

Before the
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in the
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Washington, D.C. 20559-6000

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Digital Performance Right in Sound)	Docket No. 2014 CRB-0001WR
Recordings and Ephemeral)	(2016-2020)
Recordings and Digital Performance)	(Web IV)
of Sound Recordings)	
)	

IBS' COMMENTS ON SX-CBI's JOINT RATE PROPOSAL

The Intercollegiate Broadcasting System (IBS), a non-profit Rhode Island corporation and a party to this proceeding, files these comments herein opposing the rate proposal tendered to the Board on October 7, 2014, by SX and CBI. Notice thereof was published in 79 Federal Register, No. 214, at 65609. IBS is the largest organization of academically affiliated radio broadcast stations and streaming webcasters, whose volunteer staffs are students at high schools, academies, colleges, and other educational institutions, most of whom stream their programming over the Internet.*/

*/ IBS' structure and activities are described in more detail in the written direct testimony of Frederick J. Kass, its volunteer CEO, dated October 7, 2014, and filed herein.

I.

SX and CBI's proposal is premature. In its notice initiating this proceeding, 79 Federal Register, 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 full time 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.

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.

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.

II.

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.).^{**/} 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.

^{**/} The following facts internal to CBI are drawn from the attached affidavit Frederick J. Kass, IBS’s CEO, executed on information and belief. In addition, IBS last month served discovery requests on CBI to obtain the particulars of the payments from SoundExchange to CBI.

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 SoundExchange, 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 facts, if proved, would support two propositions that are sufficient to call for postponement of action by the CRJs on the Joint Motion or denial thereof. 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. So the SX-CBI proposal carries with it no higher priority than the proposals of the other parties.

III.

There are other open factual issues bearing on proportionality that the Board should properly address before ruling on the SX-CBI proposal, 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 segmented noncommercial market place, pay \$500/\$600 a year?
2. The total noncommercial SoundExchange royalty revenue is less than 0.5% (0.005 of the total) in any given year. Student-staffed webcasters are a small fraction of that 0.5% paid to SX. Should licensees under the SX-CBI rates, paying \$600 per stream, the highest of any noncommercial stream using below 159,140 ATH per month, be considered now before the remaining 99.5% of the new 2016-2020 rates have yet to be determined?
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 (willing buyer – willing seller) or something else.
4. CPB presently pays 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. The CRB needs time to review the market place to determine the proper relationship of 2016-20 rates per stream of noncommercial webcasters.

Conclusion

For the foregoing reasons, the Board should not approve the SX-CBI proposal at this time or should deny the Joint Motion.

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