in today’s Interim Regulations to revisit the rules the Librarian and Office adopted. Rather, the Board will monitor the operation of these regulations, as well as the ones adopted today, and will request public comment in the future as to the need for amendment or improvement prior to adopting final regulations.” CBI respectfully reminds the CRJs of the board’s previous commitment to monitor the operation of the existing interim regulations before adopting any final regulations. The focus of the Notice appears to be on proposed new regulations, and the Notice fails to provide proper attention to the evaluation of the present interim regulations. As CBI demonstrates in these comments, the existing regulations are overreaching and are not working; therefore, those issues should be addressed before contemplating any additional regulations.

On December 30, 2008, the Copyright Royalty Judges (“CRJs”) published a Notice of Proposed Rulemaking (“NPRM”) proposing changes to the “interim” recordkeeping regulations. CBI and 42 others responded to the NPRM, with the majority of those responses coming from Educational Stations stating their opposition to the proposed regulations. In response to the comments from various parties, the CRJs issued the instant Notice asking numerous questions concerning how the sound recording performance data is gathered by services, how the data is used by the collective, the impact of the proposed rules, and which services should be offered alternatives or exemptions to the proposed rules.

In order to properly respond to the Notice, CBI developed a survey² for Educational Stations that specifically addressed many of the questions in the presented by the CRJs. Additionally, the CBI survey asked some base line questions to determine the ability of stations to comply with the existing recordkeeping and reporting regulations. The survey’s results are consistent with our CBI’s previous comments:

“Unfortunately, CBI must report that it is aware that some stations have already ceased their webcasting activities because even the current standards were either too costly or too burdensome to maintain operations. CBI has also heard of stations that continue to stream despite the fact that they are unable to comply with the current recordkeeping requirements. CBI does not condone noncompliance, but the CRJs should consider that, for at least some educational webcasters, noncompliance might be the direct result of overreaching existing regulations.” Docket No. RM 2008-7, Comments of College Broadcasters, Inc. at p. 3 (January 29, 2009).

Many stations find the current regulations unworkable. Many stations are not aware of what the current regulations require. Some stations are not webcasting because of the current regulations.

pursuant to the criteria set forth in 47 U.S.C. § 396. Further, these Webcasters are exempt from taxation under section 501 of the Internal Revenue code, have applied for such exemption, or are operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

² The CBI survey was limited to stations that meet the definition of Educational Stations, *see* Note 1, *supra*, and was open to all such stations, even if those that are not CBI members. More than 130 stations responded to the survey. A copy of the survey questions is included as Attachment 1.

Almost without exception, stations report that the enactment and enforcement of proposed additional regulations could lead to the termination of webcasting activities, which, for web-only stations, would mean death.

It is clear from the survey results that there is a need, at minimum, to continue the provision that currently allows noncommercial Educational Stations, paying only the minimum fee, to report on a sample basis as opposed to the proposed census basis. The CRJs should further consider, as CBI has previously proposed, that regulations prescribing differing levels of reporting appropriate to distinct services is clearly indicated. That the issue remains controversial, even after many years of examination, is proof positive that seeking a one-size-fits-all recordkeeping solution is an unreasonable and unrealistic expectation.

The CRJs cannot conclude, without further examination, that the existing regulations for statutory reports of use have, in practice, proven to be practical for all services subject to the requirements. Before considering adopting further regulations for statutory reports of use, the efficacy of the existing regulations first must be assessed. CBI's research confirms its previous projections that the existing reporting regulations have, in practice, proven to be overly burdensome. Additional recordkeeping burdens – if applied across the board – are therefore unwarranted.

CURRENT REGULATIONS AND EDUCATIONAL STATIONS

A portion of the CBI survey was designed to ascertain Educational Stations' varying abilities to comply with the existing recordkeeping regulations, in order to provide a context to determine the viability of the proposed regulations.

The survey allowed stations that *are not* webcasting to participate in order to determine why they are not webcasting. The principle reason these stations cited for not webcasting was the existing recordkeeping burden; the royalty fees were a close second.

A sampling of open-ended responses from stations *not* presently webcasting music includes:

- “With our heavy reliance on physical media, automated logging is near impossible. We have a large DJ base (50-70) and getting all of them to log their music manually has been quite a task so far.”
- “Given the costs ... and the record-keeping burden ... I don't see it as a near term option -- but we continue to monitor the situation and continue to evaluate.”
- “The school supports our intentions to webcast, but until a more realistic model of reporting web streaming and a more realistic expectation of what we can be accountable for based on the number of listeners develops, we will be waiting to turn to streaming our regular programming.”
- “We webcast all of our intercollegiate hockey play-by-play broadcasts and some other talk programming, but do NOT webcast any music. The risks, confusion and possible costs associated with webcasting music are just not worth the effort.”

The survey asked stations that *are* currently webcasting about their ability to accurately report ATH. Fewer than 30 percent of the respondents said they were able to accurately report ATH.

The remaining respondents were split equally between those that replied that they could not accurately report ATH and those who “use a number that is reasonably accurate due to our limited bandwidth, user connection limits or similar limiting factor.”

These same webcasting stations were asked, “Is your station currently submitting to SoundExchange reports of use that include two seven day periods per calendar quarter that include artist, song title, album title, record label and ATH?” The responses indicate a significant number of stations are unable to comply with the existing reporting regulations.

Almost 20 percent of webcasting stations said they were submitting, but they were submitting reports that are not fully compliant because they had trouble generating the data. Fewer than twelve percent of stations stated that they were currently submitting compliant reports of use.

However, upon further scrutiny, even that twelve percent figure seems to be an inflated number. Those stations, when later asked what means they use to comply with the current requirements, responded with statements such as, “We do not currently collect ATH, we do have a way of logging how many listeners we have at a given time, but it does not log the length in which each listener listens,” “Our ATH is estimated below the limit based on the amount of streams our server can hold at one time,” “A. Not sure, our ’IT GUYS’ give me an estimate,” and “We report song titles, not ATH.”

Open-ended responses from stations that *are* presently webcasting music, in response to the question asking if they are currently submitting complaint reports of use include:

- “Yes, but I am not sure that we submit complete information. We submit the logs with artist and song.”
- “I just took over as advisor and am looking in to this situation. I suspect the student radio is currently NOT reporting because they were not aware of the requirements and if they were enforced would not be able to comply due to limited resources and ability to compile the data.”
- “We pay a minimum fee of \$500 to Sound Exchange with no reports. We have a tiny listener base.”
- “We haven't yet submitted reports, but have playlist archives of artist, song title, album title, record label. We can provide all information except ATH.”
- “Filed a report twice, but cannot keep up with the reporting requirements. If it becomes required, we may drop webcasting of music.”
- “We are a non-profit station and were under the impression that was not necessary.”
- “For the last 18 years, XXXX³ has been building a database for its music library (about 70,000 pieces total). We're almost done. That database lists artists by last name first, first name last.”
- “No, because we can't comply with the requirements and we will cease webcasting if this is enforced.”

³ Due to our prior interactions with stations, CBI expected that there could be a large number of stations that are not in compliance with existing regulations. In order to gather representative candid responses from the spectrum of Educational Stations, CBI assured survey respondents that responses would not be attributable. For that reason, all identifying information within station responses has been redacted.

- “Collecting data preparing for our first reports. Live 365 tracks it, but sadly we seldom have enough ATH listeners to qualify a report.”
- “No, must we be?”

The frequency and nature of such comments are stunning examples of the lack of awareness and understanding of the regulations by many Educational Stations despite efforts of CBI to educate stations through instructional sessions during each year at its annual convention, list serve discussions, web site material and personal attention provided to stations who need help understanding the regulations. This high level of ignorance is not a demonstration of contempt for the regulations or the lack of concern by Educational Stations, rather a reflection of the nature of Educational Stations. These stations are primarily, if not entirely, staffed and managed by transient students. Non-compliance predictably rises in proportion to the complexity of the regulations. CBI long ago anticipated such an outcome when concern was expressed regarding the extensive interim recordkeeping regulations adopted for Section 114 licenses, when contrasted with the simplicity of recordkeeping regulations for Section 118 licenses – though the statutory language requiring each is virtually identical.

CBI queried webcasting stations that said that they *are not* submitting reports of use because they could not supply all of the data required. These stations were asked to identify the data elements that are problematic. Provided choices included: Song Title, Artist, Album, Label, or ATH. Respondents were also provided the opportunity to select “Merging the data from multiple sources into the required format is too burdensome and we haven’t determined a resource to automate the process.”

Among these individual elements, 60 percent of stations not presently submitting reports of use reported an inability to determine ATH and 43 percent reported the recording label to be an issue. Ninety-seven percent said that merging the data, the combining of sound recording and listener data, was problematic.

Open-ended responses from webcasting stations presently not submitting reports of use included:

- “All logging is done via paper, and it has proven next to impossible to force student DJ’s to accurately log their music. Not without firing so many that we’d scare off all students from participating.”
- “We are on the air 24 hours a day, some of that time using automation, the rest of the time students DJs using all forms of playback media which we do not have a database for. We currently still use paper playlists when a DJ is on the air. Our music library is vast and contains 25 years of material from many genres. At a guess we have 70,000 to 80,000 albums and CDs. We do not have the means to archive all this material. Nor do we have the software to record the data required or to merge it with the data from our automation system.”
- “Limited resources and funds! We are web-only, and our budget for all needs is less than \$10,000/yr.”
- “A good percentage of the music that we play is fact from vinyl or students’ laptops so the information has to be manually entered in. Additionally, our automation software, winamp does not have the capability to record the amount of information that the soundexchange reports would require. We frankly do not have the budget to buy automation software and to pay for licensing. Our annual budget is about \$800 (not counting BMI/ASCAP licenses). Student DJs are also not receptive to manually entering the data.”

- “Our database has over 10K tracks, and getting volunteers to accurately update all of our records isn't currently feasible. Also, there is no available field in our automation system (iMediaTouch) for label data.”
- “There is no software to bring this together.”
- “The amount of manpower needed would be more than the station staff could contribute. The added cost of this burden is not something our budget could absorb.”
- “We simply have too many sources of music, much of it owned and collected by our volunteer DJ's. This includes very old jazz recordings, foreign recordings, obscure Texas music recordings and transcriptions [sic] derived from arcane sources, and local music recordings without a recognized label. Locating and merging data from all these sources would be extremely burdensome.”
- “[C]ombination of student labor and technological limitations.”
- “We play music from multiple sources (CD, AudioVAULT, LP, even mini-disc and DAT). If we were a single format station with EVERYTHING we play stored in AudioVAULT, the reporting process would be somewhat less burdensome. But, because we block-program specialty programming around our main format, it makes gathering the data incredibly burdensome. And, determining ATH is also time consuming and complicated.”
- “We have thousands of songs in our database that include some but not all of the information. We also have hours during the day when students bring their own music to play and have none of that information available. Finally, while we have data on who visits our website, we do not have a way to sync that information with the song that was playing at a particular time.”
- “Only about 60% of our audio is produced from computer-based sources. Even those sources do not include album in all cases, and none of those databases include label. We have a focus on local artists and many of their material we play is self-released. It is very difficult to track all of the data, to get students to compile the information on-the-fly while they are doing live shows.”
- “Even just [the] time that is required to gather this magnitude of data is immense. The biggest problem is the "label" requirement - we play our music mostly from CDs (not a digital format or automation) and the label is often extremely hard to make out on the back (if it is even there at all!).”

CBI asked stations that *are* webcasting if they are submitting reports of use that are incomplete because they cannot supply all of the required data elements. Nearly 20 percent put themselves into this category. Of that 20 percent, more than 70 percent reported that the problematic data elements were ATH and recording label, with 45 percent reporting that the album element was problematic.

Open-ended responses included:

- “The Student Media Systems Administrator has developed a program to automatically capture album and label information. In our first quarter 2009 report, for example, we were able to provide this information for 1095 of the 3251 entries for the sample period. To fully comply with SE's requirements, I would anticipate employing a student to manually look up and enter the information. Assuming a student took 3 minutes to complete one entry and 1500 entries needed to be completed (as some will be duplicates), paying \$7 per hour, that would cost WKNC \$525 per quarter.”
- “[O]ur automation software does not have enough fields for song title, album, artist, and label. This means we don't have labels listed if we generate an automated playlist.”

Translating such qualitative responses relating the extreme burden to many Educational Stations presented by the existing reporting regulations – much less the additional weight presented by the proposed new regulations – into a quantitative figure of the personnel and financial costs of compliance has been extremely difficult throughout the extended rulemaking process. CBI appreciates the CRJs’ desire for such specific information and sought to collect such data through our research instrument.

CBI again emphasizes that the costs associated with compiling and reporting *reasonable* reports of use – including the costs of labor, hardware, and software – must be proportionate to the royalties to be paid. For Educational Stations, virtually all of which pay only the \$500 minimum annual royalty fee, that threshold is not great. Any annual cost of reporting compliance exceeding a fraction of the \$500 minimum yearly royalty fee would not be *reasonable*, as is required by the statute.

In previous submissions, CBI and other commenters have noted the great variety of operational structures and equipment employed at Educational Stations; therefore, a corresponding variety of responses, projecting the costs of complying with existing recordkeeping regulations, was to be expected. Cost estimates provided by Educational Station respondents ranged from \$1,500 to more than \$50,000 annually – and included comments such as, “[I]t can’t be done given our funding and volunteer staff.” Station responses continue to be consistent with the information CBI has presented throughout these extended proceedings.

A sampling of cost estimates from webcasting stations presently not presently able to provide *any* electronic reports of use includes:

- “Bare Minimum we would need to pay a student assistant minnum [sic] wage (~\$8.00) for a full 20 hour week year round. That would be roughly \$9,000 (including Workers compensation costs). That represents approximately [sic] 25% of our spendable [sic] budget which we receive from our student fees.”
- “We estimate that it will cost us \$29,000.00 for the first year and \$7,800.00 per year after to reach and maintain compliance with the proposed rulemaking.”
- “\$30,000”
- “\$5,000 to \$10,000”
- “I found a service at [the] NAB [convention] that will host streaming audio and record ATH info for \$120 per month. It will not record that info for songs not entered in to our automation system (i.e. specialty shows.)”
- “[I]ncreased server capacity \$20,000; immediate student hours--for full-time in-putting of music plus regular 20 hours a week of digital in-put at \$10/hour would the first year be a total of: \$45,000 the first year and additional digital management expenses each subsequent year of \$10,000 or more.
- Our total budget for next year is under \$500. The idea that we can't even afford the streaming fee let alone the incredible cost associated with this record keeping is crazy. Soundexchange can't even send an invoice. They need to do some more record keeping before we should do more. I estimate that it would cost me at least \$3000 to do all this but the reality is even if we did do it, I do not have yet another person to oversee it.”
- “I can't begin to figure out how to come up with a number that would include all these factors.”

- “We estimate it would cost us an additional 20K to get into compliance. We don't have that much of a budget - as our current annual budget is only \$5000.”
- “Approximately \$600 annually for a web-based music logging system like Spintron. Plus \$1500 for a computer in the air studio to use it. It would require at least 2 man-hours daily from staff (at \$7.40/hr) to reconcile the logs and ensure basic compliance by student DJ's. Extrapolated to a year-round need, that's \$3500/yr minimum. Plus 2 to 4 hours a week by management (salaried, but extrapolate to an average of \$20/hr) to enforce compliance and generally assist, and that's \$2000-\$4000/yr. Figure at least 10% overhead as well. That means the annual total could be nearly \$9000/yr.”
- “In order to train and retain staff needed to comply with the high level of record keeping proposed it would cost our station more than \$10,000 per year in labor. Additional costs for hardware and software can be estimated to be at least \$3,000.”
- “\$10,000+/yr”
- “It would most likely cost several thousand dollars to bring us into compliance - we would need to create a database of over 8,000 CDs in our library, vinyl, and restrict our DJs from bringing their own music (VERY common in our station). Compliance would most likely limit the creative voice of our station.”
- “[P]riceless, we are an all-volunteer station. If we scare the volunteers away with too much work we will have no station.”

A similar sampling of cost estimates from webcasting stations presently not able to provide fully compliant reports of use, to become fully compliant, includes:

- “[O]ur playlister program has been developed by programmers at the station and works pretty well for generating reports, although not completely accurate. I think to figure out accurate ATH you'd be looking at computer upgrades and numerous hours of labor/programming. Also compiling the reports takes time. If you look at about \$10/hour charge and approximately [sic] 40 hours of work to get the final tweaks completed and a few hundred dollars for software/computer upgrades the total estimate could be around \$700.”
- “30,000 dollars”
- “Unsure. It is already costing us about \$400 a quarterly report as is. It would cost at least the same in labor plus additional software and probably a hardware upgrade at this point.”
- “Currently we are using Live365.com to broadcast our signal. I get everything we need in the data except the Label information. I don't know why they cannot collect the data from what I send them but the burden of compliance is getting to be a lot more cumbersome. I am paying \$125 per month for this information. I believe it will go up dramatically if asked to provide more data. If I did not use this service, we would have to go off the air because we could not provide the data accurately with the resources we have.”
- “\$5,000 or higher”
- “We would have to hire another staff person at least part-time to try and comply. This would cost us at least another \$12,000.”
- “Estimated costs: between \$1500-2000. The overall cost to upgrade our hardware, software and the labor involved in connecting all these elements is too much for our station's budget. This is something that we can work on slowly, but an all-at-once expense is probably not workable.”
- “XXXX has discussed the creation custom software to accurately comply with the proposed rules with other stations in the area. The cost of our share of the software will be \$7,500, plus the cost of a new server that would be able to run it: \$2,500. This comes to \$10,000. At a more minimal level, we may be able to get a

computer programmer to write a simpler version for us specifically for the new rules, which would probably cost \$2,000.”

- “\$5,000 per year”

CBI renews the call first presented in comments in response to the prior NPRM that the CRJs compel SoundExchange (“SX”) to demonstrate which portion of Educational Stations have been capable of submitting reports of use; only through such evidence will the CRJs be able to determine whether services have been able to comply the existing regulations, before considering enacting significantly more burdensome requirements. SX is the only entity with possession of this information, and therefore is uniquely able to provide it to the CRJs.

CBI has maintained throughout the proceedings to determine recordkeeping and reports of use regulations that the current requirements are problematic for its members at Educational Stations. Clearly, not much has changed since CBI first stated that case. While this evidence alone should be sufficient to dissuade the CRJs from universally applying its proposed new regulations. At minimum, Educational Stations must be exempted from the proposed changes; the data collected strongly suggests the need to revisit and relax, at least for Educational Stations, the present statutory reporting regulations.

PROPOSED CHANGES

In the Notice, the CRJs asked for information concerning the “number of small entities that would be impacted by the proposed rule making.”⁴

CBI’s survey asked Educational Stations that are currently webcasting if they would be impacted by various portions of the proposed rules. The results for these stations are as follows:

Educational Station webcasters that would be adversely impacted by the proposed census requirement:	92%
Educational Stations that would be adversely impacted by the proposed Actual Total Performances (“ATP”) requirement:	94%

The prospective adverse impact on Educational Station webcasters is not insignificant; only 16 percent responded that the proposed census reporting requirement would *not* cause them to stop streaming. The stations’ open-ended responses are strikingly consistent with the issues discussed above relating the difficulties created by the existing sample reports, magnified exponentially by the increased volume. Because Educational Stations find the current reporting requirements to be extremely labor intensive, a prospective transition from sample to census reporting does not scale in a manner similar to other webcasting services. In the interest of expediency, we will not now present a sampling of these open-ended responses, other than one concise comment that succinctly captures the sentiment: “It costs to have someone process the data.” The lesson to be gleaned from this simple comment is that, because generating reports of use is very labor

⁴ Notice at 3.

intensive for Educational Stations, a dramatic increase in the amount of reporting required, as has been proposed, would also result in a dramatic increase in the cost of reporting for Educational Stations.

Only six percent of the Educational Station webcasters responded that the proposed ATP reporting requirement would *not* cause them to stop streaming. Explanations provided reconfirm the same points CBI has previously submitted, and include:

- “We do not believe it is possible to accurately collect this data given that we are primarily a live broadcast station that simulcasts its broadcast on the Internet. The timing of the start and end of songs would not match server records because song data is entered manually when we are live. Various errors in entering information would exaggerate time matching errors that would otherwise normally exist already due to the programming and webcasting services being on separate systems in different locations and maintained by different parts of the school.”
- “Our university is not equipped to collect user data in this manner. Right now, our stream is not even set up in a way that it can count how many people connect to our website to listen to the station. Everyone who is tapped in to the school’s bandwidth is counted in one big lump sum. Accommodations will not be made to set up a separate stream/server for our station so we can collect ATH or ATP data. We recognize that this situation will sound strange to some, but it is the reality for us with no change possible unless we switch to an outside provider to host our stream, which would cost money we don’t have in our budget.”
- “There does not seem to be a product on the market that would merge our separate systems, count and organize this information. With a volunteer student staff running the shows, we do not have the means to provide this info. This requirement and costs associated with developing a product that would allow us to do this (on top of annual webcast licensing fees) will most likely be cost prohibitive and may force the station to discontinue Webcasting.”
- “We could comply if there was a software solution that would automate the process -- and if that software was affordable to a station already coping with deep budget cuts in the soft economy.”
- “As mentioned, the station has no way to reliably collect this data. Being that we are a non-profit station that operates on a shoestring budget, there is no way we could finance a project that would allow us to become compliant with these new rules.”
- “Same as previous answer. Staffing = impossible to devote the time. Technology = not available at this time. Cost = not affordable to a small educational station. Request = above and beyond what's reasonable.”
- “This would negatively affect our station because we currently do not have the software or the technology that allows us to accurately log each connection and the length of each connection. As I said before, we do have a way in which we can monitor how many connections are present at a given time yet this does not give us the information of how long each individual connection is connected.”
- “ATH is possible because the data is general. ATP requires specific data by the song which is impossible for us to collect at the current time. We do not use a commercial service for our webcast that might be able to provide this data. I can't even imagine how we would be able to find this data, but I am guessing it would require the creation of another piece of in-house software. We do not have money to pay people to make our in-house software. All of our station specific software was programmed by DJs and alumni free of charge. It follows that if we couldn't find someone from the station community to make ATP software for us for free, we would not be able to comply with the proposed change in reporting requirements.”
- “Since we play our music from CDs and simply simulcast our air signal to the web, it would be absolutely impossible to accurately track the number of listeners during a certain song - the hardware and hours required are WAY beyond the means of any small college station such as ours.”

- “The station currently enters playlist manually and also plays non digital media and is not automated. I do not know how we would collect the information about each device connected during each song.”
- “It will be too much of a hassle, and too cumbersome to continue operating. As a college station, this isn't a money driven vehicle, so the expense and the effort for such detailed reporting, simply won't be worth it.”
- “We would attempt to develop software to fully comply. It is unlikely that we would succeed, but we would probably be able to generate partially accurate data (i.e. accurate when the automator is running, inaccurate when manual data entry is required). We would then have to determine whether to submit this data or cease webcasting.”
- “It would be extremely difficult to track who is connected to the webstream during which set of songs because of the delay associated with our webstream server. This delay is expanded when there are multiple people connected, therefore, it will be near impossible to tell who is listening to what song.”
- “Our software is not equipped to produce this information. We would be guessing at best.”
- “At this point we would not have the ability to track this data. We are unaware of how to go about doing this and any cost that would be incurred would be more than the station could afford.”
- “No one in the station has the expertise to do this. I have consulted with our IT people and even they do not have an answer to how to do this.”
- “We do not have any permanently employed personnel to handle any kind of record keeping of this nature. Our people are student volunteers who frequently turn over. We can barely keep our technical [sic] and program logs in order. We can barely keep an FCC Public Inspection File up to date. We cannot handle ANY additional regular reporting tasks or expenses.”
- “As mentioned before we are a completely student run station. Our history involves peaks and valleys of involvement. It can not be guaranteed that there would be a student dedicated to these requirements each semester. In addition, our software, to the best of my knowledge does not keep records of ATP data. Working on a shoestring budget we cannot afford additional software.”
- “We don't have the technology to track this. Right now our playlists are all done by hand; there's no way for us to keep track of how many connections we have for how long during a specific song.”
- “No means of linking listenership to our stream to any form of our logs, and no way to accurately reconcile the various logs enough even if the webstream logs could be linked.”
- “Obviously finances play a part, in that whatever the cost to ‘buy’ compliance is would far exceed the \$500 paid to SoundExchange. The burden of reworking XXXX's 18 year work-in-progress data base and library filing system would be crippling on the surface, and cause many underlying problems stemming from reporting and filing ambiguities during the years-long transition from current system to SoundExchange system.”
- “This is an impossible request. We broadcast from native media and our playlists do not have accurate start or stop times. Our current ATH calculations are not connected to our song data calculations and the fact is that there is not a possible solution to get ATP.”
- “I don't believe our connection log and song playlist are (or even can be) connected to give this info. **WOULD SOMEONE LIKE TO DONATE THE STANDARDIZED HARDWARE AND SOFTWARE NEEDED?**”
- “I am unaware of software for this purpose.”

- “At present, our technology is incapable of [sic] generating ATP data, and it is difficult to know if such technology [sic] is even possible during periods in which music playback [sic] must be manually logged. If such technology is possible (remote audio recognition system/database) its likely the cost of acquiring [sic] that capability would be prohibitive, given our \$30,000/Yr total operating budget.”

Eighty-Five percent of Educational Stations not currently streaming reported they were considering starting or restarting webcasting. The biggest cited obstacle to these plans was the current recordkeeping and reporting obligation. Ninety-four percent of Educational Stations considering starting or restarting webcasting consistently responded that each the proposed requirement to report ATP, the proposed requirement for census reporting, and the proposed requirement for monthly reports of use within 45 days of each month’s close would adversely affect their decision to webcast; however, as with many issues surrounding both the existing and proposed reporting regulations, CBI has encountered rampant misunderstanding of the requirements. Only *one* prospective Educational Station webcaster reported that its plans would *not* be negatively impacted by the proposed regulations; it is unclear if that respondent was fully cognizant of the requirements. With that in mind, it is quite likely that 100 percent of stations would have responded that their plans would be adversely affected by each of the individual proposed changes.

The CBI survey asked the stations currently streaming if the proposed census reporting requirements would cause them to stop streaming. Only 16% responded that it would not.

AUTOMATION

The Notice asks a series of questions concerning the use of automation systems, possibly with the mistaken belief that by merely adding automation Educational Stations’ recordkeeping and reporting problems would simply disappear. Perhaps this belief is formed as the result of comments filed in this and previous proceedings concerning the ability of large commercial webcasters to easily comply with recordkeeping regulations because they are automated. This, however, suggests that all automation systems are created equally and that the use of automation systems is universally appropriate for all services.

Forty-eight percent of the Educational Stations responding to the CBI survey report not using automation for any portion of the broadcast day. Of those that do use automation, 69 percent do not use it 24 hours per day, seven days per week. Only 14 percent of responding Educational Stations reported using an automation system 24 hours per day, seven days per week.

“Automation” systems are quite diverse in cost and sophistication. Further, automation systems for radio stations are designed differently than those for pure webcasters. Moreover, some “automation systems” employed by Educational Stations are not systems designed for radio at all, but have been adapted for such use by creative students operating on shoe-string budgets. For example, free applications, such as winamp and other simple music players, designed for home use are being used by some Educational Stations due to financial constraints; such software provides absolutely *no* functionality to contribute to the statutory reporting requirement.

As noted in previous CBI comments dating back to 2002, even fairly sophisticated automation systems do not solve the issues associated with the current regulations, much less those additional issues raised by the Notice – and despite the intervening years since reporting regulations were first explored, many of these systems have not been sufficiently modified to make any significant difference. Many automation systems developed for broadcast radio do not offer fields to enter either album or label. Some automation software contains field length limits which prevent the input of unabbreviated information.

For pedagogic reasons, some Educational Stations deliberately program a mix of automated and live-produced programming in order to expose students to the varied practices employed in the professional broadcasting workplace.

Further, automation systems at Educational Stations are not consistently employed on a continuous basis; very often automation systems are used seasonally by Educational Stations to minimally keep the station on-air during academic break periods, in order to meet the F.C.C.-imposed minimum operating schedule.

Some Educational Stations have not employed automation systems because of a combination of the cost of acquiring a reliable product, the lack of available expertise to develop and implement low-cost alternatives, or the intense labor demand necessary to implement and maintain such a system.

Perhaps most disconcerting of the questions presented in the Notice was one associated with the CRJs' automation questions: “[D]oes manual programming occur simply as a matter of creative choice?” Implicit in this deceptively uncomplicated question is the notion that Educational Stations that play recordings from native media rather than making use of computer-based systems do so merely as a minor quirk. Educational Stations that choose to perform recordings from native media as part of live-produced programming do so as the very fundamental essence of what makes the particular station what it is. The choice is anything but simple; it is *core* to the identity and purpose of many Educational Stations. Should the wrong-minded argument be made that Educational Stations ought to be expected to adopt such automated systems as the “cost” of availing themselves of the statutory license, the very foundation of copyright statute would be perverted. CBI respectfully contends that copyright regulations should not be about forcing creative choices; recording artists benefiting in part from royalties paid under the statutory license should be the first to see that this would be fundamentally and morally wrong. Imagine what the response would be if the CRJs proposed a rulemaking suggesting that the use of an entire octave of musical notes is simply a matter of creative choice, and to expedite licensing regulations the use of the C# is hereafter prohibited. The statutory license should not force any webcasting service to substantially reshape its content just to be able to pay the statutory royalty. Congress certainly did not intend such an outcome, even though SX might argue so. Where Congress intended to restrain content under the statutory license it already specifically did so in a sharply limited manner, and it did not do so merely to expedite royalty distribution.

A sampling of the abundant and diverse philosophically-based Educational Station responses adverse to the use of automation includes:

- “Automation would make reporting easier but it eliminates the operation of authentic broadcasts in which there is a live DJ who gains a connection with the audience. In an era where music is easy to access, it is essential for internet radio stations such as ours to produce a product that makes people want to stray away from their iTunes library and tune in to hear something different whether it is new music or the on-air personality. Live DJs add a certain flavor to accessing music. They speak to the audience and provide information and entertainment that is not accessible through sorting through one's iTunes library.”
- “We are a college station that serves our community. We have a small range signal, so the vast majority of our potential audience is connected to the university. We do a lot of live interactive programming with audience discussion and experts on the air. Our student DJs are given a great deal of freedom in selecting their own music. and each show has its own feel and personality.”
- “‘Creative Choice’ would apply to ANY operation that programs in any way, would it not? XXXX uses a digital audio database and automation system to cover time when LIVE student operations are not available. If automation systems would be the opposite of ‘creative choice’ then would that not mean that virtually all commercial radio operations are bereft of creative choice? XXXX is an operation of XXXXX College. We serve the students and community associated with the College. Our operations incorporate Communication Department courses and students. The development of radio shows, including music beds, promotional materials and individual programs are a critical part of the learning process for students. To simply sit them in front of a pre-programmed computer system would negate the need for our operations and be counter to our educational mission. It can also be shown, by many polls and stock valuations, that this idea of singular automated playlists has destroyed listenership in commercial radio. Public Radio stations are seeing increases in listenership by exercising ‘creative choice’. Clearly the freedom to develop outside of a limited playlist is of value in the educational process which IS the central mission of educational radio, which is, in turn, a REQUIREMENT of the FCC licensing process distinguishing that class of station.”
- “You cannot be fully automated. There needs to be that DJ-Listener interaction. That is what radio is all about!”
- “Automation is not radio. Automation is soulless.”
- “Why buy original works of art when you can get a copy? Why drive a stick when there is automatic? I believe that ‘creative choice’ is what makes college radio so powerful, and the lack of it is what is hurting mainstream.”
- “We are not, by our mission statement, a top forty radio station with a shallow playlist. We are ‘XXXXXXXXX’s Only Alternative’ where listeners will hear music not available from any other station at any time. Not enough staff members, volunteers, time, or computer memory is available to rip the enormous variety of music into the system that we offer to our audience. To cite the problems confronting us: one of our two hour, weekly shows is drawn from the all vinyl library of over 5,000 jazz albums, many of them first pressings and rare recordings. This library is owned and stored by the volunteer community DJ. At an average of 45 minutes of music per album, this represents 225,000 minutes or 3,750 hours of music. Our system records music from analog only in real time, so it would require 468 eight hour days just to store the music for this one single show. Many of these songs from these albums may be played only once in several years. It is not time or cost effective to input all of them into a computerized memory base. Incidentally, this show is considered [sic] the best jazz show by any radio station in XXXXXXXX.
- “Because there's no point to having radio stations if its [sic] just an automated system, and not DJs playing the music. Otherwise, why the xxxx should people listen?! If there's no sense of personality or human character in the listening format then it would make sense to just listen to a CD or iPod or anything other than radio.”
- “We will not limit ourselves to an easy means of operation just BECAUSE it is easy. Sure, it would make everyone's life simple, but there's also a lack of creativity in this form of simplicity as far as we are concerned. Not all listeners want to hear all music only. Plus, to automate music 24/7/365 on all stations would be, simply, putting more machines to work and less human beings. Thus taking the humanity out of radio. Making radio less personal, less friendly, less fun, and certainly more cookie-cutter.”

- “The joy of College radio is the unique DJs, their personalities, their choice of music and the ‘fun’ that comes with listening to College radio.”
- “A fully automated station would really cease the choice of programming for the DJ. The selection of the music played - often occurring [sic] in a participatory fashion through requests by listeners.”
- “XXXX is a student-run experiential learning environment that focuses on diversity and education. Our format transcends many genres appealing to many types of listeners. Simply, creativity cannot be automated, it is spontaneous.”
- “Non-commercial, educational stations provide a wide variety of programs, and our program hosts bring in lots of material on a variety of formats. You can't automate vinyl. You can't provide innovative, creative programming to your listeners by limiting all program hosts to material on an automation system. Why don't we use automation? Because we have live humans doing live, interactive radio.”
- “We philosophically disagree with the premise of acquiring equipment that does away with human beings.”
- “It has no soul.”
- “All of XXXX's music is hand picked by DJ's and played live in real time by a human being from the original medium. Live DJ's have the ability to take "suggestions" or requests from listeners, and interact with their audience. Live DJ's can also do ticket giveaways for local performances, which often provides exposure for local musicians and community events. Automation is the diametric opposite to the localism that the FCC is trying to encourage.”
- “Automation goes counter to the philosophy and intent of our student-run station. We want live bodies behind the mics playing music they like and can talk about. We are COLLEGE radio, which means we're committed to continued learning for student, faculty, and community listeners and student and faculty staff who are on staff.”
- “In our opinion, automation defeats the purpose of college radio. The station is an outlet for students and community members to share our passion for music and performance with our listeners. Automation does not provide our listeners with what they want (live disc jockeys).”
- “Programming is done by 56 different people every week with over 100 possible DJs filling those 56 spots. Each DJ is their own de-facto program director and they often do not decide what to play in advance of playing it. We play from native media. Our music is not on a computer. Part of the value that we provide is that we use the local community (and students are a part of the local community) to provide relevant content. Part of the beauty of college radio is that it can be inspirational and can be based on listener request. Since the FCC is concerned with localism part of the valuable aspect of college radio is that they use the local community to create programming. And this is a service to the community, as music is culture.”
- “We play new, independent and local music, primarily--from many formats, CDs, MP3s, etc., as well as from our DJs private collections. We don't have the time to put it all into a computer. And, we don't repeat (light, medium, heavy rotation) because we have too much good music to play. Many of our local artists do not even have recording contracts and bring their original recordings in to us.”
- “We choose to use live DJs because it is at the heart of our station's mission. As a student-owned and operated station, XXXX prides itself on entertaining, progressive programming that cannot be matched by some automated system.”
- “Because that is what makes radio fun. Playing out of print stuff, stuff of the ipod or laptop or cassette tape or a live set from a local band. It's not 'creative choice,' it's the reason the station exists!”

- “Our programming is very diverse and seeks to represent artists from myriad genres and media. Automation would require digitizing all source material at an extremely high labor cost. Also, the on-air mix is determined to a great extent by live requests by listeners. This local interactivity is a key component of relevant radio programming.”
- “[B]ecause we are a college radio station and college radio is synonymous with experimentation across various mediums when it comes to djing [sic]. If we used automation, the ability to be a college radio station would be lost.”
- “Automation almost completely defeats the purpose of our station. We pride ourselves in being a 24/7, 365 (or close thereof [sic]) station in which there is always a DJ there, selecting their choice of music. This makes us a unique and valuable addition to the radio landscape. Not having automation gives us character and an element of unpredictability. It also gives our station a voice, with an actual human speaking station IDs, PSAs, and track announcements each hour. Automation to us is a last resort if we are otherwise unable to broadcast 24/7, 365.”
- “XXXX prides itself on its free-format programming. The success of free form radio depends completely on the DJ that is programming a particular show. In particular, this means that the DJ has access to every single part of our 70,000+ piece music collection (plus anything they bring in themselves) at any given moment during their show. Automation restricts the essential creativity involved in programming a high-quality free form show. In addition, we have neither the time nor the money to digitize our entire music library.”
- “We use live DJ’s because live radio sounds better than i-Pod radio. We are also a university and the radio station is part of the Department of Communications and students are on the air as part of their curriculum.”
- “The reason why we still use live DJs is because we like to have the authentic feel of having a live person within the station and talking one-on-one with the audience. It is a creative choice because with live DJs our broadcasts become more authentic and contain more personality. Also we like to utilize our station as a place in which students who are looking into careers within broadcasting can gain experience.”
- “We have live DJs at our station because it is one of the most valuable experiences we can give to the students that make up XXXX. We also do not have the infrastructure to rapidly and effectively digitize all of our regular-rotation content. As such, our live DJs play almost exclusively from CDs and vinyl.”

Educational reasons cited by survey respondents for not employing full-time automation include:

- “Our station is a college radio station and uses students who are interested in broadcasting as live DJs. Our station is provided as both an activity and as an educational lab environment.”
- “We are an educational institution, and believe that our board operators need to learn manual operation of station equipment, as well as the automation systems. Additionally, many shows don’t lend themselves to automation, and require manual playback of music and other content.”
- “The judges are unclear on the purpose of media programs in colleges. Automating the radio station 24/7 would defeat the educational purpose of the operation.”
- “We use students as live DJs for about 40-50 hours of programming a week. This is viewed as an educational practice and in some cases the extension of broadcasting related courses.”
- “As an educational activity, we encourage live extemporaneous presentations on the air. Much of the music we play is not in a digital format because we prefer vinyl in some cases and because our system cannot store it all, nor do we have the resources to in put it all.”
- “We use automation on a limited basis. However, our mission is pedagogical, and there is no educational value to running an automation system. We also play many different formats of music, some of which cannot

easily be entered into an automation system. Finally, the time and costs required to automate our library 15,000+ CDs and records are prohibitive.”

- “‘Creative choice’ it is not. It is an educational requirement that station operators need to be proficient with manual operation, as well as automated operation.”
- “Educational value of providing experiential training to our ‘live’ deejays. First and foremost this is an education endeavor. There is little education value to setting a station to the radio equivalent of playing tunes on an iPod auto-play.”
- “XXXX exists to serve the students of XXXXXXXXX State University, in part by providing them practical experience in broadcasting. We operate probably 50% using our AudioVault automation system and 50% using CDs, LPs, in-studio performances, and MP3s from the DJ's computer or iPod. About 40 hours per week is ‘specialty’ programming where the music is not available via our automation system. I believe anyone who believes not fully automating a radio station is merely ‘creative choice’ needs to visit a college radio station.”
- “Again, part of our educational mission is to train effective communicators. There is no substitute for being live on the radio to sharpen one’s presentation skills.”
- “I want to go live so students have an opportunity to develop as broadcasters, not what could be just an automated, if not computer-generated voice. This level of broadcasting is about education, not creating an automated system that offers no educational purpose.”
- “Automation does not fully enhance the learning experience required for students and staff.”
- “Automation does not teach students about having an air-shift or producing a good show. College radio is thought of as a playground for kids playing music. At our station we train people to be broadcasters. Automation teaches jocks nothing, so we don't use it. We also can't afford it. Our station is student run and does not get much support for new technologies.”
- “Part of the educational experience for the students.”
- “We use some automation but try to give students some leeway and self determination as part of their education. Moving to totally automated play list would be counter-productive to our educational mission.”
- “We believe the educational benefits of having live DJs outweigh the convenience of running automation. It makes for a higher quality broadcast as well.”
- “Educational value of providing experiential training to our "live" deejays. First and foremost this is an education endeavor.”
- “[C]ollege broadcasters need live, on-air experience.”
- “As an educational license[sic], we expect students to learn how to operate a broadcast facility.”
- “We are trying to learn here.”
- “Our institution is a learning environment. Part of learning is using your creative endeavors. We also want to provide our listening audience with a variety of material that isn't found on the commercial spectrum. This would be very difficult to fully automate and would diminish much of the creativity that makes our station unique.”
- “There are many reasons we don't automate 24/7. The first is we strive to make the station a learning environment for the students, and on-air is part of it. Another reason is that by using live DJ's we are able to

stay in touch with the listeners and provide a better product to the community. The next reason is the added cost that the station would incur by adding all the music we have on LP to the automation system.”

- “Our station is, among other things, a student activity...something fun for the students to do. Sitting there while a computer plays music is not fun.”
- “Cost, experience for students to have a hands on experience and to maintain the educational value of programming that goes beyond the automation of a few staff members and includes the community of license in regards to material, engaged listenerships [sic] and current model of station.”

Survey respondents provided a number of comments explaining why the full-time implementation of automation systems would not be the perceived solution to the recordkeeping controversy, due to limitations of the technology:

- “We have specialty programming 8 to 17 hours a day where the community volunteers play the music for their shows which is not in our system. Our system could not handle all the genres we play.”
- “Because overall we have about 15 different genres and as a result we do not have the storage space for all the music from each genre. our main format is on the storage system and that’s it.”
- “Automation does not simplify anything. It places an additional work load burden on the volunteers. It does not format the reports and merge them with ATH or ATP data.”
- “Even if XXXX did use automation 24/7, our automation system does not provide album and label information.”
- “We do use automation, however, that does not mean that it creates accurate reports. Plus the combo of live and automated shows, still means that we will not have accurate data.”
- “Our automation software [winamp] does not record the information of the amount of songs played, amount of listeners, or the album from which it was from. It does not either parse the information (of song title, track number, year, artist, and album title) into an exportable program or script.”
- “Automation systems can produce (in many cases) reports of airplay based on their internal databases. MOST automation systems do NOT have the information fields required for such reporting. Although program upgrades may add those fields, they DO NOT populate the missing data! Even programs like iTunes do not supply the necessary data for census reporting. It’s simply NOT reasonable to expect the burden to fall on non-commercial educational operations when HUGE COMMERCIAL operations like iTunes don’t even offer it. This is another example of the utter lack of understanding from a group of people that actually believe the record labels give music to radio stations out of some bizarre altruistic bent and not because the airplay drives sales. Payola would not exist if airplay did not drive sales.”
- “Because we have a library of 35,000 CDs and 20,000 LPs and ripping them all to a computer is not feasible. Any less compromises our broadcasters ability to pull from the full library. This requirement would compromise the quality of our broadcast.”
- “While we do use some form of automation for portions of our broadcast day, our programming (like most student-run college radio stations) is free-form and DJs are free to pick and choose the music that they would like to play at any given time. Our rudimentary automation system is also not capable of generating the data output (at this time) that would be required to monitor the song currently playing. While this data is logged (manually), it is not time-accurate to the minute (much less the second) and we would not be able to realistically create a merged output that created number of listeners per actual song. Such a requirement is antithetical to the entire operating premise of most college radio stations. If this were, in fact, enforced, we would more than likely cease streaming our over-the-air signal than make drastic changes to our operation in order to comply with webcasting”

- “We use AudioVAULT in live DJ/assist mode. Not all the data required for reports of use is entered into our system, so it is very complicated to provide accurate reports of use. And, AudioVAULT is only used for our main format, which comprises approximately 65 percent of our broadcast week. The remaining 35 percent comes from CD, vinyl and other sources.”
- “We do use automation for about 35% of our programming, but the balance is programmed by a variety of independent programmers that represent a variety of diverse ethnic, racial, and cultural groups playing music from vinyl LPs, CDs, and cassette tapes from those hosts private collections. There is no way to convert that material to digital format for inclusion in an ‘automation’ system.”
- “We use a limited automation system when we are not live. the automation system does not collect information about songs played that we could use to compile census reporting. MOST of the day we are live and play music from CDs selected by the student DJs.”
- “Their reasoning is not grounded in real-life limitations in finance, software, and manpower.”
- “XXXX has a collection of approximately 30,000 pieces of vinyl with no cost effective way to digitize them. Though we will shortly begin the process of digitizing our 50,000+ CD collection, this project is estimated to take a minimum of three years. For XXXX, automation would mean losing access to a record archive that spans decades, has endured natural disasters, and is one of a kind. Even if XXXX were to cease use of vinyl, automation is something that could not even be considered until 3+ years down the road when our CD collection has been moved to the digital domain. The reality this is just the tip of the iceberg. There are myriad other reasons, both technical and otherwise, that would prohibit XXXX from transitioning to some sort of automation in the near future.”
- “You assume incorrectly. We do use an automation system, but it does not generate our playlists. Playlists are entered by individuals who might play vinyl-only releases (which can't be added to automation), tapes (which can't be added to automation), or other media that are not in the automation software. Our encouraging of DJ identity will essentially be punished.”
- “To the extent of my (limited) knowledge, our automation doesn't track when or what it plays. Again, our station exists primarily FOR live DJs.”

Financial considerations were also cited by some Educational Station respondents as the reason for not employing some type of automation system:

- “Cost, no one to support such a system.”
- “The price of operating and updating such systems as well as the computer equipment required to operate them exceeds our yearly operating budget.”
- “[T]he expense of automation is high, plus we believe that college radio is an educational experience for our students to explore music in all formats and from all places. [W]e believe that artists intend their art/albums to be more than just the music files that might end up on a computer. [W]e want our dj's playing vinyl if that is the format they choose. we want them to be able to search through shelves of cd's to find things that they have never heard before or maybe forgot about. you can't get that same aesthetic or immersion by just looking at a list on a screen.”
- “Limited Financial resources”
- “Automation costs money and is completely opposed to our programming philosophy. Part of being a local, community driven station means being able to actually speak to the community. You can't do that if you're not live. We also do not have a digital library; most of what we play is rare, and frequently only found on vinyl.”

- “We can't afford it, and we don't want to lose the ‘human’ element of the broadcast and our in house feedback system.”
- “We are considering upgrading to automation but cost is a impediment. We are a low-budget station.”
- “No money to purchase such item.”
- “We lack the funding to go to automation. It would also be a huge burden to load all the music we play on to a hard drive(s), since some of it is still on vinyl or comes from individual private collections. We also believe that automation would diminish the hands-on learning that takes place at our station.”
- “We have been able to incur the expense and the time to train 100+ students and to replace the hand-typed and emails methods of our own internal playlists.”

In sum, any expectation that Educational Station webcasters universally adopt the full-time use of automation systems in order to expedite statutory reports of use is overly optimistic. Such an expectation would also impinge greatly on the very nature of many Educational Stations, including unacceptable encroachment into the creative process and damage to pedagogic purposes. Even if this were not the case, automation systems in use and currently marketed do not offer a silver bullet that would solve all of the problems the current regulations pose, much less the proposed new regulations.

REPORTING PROCESSES AND TECHNOLOGIES

In the Notice the CRJs ask a number of questions concerning the cost of obtaining technology that would permit services to comply with the proposed census reporting, including an explanation of current practices utilized by services.

To understand the issues involved the CRJs must be aware of elemental dissimilarities between the operations of various classes of webcasters. Comprehension of these underlying differences is critical in the evaluation of any claim that a certain technology or product will satisfy the requirements in the proposed regulations – or, for that matter, whether a certain technology or product satisfies the requirements of the *current* regulations.

First, the CRJs are reminded that, unlike pure webcasters whose technical systems were designed particularly for webcasting, services built on the traditional broadcast radio archetype – such as Educational Stations – employ operating practices predating webcasting that are not likely to operate using tightly integrated systems. The types of operating structures utilized by Educational Station webcasters are characterized by two *discrete* processes: 1) program generation, and 2) program distribution. To generate statutory reports of use – either as required under the current regulations, or as contemplated in proposed regulations – disconnected data generated by each of these processes must be coalesced: sound recording data must first be generated and then married to *separate* audience data.

Putting aside for the moment the difficulty for Educational Stations to generate the sound recording data, the task of accurately associating sound recording information with streaming server data changes dramatically under the proposed regulations in comparison with the existing

regulations. For example, Educational Stations that now pay only the \$500 minimum annual fee presently have no need under the regulations to be able to determine or report ATP. These stations instead are permitted to report ATH. The reporting of ATH is not associated with the performance of any particular sound recording; the reporting of ATP is inextricably intertwined with the performance of each and every sound recording. Therefore, the proposal to require reporting of ATP materially increases the burden on Educational Stations. An Educational Station manually generating sound recording data might be able to comply with the existing regulations; however, time is of the essence in order to report ATP, so manual entry of sound recording data would no longer be feasible. Similarly, a technology or product now able to assist with the generation of ATH-based reports of use should not be assumed to be equally effective in the reporting of ATP, or even to be adaptable to that purpose, because ATH is not time or sound recording specific, where ATP requires both data elements.

Second, remembering the two discrete processes, *some* technologies or products assisting with the generation of sound recording performance data can be integrated with *some* technologies or products assisting with the generation of audience data. Because a particular technology or product is represented as providing a “full measurement package” does not make that claim true. For example, some technologies or products generate *only* audience data, relying on some external source for sound recording performance data; therefore, such a audience data product or technology must be *compatible* with the source of the sound recording performance data. Therefore, the products or technologies claiming to provide each of the two types of data cannot be evaluated independently; if a proposed product or technology is incompatible with an Educational Station’s existing infrastructure, the cost of replacing *both* must be considered.

Third, that some Educational Stations are able to generate reports of use on a sample basis is no indication that those same stations can *reasonably* generate census reports of use. As CBI demonstrates, *supra*, the processes with which compliant Educational Stations presently struggle to produce reports are extremely labor intensive. By extension, a commercially-released technology or product designed to support ATH-based reports of use – likely the majority of any now available – quite possibly will not suffice for the generation of reports of use that include ATP.

Fourth, the cost to Educational Stations of acquiring or replacing either or both sound recording performance data technology or products and audience data technology or products – plus the value of labor expended to produce reports of use – must be considered in the context of the \$500 minimum annual royalty paid by most, if not all, Educational Stations as their entire payment obligations. Any annual cost of reporting compliance exceeding a fraction of the \$500 minimum yearly royalty fee would not be reasonable. For a service with a much larger royalty obligation than for Educational Stations, a projected expenditure to come into compliance with the proposed regulations might be considered modest; the identical projected expenditure to come into compliance with the proposed regulations could be unreasonable when placed in the context of royalties paid by Educational Stations.

In response to the question posed by the CRJs in the Notice, “What technologies, if any, are currently employed in complying with the current requirements?,” CBI asked those stations that claimed to be submitting reports of use, “a. How you calculate ATH, including the software

used, who provides it and the cost of the software. b. How you gather the song data elements, including artist, song title, album and label, including the software used and the cost of the software. c. How you put this data into a format that meets the requirements, including the software used and the cost of the software. d. Please estimate the actual on-going costs (including money expended and "man-hours" to produce this data)."

The survey findings confirm CBI's statements in all previous proceedings. The methods used by Educational Stations to collect sound recording data elements varies widely, are not labor efficient, will inevitably produce errors, and will lack required information.

The reported technologies currently employed by Educational Stations to obtain ATH range from "we don't report it" to the use of a third party service. There doesn't seem to be a trend, nor a universal solution, much less a comprehensive understanding of the requirements by Educational Stations.

Sample responses:

- a: We calculate [sic] the ATH because the server keeps a record for us. The College provided us with the server. The cost I am not sure of. b and c: I have the song data elements required printed off in an excel spreadsheet. The students are then required to input the data by hand for me and turn it in at the end of their show. I then input them into an excel spreadsheet and send them in electronically. d: I can't put a price on it, but it is very time consuming."
- " We do not currently collect ATH, we do have a way of logging how many listeners we have at a given time, but it does not log the length in which each listener listens. For our SoundExchange reports, we require DJs to log each song that they play including song, artist, album and label. For our automation we keep a log of what is played on itunes during the weeks in which SoundExchange is being collected. This data is arrange [sic] in Microsoft Excel and does not cost any extra money because Excel has been downloaded on the station computer and the computers used for arranging the data. The man-hours to complete this report are about 5 hours for each report. We have our DJs make sure that they log all the information that is required for the report so that when it comes to reporting it is easier to arrange the data."
- "Our ATH is estimated below the limit based on the amount of streams our server can hold at one time. The software to track the song data is created by our student IT staff, and it is free to us. We have DJs input the songs that they are playing into a computer form next to the terminal. The data is reformatted to meet the requirements. The main cost is student man hours."
- "a. We divide total bandwidth per month by stream rate. We use AWStats on our IceCast server, but Google Analytics also works for us. All free software and services. [Note: AWStats reports web site traffic (i.e., number of page hits), not streaming audience (i.e., ATH).]b. We have our own logging system via our DJ portal, that we designed several years ago. c. We are writing scripts to output from our online logs to SoundExchange's forms. d. It takes a few hours per quarter currently to output, but that will go down soon."
- "A. Not sure, our "IT GUYS" give me an estimate. B. Paper Log during broadcast, then linere [sic] notes or artist webpage. C. Just a spreadsheey [sic] . . . D. 20 additional man hours per reporting."
- ".a) Automation System handles it... in-house software. b) Automation System that automatically logs song and artist. c) Accessible for music director as a log for access. d) \$0... non-commercial radio station "
- " We report song titles, not ATH"
- "[E]entries are done manually reading show logs and when there are no live DJs, we use our iTunes data."

- “This is done by students who try to submit the most accurate data possible, but it is always problematic because of turnover every year and irresponsible students.”
- “XXXX uses a third-party vendor to aggregate play data (RadioActivity) During format hours (M-F 6 AM - 6 PM) data is updated by our playout system (BSI Simian). The process requires additional custom software developed [sic] for us by our vendor. During remainder of our schedule, show hosts must manually log data to the vendors [sic] server via web-based software. Our third party vendor generates reports of use by integrating our music play data with our stream server logs. our current vendor cost is about \$500/yr - but a replacement cost for the current service would likely be much higher Though most of the labor involved on the ststion's [sic] part is voluntary, we estimate at least 30/40 man-hours a month goes into this process.”
- “We acquire ATH through our Web service, StreamOn.fm. We use our Natural Music software to generate the number of times the song played, then put in all Sound Exchange information by hand. It takes six to eight hours to produced the data--which is less than it used to be but still way too long!”

These survey responses confirm CBI’s statements in all previous proceedings. The methods used by Educational Stations to collect sound recording data elements varies widely, are not labor efficient, will inevitably produce errors, and will lack required information.

The reported technologies currently employed by Educational Stations to obtain ATH range from “we don’t report it” to the use of a third party services. There doesn’t seem to be a trend, or a universal solution, much less a comprehensive understanding of the requirements by Educational Stations.

With respect to the cost for the current requirements, the least expensive, most reliable figure we see comes from a third party vendor, Radioactivity. RadioActivity reports⁵ a minimum initial current first year cost (\$460, which does not include hardware, operating system, or Internet access, and labor costs) that is almost equal to the annual license fee and an ongoing minimum annual cost that is 72 percent (\$360, which does not include hardware maintenance, replacement, Internet access, and labor costs) of the annual license fee paid by almost, if not all, Educational Stations. Further, even with respect to the current requirements, RadioActivity finds many obstacles in helping stations comply with the current requirements, including automation integration, ATH determination, staff training, availability of data, data collection and integrating of various data sources.⁶ RadioActivity may very well be a good solution for some

⁵ Docket No. RM 2008-7, Comments of Radioactivity at p. 4 (January 29, 2009) (hereinafter “RadioActivity Comments”)

⁶ “There are, at best estimates, hundreds of different automation products available on the market, and integrating these automation playlists into a webcaster’s Reports of Use only complicates the process.”

“the Aggregate Tuning Hours (“ATH”) metric requires stations to sum up the total listening time for connected listeners, making sure that a webcaster’s streaming setup is properly logging and retaining the proper information has been a recurring issue in my work with RadioActivity.fm. In several cases it has mandated the purchase of new hardware and software – or a switch to a new streaming services provider – in order to properly generate a webcaster’s Reports of Use.”

“Ensuring that DJs are properly entering all the data required for proper Reports of Use generation has also been a struggle. The process requires a period of staff retraining, and much of the promotional media being sent to webcasters for airplay does not contain the complete set of variables needed for SoundExchange reporting. Mitigating this missing data has also been an issue in my work with RadioActivity.fm.”

Educational Stations concerning the current regulations for those that can afford the service and infrastructure, Radio Activity reports that its pricing will increase six fold if census reporting is required, and that it cannot provide ATP data.

Clearly, generating reports of use is not as simple as pressing a button, as SX has professed.⁷

What changes, if any, would be required to comply with the proposed census reporting requirement? What are the likely costs that would be required to move from the current reporting methodology to one that would be required under the proposal?

As discussed, *supra*, and in the comments of Educational Stations⁸, the proposed changes for Educational Stations are so costly and so inconsistent with their current operations that compliance, even with the current regulations, is likely to be devastating once enforced. If the proposed regulations apply to these stations, the CRJs will eviscerate Educational Stations' meaningful presence on the Internet.

SX comments to the CRJs' December, 2008, NPRM included a list of supposed commercial recordkeeping solutions under the heading, "Commercial Solutions to Compile Reports of Use Are Available at Reasonable Prices." Docket No. RM 2008-7, Comments of SoundExchange, Inc. at p. 1 (January 29, 2009). That listing cannot be accepted at face value, as none the technologies and services reported satisfy each of the four issues introduced above.

Indeed, SX claims the vendors it lists can "provide the *census* reporting *on a per performance basis* that the CRJs now propose to implement" (emphasis added). Of the pricing information

"The webcasters I deal with have found it difficult enough to comply with the current ATH-based SoundExchange reporting, as the data collection, integration, and formatting process is difficult enough to stymie anyone without a background in webcasting technology and database programming. I have been able to perform this for my customers through my services, but this is the end result of several hundred hours of custom software programming and exposure to a wide variety of broadcast technologies."(Footnote omitted)

Docket No. RM 2008-7, Comments of RadioActivity at p. 4 (January 29, 2009) (hereinafter "RadioActivity Comments")

⁷ The 2002 Report of the Copyright Arbitration Royalty Panel in the matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings (Docket No. 2000-9, CARP DTRA 1 & 2, at 107) quoted SoundExchange Chief Operating Officer Barrie Kessler's testimony that the generation of a performance report that "truly is the push of a button." Her statement was inaccurate seven years ago, in 2002, and remains inaccurate today.

⁸ See Comments of WESS at p. 4 (January 29, 2009) "the move from quarterly reports to year-round ("census") reports would be undoable. As a state-assisted university, the funding and resources simply aren't there to comply with the new rules being proposed.", Comments of WONB at p. 2 (January 29, 2009) "If obligated to document all of our music, that is heard by fewer than 25 people an hour, we would have to consider ending our stream.", Comments of WPTS at p.1, "We are submitting comments because the proposed rules for recordkeeping are, in our view, onerous and unreasonable, and will create severe hardship for us, forcing us either to eliminate our webstream entirely (resulting in no royalties at all being paid) or, even if we were able to continue webstreaming, to devote such resources to comply that other operations will be truncated or eliminated."

provided, *none* indicates that census reporting could be provided by any of the mentioned vendors at the cited costs, in the limited instances where costs are cited. As best as CBI can determine, *none* of the products SX lists can provide ATP data. Of the products listed, there is *no* indication that *any* one provides an end-to-end recordkeeping solution, under the present or under the proposed regulations.

SX lists a number of delivery networks – StreamGuys, Akamai, LimeLight, Liquid Compass, and others – claiming to provide “automated reporting” however, as delivery networks, these vendors can only provide audience data. AndoMedia, another entity listed by SX, offers only manipulation of web *site* traffic data, not *streaming* audience data. To fairly evaluate these claimed “solutions,” the CRJs must consider that an Educational Station would need a separate product to generate sound recording performance data, that the delivery network’s product might not be compatible with any existing sound recording performance data system employed by the Educational Station, and that the Educational Station would need to provide the labor to implement and operate both products. SX offers that, “One of StreamGuys’ products, for example, is a ‘Full Measurement Package’ that will provide webcasters with data on *audience measurement* through the Webcast Metrics Ranker” (emphasis added). The cost of this incomplete recordkeeping solution, which provides no data concerning sound recordings, starts at \$1,500 per year – *three times* Educational Stations’ annual royalty obligations.

LoudCity and Backbone Networks, listed by SX, offer only very constrained products, that do not integrate well with the types of local systems and technologies in service at most existing Educational Stations. In order to utilize either of these solutions, most educational stations would need to completely abandon their normal operations in favor of completely digitized and computer-oriented operations. Most Educational Stations would have to abandon prior deep investments in equipment, scrap and operations based on their current operational models, and acquire and implement totally different technologies under each of these schemes. While some stations – those, just beginning operations – might find either one of these products attractive, for existing stations, the costly change would be so dramatic that the nature of the operations would be altered in such a way that the result would be losing the volunteer base that enables the station to operate in the first place. This is contrary to the intent of Congress..⁹

In its comments SX offers names such as Rivendell and Powergold without revealing that these vendors offer only music scheduling software, which would require a separate source for audience data in order to generate reports of use. No cost information is provided regarding these products. SX offers no evidence that either of these products could be integrated with third party audience data to provide ATP.

⁹ Both the Senate and House Judiciary Committees made clear in their reports accompanying the 1995 Digital Performance Rights in Sound Recordings Act (“DPRA”), the intent of that legislation was: to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, *without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters*, which often promote, and appear to pose no threat to, the distribution of sound recordings. S. Rep. No. 104-128, at 15 (emphasis added); *accord* H.R. Rep. No. 104-274 at 14.

RadioActivity, mentioned by SX, also submitted comments in response to the prior NPRM. RadioActivity's own filing explains that the annual cost of the product, to provide census reporting, would be several multiples¹⁰ of the annual royalty obligations for Educational Stations.¹¹ RadioActivity's comments also provided the CRJs with an authoritative detailed explanation of pitfalls of reporting ATP, and clarification that this product could not provide ATP reporting.

Most of the limited pricing information provided by SX proves that even partial webcasting reporting solutions would cost as much as or more than Educational Stations' annual royalty obligations. The lowest cost cited, for a service provided by SWCast Network, Inc., does not provide sufficient accompanying information to determine how well the alleged solution would work for Educational Stations, whether the cost listed would cover census reporting, or whether the service could provide ATP data.

SX ignores totally the labor costs necessary to deploy any of its so-called recordkeeping solutions.

In summary, information collected by CBI from Educational Stations does not reveal any commercial products now available that can *reasonably* be used by Educational Stations to provide census reports of use or to report ATP. Similarly, comments submitted by SX also fails to uncover any commercial products now available that can reasonably be used by Educational Stations to provide census reports of use or to report ATP. Therefore, the CRJs should reject, at least for Educational Stations, any proposed regulation requiring census reporting or the reporting of ATH.

THE COLLECTIVE

SX comments to the CRJs' December, 2008, NPRM opens with a salvo: "Services' arguments against census reporting are old and well-rehearsed." Docket No. RM 2008-7, Comments of SoundExchange, Inc. at p. 1 (January 29, 2009), even though SX could not have known the contents of CBI's arguments and that our arguments against the newly proposed regulations were not new, because the proposals were new. In fact CBI's comments focused on the proposed requirements. It is not until now that CBI has spent any significant effort in revisiting the current regulations and we do so now because we present data requested by the CRJs concerning the proposed requirements and it is relevant that fact that most Educational Stations are unable to comply with the current rules, much less those proposed. To the extent that CBI's own comments in that proceeding explains why our position should sound familiar: the situation since the previous recordkeeping proceeding has not changed sufficiently to permit Educational

¹⁰ "The proposed CRB census reporting requirement would effectively increase station reporting duties by a factor of six. This would result in at least a corresponding six fold increase in the RadioActivity.fm pricing schedule – to an estimated \$2,160 per year." RadioActivity Comments at p. 4

¹¹ For example, RadioActivity previously offered a very specific estimated cost increase: "The proposed CRB census reporting requirement would effectively increase station reporting duties by a factor of six. This would result in at least a corresponding six fold increase in the RadioActivity.fm pricing schedule – to an estimated \$2,160 per year." Docket No. RM 2008-7, Comments of RadioActivity at p. 4 (January 29, 2009)

Stations to provide more rigorous reports of use. Docket No. RM 2008-7, Comments of College Broadcasters, Inc. at p. 7 (January 29, 2009). As a matter of fact, now that a history of webcasting reporting has been established it is clear that, for Educational Stations, the existing reporting regulations are much too demanding.

SX's attacks on the services' arguments, presumably including CBI's, were made prior to and without benefit of actually reading our comments. In its instant comments, CBI does revisit its comments previously made, as well as the current regulations; however, our conclusions here are based on new research of Educational Stations, conducted in specific response to the CRJs' request for additional information. That research proves that issues CBI previously brought to light *continue* to be persistent issues to be considered in the present proceeding. Simply put, many Educational Stations cannot comply with the existing regulations, and even fewer could comply with the proposed regulations.

The collective instead takes an "If you build it, they will come" position. In its comments, SX argues that, "The fact that services report this information for sample weeks, and many services report it for every week of the year, demonstrates that it is practicable for services to report that information." SX Comments at p. 7. The underlying assumption that all services are able to comply with the existing regulations, just because the regulations exist, is critically flawed, as it assumes a one size fits all approach. Some classes of services might be out of compliance with the regulations because the current regulations are too demanding for that specific type of service. SX states as fact that services *are* reporting; is that statement true with respect to all services, or are there specific types of services that are not reporting? CBI's prior comments called for – and we renewed that appeal above – an accounting from SX demonstrating the proportion of Educational Station webcasters that have been able to provide completely-compliant reports of use, which would provide the CRJs an accurate depiction of the validity of the present regulations.

In its previous comments, SX suggests that "...webcasters should make the small marginal effort..." to provide the more burdensome reports of use. SX Comments at p. 7. CBI abundantly demonstrates above that, in context, the effort and expense for Educational Stations is neither small nor marginal.

SX claimed that, "Today, census reporting is technologically feasible and does not impose unreasonable costs." SX Comments. at p. 2. The information CBI presents herein demonstrates that the proposed census reporting, for Educational Stations, fails any test of reasonableness, because the increased compliance cost to these stations would be, even in the most optimistic of cases, several multiples of the royalties to be paid.

SX's own comments in the response to the prior NPRM provides evidence that the additional regulations contemplated here are not at all necessary, at least for Educational Stations. "SoundExchange estimates that over 75% of the royalties it receives from licensees are associated with reports of use that are made using year-round census reporting." SX Comments, at p. 6. Again, CBI addressed the same issue in its comments:

“CBI submits that those services that can readily provide more comprehensive reports have already voluntarily agreed to do so, leaving only those services least able to comply with highly detailed, census reports of use to be subject to regulatory reports of use. All that is to be accomplished by adopting more stringent regulations would be to force out the remainder – services least able to comply, such as educational services – or to unwittingly encourage noncompliance. CBI does not believe that Congress, in specifying *reasonable* reports of use, intended to prescribe regulations that would force out an entire class of services, which would be the likely result should the proposed regulations be adopted.” CBI Comments at p. 11.

With such a high percentage of services (likely differently-situated than Educational Stations) exceeding the regulatory requirements, there is little demonstrated need for the more severe proposed regulations that would in effect only apply to those services least able to comply. There certainly is no such confirmed need to require more onerous reporting from Educational Stations.

On the same page of its prior comments, the collective embarks of another journey of false logic when it states, “Given that so many services are able to provide census reporting (including services of various sizes and even some noncommercial public radio stations), there is no valid reason that other services cannot do so as well within a reasonable time.” CBI accurately predicted such antics when we commented, “Our understanding is that several commercial services, for a variety of reasons and under various contexts, have reached agreements to provide SX with census reports of use containing more extensive data than what is required by the existing regulations. Such agreements are not evidence of the willingness and ability of *all* services to provide more wide-ranging reports, such as those proposed in the Notice.” CBI Comments at p. 11.

SX discusses in its prior comments an analysis they performed using data from a cherry-picked unnamed large commercial service – not at all analogous with Educational Stations – comparing theoretical royalty distributions utilizing census versus sample data. SX Comments at p. 4. Their results conveniently showed dramatic underpayments of hundreds or and thousands of dollars; however, their assumptions, once again, are flawed. By their own account, performances representing 75 percent of royalties collected are already accompanied by census reporting. The remaining small number of services still reporting on a sample basis, being few and each paying comparatively small amounts of royalties, individually would not result in such a large error as suggested by the SX example. Educational Stations, being some of the smallest of the small services, even in the aggregate would provide negligible error if they continue to report on a sample basis. The likely damage to Educational Stations caused by the proposed new regulations is not justified in order to achieve virtually no additional data resolution.

The only argument SX offers to support its call for census reporting, including ATP, is that higher-resolution data is necessary for the accurate distribution of royalties. For this argument to be given any weight, SX first must be compelled to demonstrate that they have actually used data collected from Educational Stations to distribute royalties from these stations since the 1998 inception of the statutory license. If SX has distributed no royalties collected from Educational

Stations, they have no justification for supporting the CRJs proposed need for more stringent reporting from these stations.

ALTERNATIVES AND EXEMPTIONS

In the Notice the CRJs entertain suggestions for alternatives and exemptions for certain webcasters with respect to the proposed changes. CBI is willing and motivated to work with interested parties to find a reasonable recordkeeping and reporting metric that is appropriate to the current situation. Both in its comments here and in the prior record, CBI has established ample need and justification for an exemption for Educational Stations to the proposed regulation changes.

CBI has previously suggested that the CRJs reference recordkeeping regulations established under the statutory language of Section 118 to craft service-appropriate alternative reporting requirements for Educational Stations under Section 114, as the language requiring Section 118 reports of use is indistinguishable from the language that requires Section 114 reports of use. How the statutory language is applied to various non-commercial stations in 118 shows a well-considered history of the consideration of the differences between various types of non-commercial stations, by three levels of reporting within the non-commercial segment.

Though CBI's strongly held belief is that reasonable Section 114 reporting regulations for Educational Stations should mirror the long-established reasonable reporting requirements of Section 118, our comments to the previous NPRM offered a compromise providing that Educational Stations paying only the minimum fee be allowed to continue to submit reports of use using the current 14 days per calendar quarter sampling method and to continued to be permitted to use ATH in those reports.

The research we report in our comments above reveals that even that the previously offered compromise does not adequately address the demonstrated excess of the present regulations. To truly reach the statutory mandate to establish reasonable reporting requirements for Educational Stations, the CRJs should take into account the statutory requirement to distinguish among the different types of digital audio transmission services,¹² and revise accordingly the existing regulations specifying requirements for reports of use as applied to Educational Stations.

¹² See 17 U.S.C. 114(f)(2)(B): "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 service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base its decision on economic, competitive and programming information presented by the parties—

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

CONCLUSION

CBI appreciates the CRJ's responsiveness, through this Notice of Inquiry, to concerns recently called to the Board's attention. Before looking ahead to prospectively adopting new regulations, we encourage the board to look back to ensure the existing regulations are working as intended. "[T]he Board will monitor the operation of these regulations, as well as the ones adopted today, and will request public comment in the future as to the need for amendment or improvement prior to adopting final regulations." CBI maintains that the existing regulations are not working, because, for Educational Stations, they have proven to be overreaching, despite previous efforts to carefully adopt those regulations.

In the very least, the CRJs should not adopt any new regulations requiring Educational Stations that pay only the minimum fee to report on a census basis, or requiring these stations to report Actual Total Performances.

Respectfully submitted,

COLLEGE BROADCASTERS, INC.

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(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)."

CBI ATTACHMENT 1

CBI SURVEY QUESTIONS

Basic Information

* 1. The following is required so we can verify your responses. This information will not be shared with any additional parties.

Name:

Station Call letters/name:

Station web address:

State:

Country:

Phone Number:

* 2. Email:

Student Station

* 3. Is your station primarily operated by students?

Yes

No

* 4. Is your station funded by the Corporation for Public Broadcasting?

Yes

No

Not operated by students/CPB

While CBI is interested in all educational stations, its participation in this proceeding is limited to non-CPB educational stations primarily staffed by students. We thank you for your interest in this matter and invite you to become more informed about CBI by visiting our [web site](#).

If you know of a station that should participate in this survey, please provide them with this url <http://tinyurl.com/CBI-recordkeeping-survey> .

Is your station webcasting or simulcasting currently?

5. Are you currently webcasting?

Yes

No

Why aren't you webcasting?

* 6. It is important for us to determine why you are not webcasting. Please rank the reason(s) you are not webcasting with 5 being the most important reason and 1 being the least important reason.

	5	4	3	2	1	N/A
The royalty fees are too expensive	jn	jn	jn	jn	jn	jn
We don't see it as important	jn	jn	jn	jn	jn	jn
Our school won't allow us	jn	jn	jn	jn	jn	jn
We haven't figured out how to webcast	jn	jn	jn	jn	jn	jn
The recordkeeping requirements are too burdensome	jn	jn	jn	jn	jn	jn

Other (please specify)

7. If you have any other thoughts you wish to share concerning the reason your station is not currently webcasting, please take a moment to provide your insights here.

* 8. Are you considering starting/restarting webcasting/simulcasting?

Yes

No

Not webcasting but considering starting

9. What do you perceive to be the single biggest obstacle to resuming your webcasts, assuming that the current recordkeeping/reporting requirements DO NOT CHANGE.

Recordkeeping/Reporting Obligations

Royalty Fees

Cost of hardware/software

School bureaucracy

Obtaining a service to host our streams

Other (please specify)

10. The Judges want to require all stations to report Actual Total Performances ("ATP"). The ATP proposal would mean you need to be able to count and report each and every connection to any portion of a song, regardless of length, for each song.

Would your stations plans to start webcasting/simulcasting be adversely impacted by the portion of the proposed rules that would require you to report ATP?

Yes

No

11. Would your stations plans to start webcasting/simulcasting be adversely impacted by the portion of the proposed rules that would require you to provide census reporting?

Yes

No

* 12. Would your stations plans to start webcasting/simulcasting be adversely impacted by the portion of the proposed rules that would require you to provide census reports to SoundExchange within 45 days after the last day of each month?

Yes

No

Currently webcasting

13. Aggregate Tuning Hours ("ATH") is defined as the total number of hours when computers and other devices are connected to your webcast. For example if one computer is connected to your computer for one hour, your ATH is 1. If 10 people are connected to your webcast for one hour, your ATH is 10.

Are you able to accurately report your ATH? Remember, your answers will be confidential.

Yes

No, but we use a number that is reasonably accurate due to our limited bandwidth, user connection limits or similar limiting factor

No

14. Is your station currently submitting to SoundExchange reports of use that include two seven day periods per calendar quarter that include artist, song title, album title, record label and ATH? Remember, we won't reveal station specific information, so please be candid in your response.

No, because we can't comply with the requirements

No, because we weren't aware of the requirement and will cease webcasting if this is enforced.

No, because we weren't aware of the requirement, but will now become compliant, provided that the PROPOSED new rules won't apply to our station.

Yes

Yes, but we are not fully compliant because we have problems with generating all the data required.

Other (please specify)

Answered No, because we can't comply with the requirements

* 15. You stated that your station is not submitting reports to SoundExchange because you can't provide the required data. Please check all elements of the required data that are problematic for your station.

Song Title

Artist

Album

Label

ATH

Merging the data from multiple sources into the required format is too burdensome and we haven't determined a resource to automate the process

Please explain why this would pose a problem for your station

16. The Copyright Royalty Judges want to know how much it would cost stations to comply with the proposed rules. Because your station can't comply with the current rules, it is important to know how much it would cost you to come into compliance with the current rules. Please use your best estimate to determine the cost of becoming compliant in the box below. When calculating your costs, don't forget to include labor, software, hardware or any other expenses, even if they don't require money. Volunteer labor is an expense, not an unlimited resource. If the cost is too great to come into compliance because of any of these factors, please explain. Again, the Judges want to know HOW MUCH, so please include a bottom line dollar figure in your response.

No, not aware of requirements/ will cease webcasting if enforced.

* 17. You stated that your station would cease webcasting if the current recordkeeping and reporting requirements were to be enforced. Below are a number of potential factors that might make you take this position. Let us know how important each factor is in your decision to cease webcasting if the current requirements were to be enforced.

	Most important reason	Important Reason	Somewhat Important	Not Very important	N/A
Can't determine ATH	jn	jn	jn	jn	jn
The cost and burdens are unreasonable	jn	jn	jn	jn	jn
We can't supply label information easily	jn	jn	jn	jn	jn
We don't keep computer logs of songs played	jn	jn	jn	jn	jn
We don't have the resources required to be fully compliant	jn	jn	jn	jn	jn

Other (please specify)

No but will become compliant - no new rules

- * 18. You stated that your station is not compliant because it was not aware of the requirements and now that you know what is required, you will take steps to become compliant if the current rules stay in place and the proposed new rules don't apply to your station. We will ask you about the new proposed rules later.

Please estimate the amount of time it will take you to become compliant with the current rules and how much it will burden the station in terms of fiscal numbers, volunteer time and paid staff time. Please be specific as possible and tell us what you expect to be the most challenging aspect of the process of becoming compliant.

19. You stated that your station would not become compliant if the proposed new rules apply to your station. Please identify each of the elements of the proposed new rules that caused you to reach this decision. Check all that apply.

ATP = Actual Total Performances. This means that you need to count each and every connection to any portion of a song, regardless of length, for each and every song.

- ATP is either impossible to calculate or too great of a burden
- Census reporting is too great of a burden or impossible given our circumstances
- We will not be able to submit monthly reports within 45 days due to our academic schedule
- The cost of generating the required data (including labor and purchases) is too great
- Other

Other (please specify)

Answered Yes to compliant with reporting

20. You stated that your station is currently submitting compliant reports with SoundExchange. Please take a few moments to tell us...

a. How you calculate ATH, including the software used, who provides it and the cost of the software.

b. How you gather the song data elements, including artist, song title, album and label, including the software used and the cost of the software.

c. How you put this data into a format that is meets the requirements, including the software used and the cost of the software.

d. Please estimate the actual on-going costs (including money expended and "man-hours" to produce this data).

Submitting non compliant reports

21. You stated that your station is submitting reports, but that they are not fully compliant because of problems generating the required data. Please identify the problem which data element(s).

- Song Title
- Album
- Artist
- Label
- ATH

The Copyright Royalty Judges want to know how much it would cost stations to comply with the proposed rules. Because your station can't comply with the current rules, it is important to know how much it would cost you to come into compliance with the current rules. Please use your best estimate to determine the cost of becoming compliant in the box below. When calculating your costs, don't forget to include labor, software, hardware or any other expenses, even if they don't require money. Volunteer labor is an expense, not an unlimited resource. If the cost is too great to come into compliance because of any of these factors, please explain. Again, the Judges want to know HOW MUCH, so please include a bottom line dollar figure in your response.

New Rules Section

We will now move on to questions concerning the proposed new rules. It was important for us to establish a baseline determination of compliance with the existing rules before we turn to the subject of the new rules.

Census Reporting

- * 22. The current rules require webcasters to provide "reports of use" (a list of songs, including artist, song title, album, label, ATH and other generic data) for two, seven day periods in each calendar quarter. The proposed rules would require your station to provide "reports of use" (including the same data mentioned above) on a monthly, 24/7 basis within 45 days after the last day of each month. This is known as census reporting.

Would your station be adversely impacted by the portion of the proposed rules that would require you to provide census reporting?

No

Yes

Adversely affected by census reporting

23. You stated that your station would be impacted by the proposed requirement for census reporting.

Would census reporting cause you to cease webcasting?

Yes

No

Maybe

Please explain why this would be a problem for your station and cause you to either stop webcasting or consider stopping your webcasts. If the burden, including, but not limited to fiscal costs is a reason, please be specific.

If this would not cause you to cease webcasting, please take a few minutes and explain,

- how you collect the song data (artist, album, song title and label).
- how you merge this data with ATH data (we will ask you about ATP information later)
- what software is used to collect and merge the data and the acquisition and ongoing cost of that software.



Not Adversly Affected By Census Reporting

24. You stated that your station would not be impacted by a requirement to provide census data. Please take a few minutes to provide information concerning the software used to generate census data, its acquisition costs and on going costs.

Adversley affected by ATP?

- * 25. The proposal from the CRJs includes a provision that all stations must report Actual Total Performances ("ATP"). This ATP provision would require you to count each and every connection to any portion of a song, regardless of length, for each and every song.

Would your station be affected by this proposed requirement?

Yes

No

Would ATP Data cause you to cease webcasting?

26. You stated that your station would be impacted by the proposed requirement to report ATP data.

Would this requirement cause you to cease webcasting?

Yes

No

Maybe

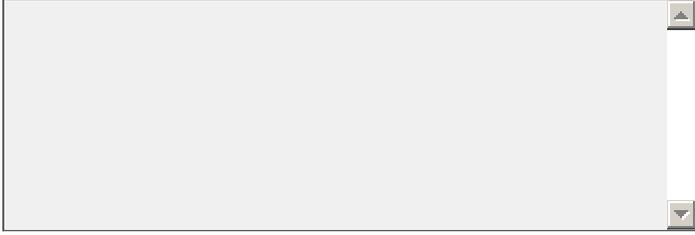
Please explain why this would be a problem for your station and cause you to either stop webcasting or consider stopping your webcasts. If the burden, including, but not limited to fiscal costs is a reason, please be specific.

If this would not cause you to cease webcasting, please provide information about the software and processes that would allow you to provide this information including the acquisition cost of the software and ongoing costs and why this would have an adverse impact on your station operations.



Not adversely affected by ATP reasons

27. You stated that your station would not be impacted by a requirement to provide ATP data. Please take a few minutes to provide information concerning the software used to generate ATP data, its acquisition costs and on going costs.



Use automation?

- * 28. The CRJs want to determine the percentage of stations that use "automated playlists" because it appears that they believe that "automated playlists" makes census reporting easy.

Does your station use "automated playlists" (we assume the CRJs mean an automation system)?

Yes

No

Uses automated playlists

29. You stated that your station uses automation/automated playlists, does your station do this 24/7/365?

Yes

No

30. Your station is automated, 24/7. Does the software you use allow you to provide census data that includes ATH, artist, song title, album and label in a format that is compatible with the regulations?

jm Yes

jm Yes, but... (see comments below)

jm No (see comments below)

Please provide as much information concerning your response as possible, including the costs and labor invested in obtaining and maintaining your systems.



- * 31. Your station uses automation, but not 24/7. Please explain why your station chooses to use live DJs instead of fully automating your station. The CRJs have suggested that this may be simply a matter of "creative choice". Please include any reactions to the suggestion that "creative choice" is not the only reason you have live DJs at your station, if this is the case.

- * 32. The Copyright Royalty Judges believe that the use of automation systems would make census reporting an easy task and wonder why stations like yours don't use automation 24/7. Please offer your reactions to this line of thought.

No Automation

33. SoundExchange and the Copyright Royalty Judges seem to think that automation is commonplace and that generating reports of use is a matter of clicking on a button or two. You aren't using automation and claim that the reports of use are an unreasonable burden on your station, so why don't you just use automation?

Exemptions

34. If the Judges were to exempt certain classes of entities from the proposed year-round reporting provision, what would be appropriate criteria for such an exemption?

a revenue-based cut-off

those entities that qualify for the minimum \$500 per channel or per station performance royalty

fewer than 5 full time employees

Other (please specify)

35. Should the Judges exempt educational stations which pay only the \$500 annual minimum fee from the proposed ATP requirements?

Yes

No