

Before the
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in the Library of Congress
Washington, D.C. 20024-0977

Proposed Findings and Conclusions of
INTERCOLLEGIATE BROADCASTING SYSTEM (IBS)

These proposed findings and conclusions are filed on behalf of the Intercollegiate Broadcasting System, Inc., a non-profit Rhode Island corporation, founded in 1940.

IBS and its Member Stations

IBS is the largest organization of radio broadcast stations and streaming stations, whose staffs are comprised of students at high schools, academies, colleges, and other educational institutions, domestic and foreign. The stations are largely student-managed and are predominantly staffed by student volunteers. Most of these stations are extra-curricular activities financially supported by student activities or student assessments. A few are curricular activities directed by members of the institutional faculty. Few have revenues from their operations. IBS currently carries on its membership rolls some 800 stations. Most IBS Members are public schools, community colleges, and State colleges/universities, entities of our fifty States. The high school and community college stations are dramatically different from those at state college and universities; the high school and community colleges have no dormitories and very limited broadcasting activities. (Kass testimony, 23 tr. 6263-64; Kass WDT [Exhibit 9000] at 2)

IBS operates with a volunteer staff and has no paid officers or employees. IBS, itself, does not transmit digitally recorded music. (Kass testimony, 23 tr. 6262, Kass WDT [Exhibit 9000] at 1)

IBS's principal purpose is to promote such stations and to teach students about communications, media, how to operate a broadcast station, and to teach them in supporting fields such as program production, writing scripts and continuity, music, news, sports announcing, engineering, sales techniques, drama, accounting, management, and regulation. To this end IBS hosts annually a national conference and several coast-to-coast regional conferences that feature instructional lectures, sessions, and panels, involving presentations by leaders from educational institutions, allied arts, the media, and government, including from time-to-time SoundExchange. (Kass testimony, 23 tr. 6263, 6265, Kass WDT [Exhibit 9000] at 3)

Laws in several states prohibit using State funds to support organizations that are, or fund, lobbying groups.¹ SoundExchange uses revenues to fund lobbying. A conflict between state statutes and federal statutes needs clarification. (Kass testimony, 23 Tr. 6263-64, 6271-72 [5/28/15], Kass WDT [Exhibit 9000] at 2)

These stations operate as non-profit entities within the meaning of the statute, as amended. They use digitally recorded music as instructional media for announcers and programmers. Some members of IBS have direct licenses from some artists so that the hours devoted to webcasts thereof are outside the statutory license. The instantaneous listenership to

¹ There are various multi-state compilations, *e.g.*, by the National Conference of State Legislatures, "Limitations on Public Funds for Lobbying," www.ncls.org/research/ethics/50-state-chart-on-public-funds-to-lobby.aspx, citing most notably Hawaii § 42F-103(a), Iowa § 68B.8, New Hampshire 1:15.5 (such funds must be segregated), and Washington RCW 42.17A.635(2) ('no public funds may be used directly or indirectly for lobbying...').

such music on member stations is typically on the order of five listeners, with the exception of course-related music and other on-campus events. In contrast, audiences for live sports broadcast live musical performances, lectures, and other on-campus originations are typically much larger than the audience for digitally recorded music. (Kass WDT [Exhibit 9000] at 3)

IBS Members provide significant science, technology, engineering, management, media, and communication skill set training. The stations typically act as learning laboratories where students may learn and perfect their skills. (Testimony of Kass, 23 tr. 6263; Kass WDT [Exhibit 9000] at 3)

The Judges Should Not Approve the Proposed Agreement between SX and CBI.

The Judges should decline to incorporate the public terms of the proposed agreement between SX and CBI (College Broadcasters, Inc.), published in 79 Fed. Reg., No. 214, at 65609 (Nov. 5, 2014), because (1) it is disproportional, (2) because it does not reflect the diversity between the smaller number of CBI member stations and the larger number of non-CBI-member stations, and (3) the published agreement does not reflect the full terms of the financial relationship between SX and CBI.

(1) Royalty Rates Should be Proportional.

In its notice initiating this proceeding, 79 Fed. Reg., No. 2, 412, 414 (January 3, 2014), the judges specifically inquired into the “disproportionality” of revenues generated by the varieties of marketing plans of commercial webcasters. But the same, if not greater, disparities in receipts exist among the noncommercial educational webcasters. The Corporation for Public

Broadcasting (CPB)-qualified webcasters are relatively well-funded in comparison to non-CPB-qualified educational webcasters. CPB-qualified webcasters, such as Nation Public Radio webcasters, have at least five full-time paid staff members, or equivalent. CPB-qualified webcasters have a large per stream number of domestic listeners at any given time. Those webcasters with institutionally paid fulltime Faculty/Staff are generally better funded than the webcasters relying solely on student-volunteer staffs. As a general rule, high school and academy webcasters, operating limited days and hours with volunteer-student staffs, are less well-funded than webcasters operating more hours and days and/or with paid student staffs. So far as IBS is aware, none of the educationally affiliated webcasters operates for profit, but rather operate within the definition of a “noncommercial webcaster” in Section 114(5)(E)(i) of the Act.

Such circumstances must be taken into account by the Board in setting rates and terms under Section 114(f)(2) (“Such rates and terms shall distinguish among the different types [of services].”) and under a market rate test. The foregoing circumstances necessarily affect each webcaster’s ability to pay performance royalties, as is already recognized in Section 118 of the Act with respect to over-the-air broadcasts. The number of domestic listeners to any noncommercial stream at any given time varies widely among noncommercial webcasters. The relative usage of digitally recorded music varies widely by webcasters with numbers of hours of streaming and with programming formats, *i.e.*, some programming is non-musical, live (unrecorded) music, or music from analogue (non-digital) recordings and thus not subject to licensing. Some members of IBS have direct licenses from some artists so that the hours devoted to webcasts thereof are outside the statutory license. The webcaster’s actual use of licensed digital music should be reflected in the royalty rate they pay SoundExchange (SX).

The webcaster’s ability to pay in turn limits the market price that the willing buyer is willing to pay. Each of these categories of educationally affiliated webcasters constitutes a distinctive sub-market with a distinctive economic base. The recent report of the Register, “Copyright and the Music Marketplace,” (Feb. 2015) points out that

Experience with the section 112 and 114 ratesetting process for noncommercial entities has shown, for example, that the willing buyer-seller standard can adequately account for the limited resources of, and other factors peculiar to, noncommercial users. *See* NRBNMLC First Notice Comments at 11-13 (noting that the CARP and CRB have consistently set lower rates for noncommercial broadcasters).

Id. at 182n913.

The foregoing position reinforces the Office’s more general belief “that an important element of a robust and fair music marketplace is to treat equivalent uses of sound recordings ... alike, or as can practically be achieved.” *Id.* at 125.

As the Register observes in her report at 172n.868:

The CRB ... is free to reject benchmarks that it perceives to be unreasonable or otherwise without merit. *Music Choice v. Copyright Royalty Board*, No. 13-1174..., (D.C.Cir., [slip op. at 15 (decided) Dec. 19, 2014) (“The [CRJs] were within their broad discretion to discount [Sound Exchange’s proposed] benchmarks and look elsewhere for guidance,” as the CRJ’s “mandate to issue determinations ... does not hamstring the Judges when neither party proposed reasonable or *comparable* benchmarks.” (emphasis supplied)

Such circumstances must be taken into account by the Board in setting rates and terms under Section 114(f)(2) (“Such rates and terms shall distinguish among the different types [of services].”) and under a market-rate test.

(2) The Rate Proposed by SX and CBI Does Not Meet The Test.

The rate suggested in the SX-CBI motion is neither a “market rate” nor is it appropriate for other than a minority of college broadcasters.

A.

CBI represents only a minority category of college broadcasters. On this point “a page of history is worth a volume of logic.” *Cf. New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).²

Until recently CBI predominantly served the co-located radio operations of members of the College Media Association, primarily comprised of full time paid advisers of college print publications. CBI held its conventions concurrently and co-located with CMA’s. A few years ago CBI came to a parting of the ways with CMA, and IBS produced broadcast speakers for a successful 2012 Spring New York City CMA convention. IBS further provided broadcast speakers for the CMA/ACP (Associate Collegiate Press) Fall 2012 Chicago conference, in place of CBI. Subsequently, CMA/ACP used CMA paid Staff from Vanderbilt University to serve the radio affiliates of CMA.

About that time CBI began holding annual conventions on its own. The severing of the tie between CMA and CBI left CBI having to fund its Executive Director’s salary. The amount was, IBS is informed and believes, equal in part to payments and resources from Sound

² The following facts internal to CBI are drawn from the attached affidavit Frederick J. Kass, IBS’s CEO, executed on information and belief. They remain undisputed. Since then IBS served discovery requests on CBI to obtain the particulars of the payments from SoundExchange to CBI, but CBI refused to respond. Nor did CBI tender a witness who would have been subject to cross-examination. (23 Tr. 6268-69)

Exchange, although they may be listed as CBI convention sponsorship or some such by SX. But a substantial number of present members of CBI who continued from CBI's relationship with CMA, when such a paid staff was a criterion for membership, presumably still have such a paid staff. These undisputed facts, we submit, would support two propositions that are sufficient to call for denial of the proposal. First, CBI's membership is not representative of a majority of educationally based broadcasters and webcasters, since only a minority of educationally based broadcasters and webcasters have paid staffs. Second, the rates proposed by SX and CBI do not fairly represent the net marketplace payments by CBI members to SX.

B.

The rates proposed should in no event be binding on non-signatories. IBS takes no position on whether the CRJs should approve the rates for signatories, but the proposed rates are not reasonable for the majority of educationally based broadcasters and webcasters that do not have comparable paid staffs. The Judges in Web III heard a morning's argument running to the lunch over the question of whether the proposed rates should be approved on an "opt-in" basis. The argument seemingly was adjourned and never resumed. Evidence was never formally taken on whether the proposal would be reasonable for webcasters not meeting the implicit assumption of a paid staff.

As we understand the statute, the webcaster and SX may agree on rates, which do not require approval of the CRJs, but are required to be public so as to prevent discrimination among webcasters by making them available to like webcasters, analogous to a tariff, without approval of the rates by the Board. But at this point in this proceeding there is not sufficient evidence to

demonstrate that the proposal “provide[s] a reasonable basis for setting statutory terms of rates” binding non-signatories. Nor is there are evidence on the proportionality” of the proposed rates in comparison to the other parties, *e.g.*, the CPB-qualified stations. And there is no evidence that any webcaster has signed an agreement with SoundExchange at these rates.

C.

There are other open factual issues bearing on proportionality that preclude the Board from adopting the SX-CBI proposal. On the assumption that the bench will follow through with its colloquy with counsel in early May, 2015, in adopting the SX-CPB-NPR proposal, then the SX-CBI proposal violates the proportionality test, *viz.*:

1. The largest noncommercial users of the license administered by SX -- CPB-qualified, including NPR, NFCB, and their four networks NPR, APM, PRI, PRX -- pay much less than \$300 per stream per year. Why should much smaller license users, like IBS members in a noncommercial market place, where payment for use should be proportional to use, pay \$500/\$600 a year?
2. The total noncommercial SoundExchange royalty revenue is less than 0.1 % (0.001 of the total) in any given year. Commercial license users account for 99.9 % of SoundExchange’s royalty revenues. Student-staffed webcasters are a small fraction of that 0.1 % total noncommercial revenue paid to SX. Should licensees under the SX-CBI rates, be expected to pay \$ 600 per stream, the highest of any noncommercial stream using below 159,140 ATH per month under the proposed 2016-2020 rates?
3. For royalty years 2009 and 2010 Live365 reached a settlement with SX, approved by the CRB, to pay SX a flat \$ 50,000 a year to cover over 5,000 streams each year, or about \$10 per stream per year. The CBI – SX agreement for some reason proposes a royalty rate of \$500/\$600 per stream per year. The CRB needs to analyze the noncommercial market place to determine if such a high rate is part of an orderly market, *i.e.*, willing buyer – willing seller, or something else.
4. The proposed Web IV CPB/NPR per ATH rate to use one ATH of statutory music is \$ 0.001964 (\$ 560,000 annually to use 285,132,065 ATH). At the

\$ 0.001964 per ATH rate, IBS members such as public schools and community colleges use as little as \$ 3.45 a year in total use of covered licensed ATH (assuming 4 ATH per hour, 3 hours a day, five days a week, 39 weeks in a school year, 75 % licensed/25 % unlicensed webcasts times \$ 0.001964 per ATH). IBS members should pay proportional royalties for their proportional use at the rate set for “public entities” unlicensed webcasts times \$ 0.001964 per ATH.

5. CPB will pay SX for all CPB qualified entities at about \$ 300 per entity per year. On a per stream basis CPB pays much less than \$ 300 per stream, perhaps as low as \$50 per stream per year. Why should be bigger noncommercial simulcasters pay less per ATH than the small noncommercial simulcasters, when both are noncommercial webcasters within the statutory definition in Section 114(f)(5)(E)?

*The Royalty Rates Among Noncommercial Licensees
Should be Proportional to Their Respective Uses.*³

Given the legal and factual similarities among the non-commercial licensees, differences in royalty rates should be a function of usage, *i.e.*, everyone pays the same amount to SoundExchange per each ATH covered under their digital music licenses.

That is not the case at the moment for digital music. Under the published SX-CBI proposal, qualifying licensees would pay \$ 600 for up to 159,140 ATH per individual *channel or station* annually. The total aggregate annual license fee for 530 public radio stations for all website digital music performances by *entities* covered by the SX-NPR agreement would be based on 285,132,065 ATH and prices at \$ 560,000 ($\$ 2,800,000 \div 5$).

Thus, the NPR rate proposed is \$ 1,056,000 per entity (station) for an average of 44,832 per month for 530 public radio entities, assuming ATH is allocated to 530 stations and no ATH were used by the gigantic covered network of NPR, APM, PRI, and PRX. Each of the 530 NPR entities may have as many website “channels” as desired. If, for instance, on the average each

³ The calculations under C are drawn from IBS’ Comments Opposing SX-NPR’s Proposed Settlement, filed in April, 2015, as part of the record herein. (Colloquy, 23 tr. 6269)

NPR/CPB-funded radio entity had four website channels, then the royalty rate per channel per year would be approximately \$ 260.00 per channel per annum for use of on average 44,832 ATH per month. The “on average” phrasing reflects the provision of the proposed agreement allow each entity to use 285,132,065 ATH in any year.

In contrast, according to the records in Web II and III, IBS members use less than four percent of the ATH allowed them under the minimum annual fee of \$ 500 per channel for use of up to 159,140 per month under Web II and Web III and the proposed SX-CBI agreement. That is, IBS members use an average of 6,366 per month. Thus, a proportionate per entity annual fee for IBS member based on use of ATH per entity per month, using the NPR rate *per entity*, would be \$ 147.92. But on a per-channel basis (assuming an average of four channels per NPR station, the IBS Member annual fee *per channel*, the term used in the instant SoundExchange proposal would be \$ 36.98 ($\$ 147.92 \div 4$).

Taking into account, however, that half the proposed annual fee of \$ 560,000 covers certain internet transmissions by ... American Public Media, Public Radio International, Public Radio International, Public Radio Exchange, and certain public radio stations” as well as NPR, the allocated average rate of \$ 36.98 above to IBS member stations would be reduced to \$ 18.49 per channel. Simpler yet, four percent of the SX-CBI minimum annual rate of \$ 500 is \$ 20 per year.

Thus, the proposed SX-NPR-CPB and SX-CBI annual rates in no way meet the comparability test for noncommercial royalty rates. This failure may be attributed to the scanty data presented by the proponents of the SX-CBI and SX-NPR-CPB proposals. Based on the “number” of streams or channels that use the statutory digital music performance license,

according to the prior Web II and Web III records, huge numbers of noncommercial streams are not parties in Web IV or to the instant SX-NPR-CPB agreement. Therefore, it would be difficult for the CJRs to construct a marketplace rate for those parties that are not parties within the proposed *partial* SX-CPB settlement. It is even more difficult for the Judges to determine if the proposed noncommercial settlements reflect the legal and political resources available to the hypothetical “willing” buyer, the noncommercial webcaster, as mentioned in the Register’s Report at 182n.913, quoted above.

For instance, in 2009 and again in 2010 according to the records, Live365 and SoundExchange agreed upon a flat fee of \$ 50,000 paid by Live365 to SoundExchange to cover all uses of the statutory performance license for a reported 5000 – 8000 streams in 2009 and 2010. The annual willing seller—willing buyer noncommercial rate therefore would be less than \$ 7.00 per channel/stream in 2010. Live365 is not listed as a party to this proceeding. The marketplace rate for over 8,000 noncommercial webcasting channels/streams is an important component of establishing an orderly economic market.

It is apparent that the comparability issue in these proceedings is that legal resources, or lack thereof, limit huge numbers of users of the statutory licenses from informing the Board of their part in the marketplace. This is precisely the result adverted to in the Register’s Report at 172&n868, quoted above.

*The Non-Rate Conditions Do Not Advance
the Purposes of the Copyright Clause.*

The SX-NPR-CPB proposal is not ready for final disposition. The Board has admitted that the reporting provisions are in a state of flux. *Notice and Recordkeeping for Use of Sound*

Recordings under Statutory License, Docket No. RM-2008-7, 74 Fed.Reg. No. 196, 42,418-19 (Oct. 13, 2009). Thus, the aggregate burden on small licensees would remain uncertain, and they would be faced with the delay and expense of negotiating terms with an often-uncöoperative licensor.

Moreover, recent experience with the DCMA shows that, as administered and as embodied in the SX-NPR-CPB proposal, it interferes with student learning in the STEM programs and the like at domestic educational institutions. It does not advance the purposes of the United States Constitution, Article I, Section 8, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

It is vital to the purposes of the copyright provisions of the Constitution that students of all ages have digital communications skill sets. Knowledge of the modern Internet and audio-visual worlds is the future of the United States. It remains unclear that the proposal is consistent with the purposes of Section 8, where educationally affiliated webcasting provides an essential take-away for students.

Moreover, for SoundExchange to divert \$ 8,000,000 from the artists to pay Jenner & Block, as SoundExchange’s Form 990 showed for 2012 – a non-ratecase year – does not advance the Constitutional purpose.

The artificial restrictions on webcasters’ programming of subject digital recordings of music are an unnecessary and harmful impediment to students’ learning. The Register’s Report reflects SoundExchange’s recognition that these conditions on webcasters’ playback of digitally

recorded music are not essential. *Op.cit.*, III(B)(3)(b) (“record labels regularly grant broadcasters waivers of the restriction”). The Board should now allow their burdening effect on educationally affiliated webcasters to continue.

Conclusion

For the foregoing reasons, the Board should not approve the SX-CBI proposal, or at least it should not make it binding on non-signatories. Educationally affiliated, noncommercial webcasters (as defined by statute) should pay proportional royalties for their proportional licensable use at the rate set for “public entities” webcasting use. Annual royalties collected by SoundExchange should be limited to only those that exceed annual amounts that SoundExchange determines can collect cost-effectively.

Respectfully submitted,

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June 19, 2015