

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

In re ) NOTICE AND RECORDKEEPING FOR ) USE OF SOUND RECORDINGS UNDER ) STATUTORY LICENSE )	Docket No. RM 2008-7
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**REPLY COMMENTS OF COLLEGE BROADCASTERS, INC.**

College Broadcasts, Inc. (“CBI”) is pleased to submit these Reply Comments in response to the Copyright Royalty Judges’ (“CRJs”) Notice of Inquiry (“Notice”),<sup>1</sup> and the initial comments submitted pursuant thereto.

**INTRODUCTION**

The Notice was a follow-on to a previous Notice of Proposed Rule Making (“NPRM”)<sup>2</sup> that proposed additional recordkeeping and reporting requirements on certain services utilizing statutory licenses provided for in Sections 112 and 114 of Title 17 of the United States Code. Specifically, the NPRM sought to require services to report Actual Total Performance (“ATP”) data on a census basis with monthly reports of use due on or before the 45th day after the close of each month. Subsequent to receiving comments filed in response to the NPRM, the CRJs issued the Notice and sought “additional information to gain a fuller understanding of the likely costs and benefits that will be derived if the proposed census reporting provision is adopted and

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<sup>1</sup> 74 F.R. 15901 (April 8, 2009).

<sup>2</sup> 73 F.R. 79727 (December 30, 2008).

to consider any alternatives to the proposal that might accomplish the same goals as the proposal in a less burdensome way, particularly with respect to small entities.”<sup>3</sup>

The evidence put forth in the record in this proceeding has brought to light a number of critical pieces of information that not only support the need to exempt Educational Stations<sup>4</sup> from the proposed changes, but also reveals the need to amend the current interim recordkeeping regulations<sup>5</sup> in a manner that will increase the number of services able to submit reports of use and allow the royalties collected from Educational Stations to flow to the rights holders and performers.

CBI believes there is ample evidence in the record to support the removal of the requirement under the interim regulations for Educational Stations paying only the minimum fee to report Aggregate Tuning Hours (“ATH”). Removing this requirement will eliminate the most onerous burden associated with recordkeeping and generating reports of use for Educational Stations, which are among those noncommercial licensees from which SoundExchange (“SX”) “has received reports from only a small percentage.”<sup>6</sup> Removing the largest obstacle, ATH, that these stations face with reporting would allow stations not presently reporting to begin reporting. Experience has now proven that many Educational Stations cannot comply with the overly demanding present interim regulations.

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<sup>3</sup> Notice at 15903.

<sup>4</sup> 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 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.

<sup>5</sup> 71 FR 59010 (October 6, 2006).

<sup>6</sup> Docket No. RM 2008-7, Comments of SoundExchange, Inc. at p. 18 (May 26, 2009) (“SX Comments”).

Any implementation of new regulations to require additional reporting requirements, in the form of ATP data or census reporting, would be counterproductive, as such a move would increase noncompliance by services unable to conform. Data in a CBI survey<sup>7</sup> introduced in initial comments for this proceeding showed that more than 92% of Educational Stations would be adversely affected by such a requirement.

These reply comments will also address many of the other issues raised in earlier comments for this proceeding, including an appropriate deadline for submitting reports of use and how to address missing historic data.

**ATH DATA IS USELESS TO SOUNDEXCHANGE AND  
ATP DATA IS IMPOSSIBLE FOR EDUCATIONAL STATIONS TO PROVIDE**

SX's own comments affirm that ATH data from Educational Stations providing only one channel affords no utility for the collective: "It follows that if a service has only one channel (as is the case for many webcasters), then ATH itself is useless."<sup>8</sup> Because ATH data from Educational Stations is of no use to SX, Educational Stations should not be required to report such data. According to the CBI survey of Educational Stations, fewer than 28% of stations said they could report ATH. Clearly, the inability to produce ATH has a direct negative effect on the ability of a station to produce a report of use, but does not serve SX's royalty distribution purposes.

Introducing new regulations requiring the reporting of ATP data would further frustrate efforts by Educational Stations to provide reports of use. ATP data is much more complex than

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<sup>7</sup> Results of the CBI survey were introduced in CBI's initial response to the Notice. See CBI Comments (May 26, 2009).

<sup>8</sup> SX Comments at p. 22 (May 26, 2009).

ATH data, and in most cases, if not all, is impossible for Educational Stations to generate.<sup>9</sup> In its comments in response to the NPRM, SX proffered a list of “[c]ompanies in the marketplace offer[ing] a range of technologies, including commercially available software and other third-party solutions, which services can use to provide the census reporting *on a per performance basis* that the CRJs now propose to implement” (emphasis added);<sup>10</sup> however, CBI’s initial comments in this proceeding corrected SX’s inaccurate contention, revealing that *none* of SX’s purported “solutions” can provide ATP data for existing stations in a manner consistent with the intent Congress. Aside from the myriad technical issues of generating ATP data, the record clearly establishes that costs of developing ATP reporting would substantially exceed the royalties paid by Educational Stations.

### **EDUCATIONAL STATIONS SHOULD BE EXEMPT FROM CENSUS REPORTING**

In arguing for census reporting for all services, SoundExchange states that, “SoundExchange believes that the royalties should be based *to the extent possible* on the actual transmissions made by the services” (emphasis added).<sup>11</sup>

The statute does not require services to provide reports of use “to the extent possible;” the statutory standard the CRJs must consider is whether the requirements for reports of use are *reasonable*. CBI has consistently demonstrated that, for Educational Stations, the personnel, software, and hardware costs of providing census reports of use are not reasonable and places particular emphasis on the results of the survey conducted by CBI.<sup>12</sup> CBI supports the extensive

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<sup>9</sup> Spintron Comments at p. 2 (May 26, 2009), Harvard Radio Broadcasting Company Comments at pp. 19-22 (January 29, 2009), Blazeradio Comments at p.2 (January 29, 2009), RadioActivity Comments at p. 5 (January 29, 2009), The National Association of Broadcasters Comments at p. 3 (January 29, 2009).

<sup>10</sup> SoundExchange NPRM Comments at p. 9.

<sup>11</sup> SX Comments at footnote 10.

<sup>12</sup> Ibid at p. 9, “According to the records SoundExchange maintains in the ordinary course of its operations, 590 payor services – representing thousands of individual channels and stations –

analysis of reasonableness submitted by Harvard Radio Broadcasting Company (“WHRB”),<sup>13</sup> which concluded “that there is no scenario in which it is reasonable for the CRB to adopt census-based reporting for non-commercial webcasters.”<sup>14</sup>

SX’s comments in response to the Notice once again engage in an unsupported leap of logic: “SoundExchange’s experience suggests that licensees that implement processes for census reporting are generally more diligent about the quality of the data they report than licensees who report on a more ad hoc basis.”<sup>15</sup> SX provides no evidence – because there likely is none – to support the nexus of census reporting and data accuracy for all services. A more likely explanation is that the large services that have already voluntarily agreed to provide census reports of use differ in other important ways from those comparatively small services that are not able to provide census reports of use. The large services that are providing census reports of use are highly mechanized; smaller services such as Educational Stations are significantly characterized by manual systems much more prone to generating errors.

We cannot refute SX’s experience with census reporters where it comes to accuracy; however, we doubt that SX’s past experience can be correctly generalized to services not now providing census reports of use. Therefore, we must also question the basis for SX’s contention that “its incremental costs of processing otherwise comparable census versus sample reports are

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have paid SoundExchange statutory royalties for 2008.11 The vast majority of them – 576 – are webcasting services.” at p. 10. “more than half of webcaster payor services paid only the \$500 minimum fee”, at p. 19, “Of the webcasters paying only a single-channel minimum fee of \$500 per year, nearly 80% designate themselves as noncommercial. Just by examining the payor name, to determine whether it includes the name of a school, it appears to SoundExchange that approximately 50% are associated with colleges, universities and other educational institutions.”  $576 * 0.5 * 0.8 * 0.5 = 115$ . 115 represents the number of minimum fee paying noncommercial payers associated with colleges, universities and other educational stations. The CBI survey in response to the Notice included 101 Educational Stations which stated that they were currently webcasting, which constitutes more than 87 percent of the 115 “payors” that are associated with colleges, universities and other educational institutions.

<sup>13</sup> See, generally, Comments of Harvard Radio Broadcasting Company (January 29, 2009).

<sup>14</sup> Ibid at p. 16.

<sup>15</sup> SX Comments at p. 8.

only modestly higher.”<sup>16</sup> SX’s costs of processing census reporting should be of interest to the CRJs because such a consideration is one element in determining whether reports of use are “reasonable.” Increasing the quantity of reporting by small entities, through a requirement for census reports of use, *would* increase the frequency of errors with which SX would have to contend.<sup>17</sup> Increased errors *would* incrementally increase SX’s costs to process reports of use.

In its initial comments in response to the Notice CBI highlighted SX’s previous admission that 75% of the royalties it receives are associated with census reports of use.<sup>18</sup> SX’s comments now provide a new, much more optimistic perspective:

Going forward, SoundExchange expects to receive census reports of use from the hundreds of commercial broadcasters who have elected to take advantage of SoundExchange’s agreement with NAB under the Webcaster Settlement Act and have not elected small broadcaster status..., as well as 26 small commercial webcasters that have indicated to SoundExchange that they wish to be subject to the Webcaster Settlement Act agreement and have not elected microcaster status  
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SX is already receiving voluntary census reports representing a very large portion of the royalties it receives, and has reason to expect that portion to grow substantially – all without the need for regulations stipulating census reports of use. Information provided by SX proves that there is no strong need for a *regulatory* requirement for census reports of use, when the vast majority of services are already *voluntarily* doing so. 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

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<sup>16</sup> Ibid at p. 7.

<sup>17</sup> See SX Comments at p. 19: “[I]t has become apparent that the least usage-intensive licensees often provide reports of use with poor quality data, which requires additional staff time to resolve processing problems.”

<sup>18</sup> CBI Comments at p. 27.

<sup>19</sup> SX Comments at p. 16.

the remainder – services least able or more likely unable, to comply, such as Educational Stations – or to unwittingly encourage noncompliance.

SX recognizes that census reporting does is not equally reasonable for all services,<sup>20</sup> but argues most strongly for census reporting by the largest services – those that are already voluntarily providing census reports of use: “Census reporting is particularly appropriate for the larger services that generate the highest usage and, therefore, the largest proportion of the royalties paid to SoundExchange.”<sup>21</sup> SX acknowledges that the collective has voluntarily entered into agreements, with small commercial webcasters and the National Association of Broadcasters, transitionally permitting some small webcasters to provide fewer, less detailed reports of use – *or none at all*.<sup>22</sup> They explain, “SoundExchange fully expects that technology making census reporting easier and more affordable for all licensees will increasingly become more widely adopted.”<sup>23</sup> However, as CBI established in initial comments, Educational Stations are not likely to realize any benefit from adopting such *anticipated* developments in technology, because the nature of the programming of many Educational Stations does not mesh well with these technologies. The difficulty is symptomatic of the *core* nature of Educational Stations, and is not a “transitional” issue; census reporting will continue to be unreasonable for Educational Stations for the foreseeable future.

Though CBI doubts any need for regulatory intervention to require census reports of use, the record clearly establishes that should such regulations be established, Educational Stations as

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<sup>20</sup> See SX NPRM Comments at p. 2: “SoundExchange recognizes that there may be rare situations in which a service cannot today provide census reporting.”

<sup>21</sup> *Ibid.* at p. 2.

<sup>22</sup> *Ibid.* See also SX Comments at p. 20: “[S]mall broadcasters and microcasters may elect the option to provide no reporting at all, but pay an additional \$100 fee, which will be used by SoundExchange (along with very basic usage information provided in the election form) to develop a proxy royalty allocation model taking into account the diverse playlists that such licensees typically employ.”

<sup>23</sup> *Ibid.*

a class should be exempted, rather than prescribing the demise of at least 84% of Educational Station webcasters due to the implementation of such a requirement.<sup>24</sup>

### **EVALUATING THE LOW RATE OF COMPLIANCE WITH THE INTERIM REGULATIONS**

SX complains about noncompliance of services with the interim regulations requiring reports of use. CBI, in our earlier comments, acknowledged that many services cannot comply with the interim regulations because they are already too demanding.

SX tallied 590 payor services for 2008, 576 of which were webcasting services.<sup>25</sup> SX also states that, “[A]pproximately 60% of licensees who have made payments for performances in the first quarter of 2008 have failed to provide a corresponding report of use.”<sup>26</sup> Combined, these two figures suggest that approximately 354 services (60% of 590) did not provide reports of use for the first quarter of 2008.<sup>27</sup> SX explains that more than half of the 576 webcaster payor services paid only the \$500 minimum fee for 2008, suggesting that something more than 288 services paid only the minimum fee. It is therefore likely that a large portion of the non-reporting services (~354) are paying only the minimum fee annually (288+).

The collective concedes, “It is not unreasonable to ask what level of licensee and SoundExchange resources it would be desirable to expend in distributing accurately the last few hundred thousand dollars – or even the last few million dollars – in webcasting royalties.”<sup>28</sup> Again, by SX’s figures, something more than 288 webcasting services paid only the minimum \$500 of fee for 2008. Rather than languishing over what level of reporting is necessary to accurately distribute “the last few million dollars” from webcasters not able to provide reports of

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<sup>24</sup> CBI Comments at p. 9.

<sup>25</sup> SX Comments at p. 9.

<sup>26</sup> Ibid. at p. 15.

<sup>27</sup> SX explains in footnote 11 how it determined the number of “payor services,” which might or might not correspond with the number of “licensees.” CBI would welcome less ambiguous figures from SX.

<sup>28</sup> SX Comments at p. 10.

use under the interim regulations, it seems that SX is consumed with crippling an entire segment of webcasters over the distribution of less than \$144,000 annually (288 times \$500).<sup>29</sup> SX states that approximately 50% of the webcasters paying only the minimum fee are associated with colleges, universities and other educational institutions.<sup>30</sup> According to SX figures, then, in aggregate the universe of Educational Stations account for annual royalties in the neighborhood of only \$72,000, *before* deducting SX’s “administrative fee”<sup>31</sup>. This figure is likely *overstated*, because it does not account for the 20% of licensees that are commercial services.<sup>32</sup> SX does not provide any information about the total number of copyright owners and artists to which it distributes royalties, but we believe the average per-owner and per-artist amounts from Educational Stations would calculate to be extremely small amounts with the vast majority failing to exceed the minimum distribution threshold.<sup>33</sup> Indeed, to date SX has provided no evidence that it has distributed *any* royalties from Educational Stations since the 1998 inception of the statutory license.<sup>34</sup>

SX attributes the missing reports under the interim recordkeeping regulations to the “lack of cooperation” by some services.<sup>35</sup> CBI again presents its own alternative assessment: the rate

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<sup>29</sup> This example allows for *no* SX “administrative fee;” therefore, in actuality the case against SX’s argument is even more compelling. SX provides no indication of its overhead costs, other than revealing that only 69% of 2008 royalties have been allocated to copyright owners and artists. SX Comments at p. 27.

<sup>30</sup> SX Comments at p. 19.

<sup>31</sup> *Ibid.* at p. 26.

<sup>32</sup> “Of the webcasters paying only a single-channel minimum fee of \$500 per year, nearly 80% designate themselves as noncommercial” SX Comments at p. 19. If applied, the station total would be 115 with a resultant collectively paid royalty pool of \$57,500, before deductions for “administrative fees”.

<sup>33</sup> SX will not distribute royalties to a copyright owner or artist until the payable amount exceeds \$10.00. SX Comments at p. 30.

<sup>34</sup> See SX Comments at p. 27: “SoundExchange generally provides each royalty-earning entity with an electronic or hard copy statement reflecting the performances – *and the licenses under which the sound recordings were performed* – for which the royalty payment is made” (emphasis added). SX states that it already tracks royalty payments by licensee category; therefore, the CRJs could request and SX could easily provide information describing the royalties paid by Educational Stations. Such information could provide the CRJs with important context in which to evaluate reasonable costs of reports of use to be borne by Educational Stations.

<sup>35</sup> SX Comments at p. 28.

of noncompliance is proof positive that the interim regulations established requirements beyond the reasonable abilities of some small services, such as Educational Stations.

With approximately 60% of services presently not able to provide reports of use under the interim regulations, the CRJs should not now contemplate exacerbating the situation by enacting more burdensome requirements, particularly on those who have demonstrated an inability to comply. With respect to Educational Stations, it is clear that lowering the burdens, by dropping the “useless” ATH requirement, will increase the ability of stations to comply with the regulations and result in expedited allocations and eventual payments to rights holders and artists.

### **ALTERNATIVES**

The CRJs specifically requested information concerning alternatives to the proposed regulations. CBI believes that Educational Stations, copyright owners, and artists each would be best served by regulations that recognize distinct differences in services and their respective abilities to provide usage data. Comments from SX and CBI alike clearly establish that the one-size-fits-all interim regulations are not working. The proposed additional regulations would only further break a broken system.

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. 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.

In the alternative, CBI recommends that the CRJs create under Section 114 recordkeeping regulations for the distinct class of Educational Stations that is different from all other services. It is noteworthy that virtually all of the comments in response to the Notice, as well as a large volume of the previous comments in response to the NPRM, came from Educational Station webcasters and their representatives. Much of the languishing recordkeeping controversy could be simply resolved by treating services that are different differently.

We specifically recommend that, 1) Educational Station webcasters should not be required to report ATH, 2) Educational Station webcasters should not be required to report ATP, and 3) Educational Station webcasters should be exempted from any requirement for census reporting and should be allowed to continue reporting on a sample basis of two weeks per calendar quarter and 4), Educational Stations be given the option subsidizing the use of proxy data.

In its comments, SX discusses the possibility of utilizing some form of proxy data to facilitate the distribution of royalties in some circumstances.<sup>36</sup> CBI agrees with SX that such a provision should not be universal, but we believe such a provision could be a solution for a definable class of differently-situated services such as Educational Stations. We recommend considering allowing Educational Stations to elect to pay a data proxy fee in lieu of providing reports of use.<sup>37</sup> The data proxy fee would compensate SX for the cost of acquiring alternative data, such as has been long used by performance rights organizations ASCAP and BMI, for its

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<sup>36</sup> Ibid. at p. 6.

<sup>37</sup> CBI recommends an optional annual Educational Station data proxy fee be established at \$100 for those stations paying only the \$500 minimum annual royalty fee. The reasonable proxy fee must be a fraction of the annual royalty paid by these stations. SX has previously agreed to such proxy fees, both under the Small Webcaster Settlement Act of 2002 and under the Webcaster Settlement Act of 2008. Further, the data introduced by SX indicates that the agreements entered into by SX and NAB and SX and Small Webcasters allow those services to utilize the proxy option up a usage level that is nearly equivalent to the minimum fee paid by those services at the 2009 rates.

use in distributing the modest amount Educational Station royalties. Even should such a data proxy fee be permitted, the three provisions of the foregoing paragraph should still apply to Educational Stations not electing to pay the data proxy fee.

CBI supports SX's call for regulations authorizing SX to distribute royalties it has received based on a reasonable proxy when it has not been able to obtain sufficient reports of use from the service within one year after receiving payment,<sup>38</sup> to the extent that such an amendment would facilitate the compromise we suggest above and provide the only likely source of data available to SX necessary to distribute those royalties.

If the purpose of the recordkeeping proceeding is to facilitate the distribution of royalties to copyright owners and artists, and not to penalize services, such alternatives for Educational Stations must be considered.

#### **MISSING HISTORIC DATA**

As above, CBI supports SX's request for authority to distribute historical royalties based on proxy data – particularly with respect to Educational Stations, many of which are unlikely able to provide historical performance data. Educational Stations very much want the royalties they have been paid to be allocated and distributed.

#### **DEADLINE FOR SUBMITTING REPORTS OF USE**

CBI understands the desire to establish in the regulations a clear deadline for submission of reports of use. Due to the nature of educational institutions and academic calendars, short deadlines that risk falling during break periods put Educational Stations at great risk of unintentionally coming into non-compliance with proposed deadlines. CBI therefore recommends that Educational Stations be permitted a minimum of 60 days following the end of a

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<sup>38</sup> SX Comments at p. 5.

calendar quarter to submit sample reports of use. Given the small financial amounts associated with Educational Station royalties, any potential harm to copyright owners and artists would be negligible, if any.

**SERVICES SHOULD CONTINUE TO BE ABLE TO  
SUBMIT REPORTS WITH OR WITHOUT HEADERS;  
FORMAT CHANGE PROPOSALS SHOULD BE REJECTED**

Among the shopping list of new proposals submitted in the NPRM comments by SX is a request to require headers for electronic reports of use. Systems developed by both SX and services have been based on the present regulations. SX offers another of its unsupported claims that, “The requirement of including a header with a file imposes a trivial burden on services.”<sup>39</sup> To avoid further confusing the complicated issues at hand, CBI respectfully suggests that the CRJs should not make this or any of the litany of other changes SX proposes to the *format* of the reports of use at this time.

**THIS IS THE APPROPRIATE VENUE FOR PROMULAGATING  
RECORDKEEPING AND REPORTING REQUIREMENTS**

SoundExchange makes a number of comments in reply to the Notice that are pertinent.

“The Judges’ attention to these issues has the potential to make a significant difference in the distribution of royalties”.<sup>40</sup>

“There is substantial room for improvement in the current notice and recordkeeping regime – including both the details of the regulations and, probably more important, the level of compliance by licensees.”<sup>41</sup>

CBI simply cannot disagree agree with these statements. The proposed changes to the existing regulations, as outlined above by CBI and in its original comments, serve to satisfy both

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<sup>39</sup> SX NPRM Comments at p. 24.

<sup>40</sup> SoundExchange comments at p. 1 (May 26, 2009)

<sup>41</sup> Ibid

of these goals and the goals of Educational Stations which is to see the royalties they pay to actually be allocated and distributed through a change in the regulations concerning recordkeeping and reports of use which allow more stations to be compliant with the current regulations which include a useless data element that less than 28% of Educational Stations are capable of reporting.

However, SoundExchange makes the additional suggestion that this instant proceeding, is not the appropriate venue to promulgate such changes. “The CRJs should adopt a general requirement of census reporting, and permit any asserted special circumstances to be addressed through the Webcaster Settlement Act or other agreements.”<sup>42</sup>

The venues offered by SoundExchange for changes include Congressional action, a negotiated settlement or the rate setting proceeding that is currently in progress for 2011-2016 (Webcasting III).

The ability to reach a settlement under a bill which has not passed either house of Congress is at best speculative, particularly given a prior inability to reach a settlement. The remaining solution proposed by SX is the most problematic. The CRJs refused to rule on matters pertaining to recordkeeping and reports of use in Webcaster II, deferring to this instant proceeding.<sup>43</sup>

The CRJs now have a large body of comments to consider, the vast majority of which support CBIs’ arguments to not only reject the proposed changes with respect to Educational Stations, but to change the existing regulations in a manner that would permit more services to comply with the regulations and provide data needed by SoundExchange to allocate and

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<sup>42</sup> Ibid at p. 8

<sup>43</sup> “because our recordkeeping regulations are interim and not final, there is ample opportunity to again address the Services’ costs in a future rulemaking.” 72 F.R. 24110 (May 1, 2007).

distribute royalties collected from Educational Stations, which have to date, not been allocated much less distributed. The only potentially viable option left, if not resolved here, is to further delay the distribution of royalties in a different venue, the rate setting proceedings already under way, but not likely to conclude for over a year.

If the CRJs opt to exercise put of a decision until the conclusion of Webcaster III, it would not only delay the distribution of royalties, it would require revisiting this same material anew.

While SX proclaims that it wants to distribute the royalties collected, the only obvious outcome of delaying the promulgation of regulations would be a delay in the allocation of the royalties collected previously, currently and prospectively until these issues are resolved. The evidence and proposals submitted by CBI provide increased reporting by those least able to comply with the existing requirements which would result in the distribution of royalties. Further delaying the proper decision to enact the changes to existing regulations would deny the performers and copyright holders of the royalties collected. Moreover, punting a decision in this matter to the rate setting proceeding (Webcaster III) would require all parties to incur significant additional and unnecessary expenses.

Despite the extremely limited protestations to the contrary made by SX, this is the appropriate venue to enact changes to the recordkeeping and reporting regulations, particularly since the CRJs punted this issue in the previous rate setting proceeding. Delaying the implementation of corrective regulations neither creates data needed to allocate or distribute royalties, nor does it save the resources of the CRJs or the parties that will need to revisit these issues in another proceeding. The CRJ's have all the data they need to conclude this proceeding and to adjust the regulations accordingly by adjusting the regulations to not require census data,

ATH, ATP or other additional burdens proposed by SoundExchange, as outlined by CBI and others.

## **SUMMARY**

For the reasons outlined above, the CRJs should modify the existing regulations for reports of use so that Educational Stations, paying only the minimum annual royalty, may continue to submit reports of use per the present sample basis, but without the ATH data that SX contends is useless for a service providing a single channel. For the removal of all doubt, Educational Stations also should not be required to provide ATP data. Further, the CRJs should consider adopting for Educational Stations the concept of a data proxy fee, which has been introduced into these proceedings by SX.<sup>44</sup>

The changes CBI proposes herein would promote the universal desire to craft reasonable means to maximize timely royalty distribution to copyright owners and artists. If requested, CBI would work with the CRJs and other interested parties in crafting regulations that would codify the proposals put forth by CBI.

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<sup>44</sup> See SX Comments at p. 21: “Thus, if the Judges were to conclude that census reporting by the lowest-paying services was unreasonable, and that it is worth sacrificing some accuracy to save costs, these agreements illustrate an alternative that seems promising.”

June 8, 2009

Respectfully submitted,  
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