

**Before the  
UNITED STATES COPYRIGHT ROYALTY BOARD  
Washington, DC**

In the Matter of	)	
	)	
Notice and Recordkeeping for Use of	)	
Sound Recordings Under Statutory	)	Docket No. RM 2008-7
License	)	

**REPLY COMMENTS OF THE AMERICAN COUNCIL ON EDUCATION**

The American Council on Education (“ACE”) respectfully submits its reply to the initial comments filed in response to the Copyright Royalty Judges’ (“CRJs” or “Judges”) Notice of Inquiry (“NOI”) on Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2008-7, published in the Federal Register on April 8, 2009.

The record in this proceeding demonstrates that there is no rational basis upon which to increase the recordkeeping burdens on college radio webcasters, as proposed in the NOI. College Broadcasters Inc., Harvard Radio Broadcasting, Intercollegiate Broadcasting System, KTRU, National Federation of Community Broadcasters, University of California NCE stations, WSBF FM Clemson, WSOU FM, and WTBU, as well as ACE, each document the substantial harms that would be caused by requiring college radio webcasters to provide SoundExchange with year-round, census reporting and/or reporting based upon the actual total performances (“ATP”) of each sound recording.<sup>1</sup>

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<sup>1</sup> As used herein, the term “small webcaster” refers to a webcaster that does not, in a given year, incur any royalty fees for use of the statutory license of Section 114 in excess of the minimum, \$500 fee per station or channel.

As KTRU of Rice University explains, the current recordkeeping regulations—which allow reporting based upon a sample of two weeks per quarter, using aggregate tuning hours (“ATH”) to calculate the number of performances of each sound recording—“are already a heavy burden on KTRU’s limited resources.”<sup>2</sup> This burden arises in part because college radio stations typically do not use automated playlists, which for larger broadcasters and Internet-only webcasters facilitate reporting on the use of sound recordings. As another college radio station explains, in college radio “each piece is played from CD, vinyl LP and music brought in by the DJs.”<sup>3</sup> No log tracking the sound recordings played is generated automatically; “any logs that the station generates must be made by hand by DJs in the recording booth.”<sup>4</sup> Thus, creation of a report based even on two weeks per quarter and a calculation of ATH is no small task. Simply put, a switch to census-based reporting or a requirement that licensees abandon use of ATH in their reporting would turn an already challenging process into an impossibility for many college radio stations.

ACE agrees with SoundExchange that the Judges’ decision in this proceeding “will necessarily need to depend on a balancing” of the goals of precision of reporting, on the one hand, and efficiency and cost-effectiveness of reporting, on the other hand.<sup>5</sup> In addition, ACE appreciates SoundExchange’s acknowledgement that, in comparison to small webcasters,

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<sup>2</sup> Comments of KTRU, at 2 (May 26, 2009). *See also* Copyright Royalty Board, *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License: Interim Final Rule*, 71 FR 59010 (October 6, 2006), *codified at* 37 C.F.R. § 370.3.

<sup>3</sup> Joint Comments of University of California NCE Broadcast Radio Stations and Associated College Broadcasters Who Simulcast, at 2 (May 26, 2009).

<sup>4</sup> Comments of WTBU (Boston University), at 1-2 (May 26, 2009).

<sup>5</sup> Comments of SoundExchange, Inc. at 2 (May 26, 2009).

“Census reporting is particularly appropriate for larger services that generate the highest usage, and, therefore, the largest proportion of the royalties paid to SoundExchange.”<sup>6</sup>

SoundExchange’s tacit acknowledgement that the costs of census-based reporting may outweigh the burdens they would impose upon college radio and other small webcasters is at odds, however, with its request that the CRJs revise the recordkeeping regulations to impose census-based reporting on all licensees. SoundExchange attempts, but fails, to resolve this tension by stating that an unduly-burdened licensee might obtain “relief” from new recordkeeping requirements *if* SoundExchange agrees to grant such relief as part of a settlement with the licensee in a rate proceeding.<sup>7</sup> In effect, this approach would have the Judges delegate to SoundExchange the authority to decide which recordkeeping regime will apply to college radio stations and other small webcasters. While ACE agrees that it may be beneficial to consider recordkeeping concerns as part of a rate proceeding, the regulations of the Copyright Royalty Board should not impose by default an unreasonable recordkeeping requirement, which requirement would be “waived” only through petition to a private, third party.

In asking the CRJs to impose new recordkeeping requirements on college radio stations, SoundExchange fails also to respond meaningfully to the precedent established under the decidedly-balanced recordkeeping regulations governing the broadcast of musical compositions by noncommercial, college radio stations not affiliated with National Public

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 21 (“SoundExchange believes that the better approach is to provide a default rate of census reporting in the regulations, and to recognize that any appropriate relief therefrom can best be worked out in settlements of rate proceedings . . . or under special negotiating authority such as the Webcaster Settlement Act if available”).

Radio.<sup>8</sup> Such stations need only provide a music-use report upon request for one week of each calendar year, and ASCAP, BMI and SESAC can request such a report from no more than ten college radio stations each year.<sup>9</sup> SoundExchange, in a footnote to its comments, attempts to dismiss this precedent by noting that ASCAP and BMI “collect data from other sources as well.”<sup>10</sup> SoundExchange does not, however, provide any rationale as to why it could not augment reporting from college radio webcasters with data from other sources in calculating payments to owners of sound recordings and artists.

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<sup>8</sup> *See* 37 C.F.R. § 381.5.

<sup>9</sup> *Id.*

<sup>10</sup> Comments of SoundExchange at 6, n.10.

**CONCLUSION**

The substantial record compiled in this proceeding documents the undue burden that census-based reporting and reporting based on ATP would impose upon college radio webcasters. Accordingly, ACE respectfully requests that the Copyright Royalty Judges maintain the ability of college radio webcasters to report on use of sound recordings based upon the existing regulations adopted in 2006.

Respectfully submitted,



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