

**Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.**

In The Matter Of:

**Determination of Royalty Rates
for Digital Performance in Sound
Recordings and Ephemeral
Recordings (Web IV)**

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) **14-CRB-0001-WR (2016-2020)**
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**COMMENTS OF THE NATIONAL RELIGIOUS BROADCASTERS
NONCOMMERCIAL MUSIC LICENSE COMMITTEE TO THE
PROPOSED RATES AND TERMS FOR NONCOMMERCIAL
EDUCATIONAL WEBCASTERS SUBMITTED BY SOUNDEXCHANGE AND CBI**

INTRODUCTION AND SUMMARY

The National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”) respectfully comments on aspects of the rates and terms that College Broadcasters, Inc. (“CBI”) and SoundExchange, Inc. have proposed to apply to digital audio transmissions of sound recordings by certain noncommercial educational webcasters (“NEWS”) under the statutory licenses set forth in 17 U.S.C. §§ 112(e) and 114(f)(2) (the “Statutory Licenses”). *See Digital Performance Right in Sound Recordings and Ephemeral Recordings: Proposed Rule*, 79 Fed. Reg. 65609 (Nov. 5, 2014). The NRBNMLC is an arm of the National Religious Broadcasters Music License Committee, which was formed many years ago under the National Religious Broadcasters’ auspices to represent religious and other radio stations with similar interests in music licensing matters. The NRBNMLC was formed in 2002 to represent the interests of noncommercial religious and other broadcasters in music licensing matters. The NRBNMLC represents, among others, noncommercial radio stations that would be bound by the

SoundExchange-CBI proposed NEW rates because some represented stations are affiliated with a religious college or university, transmit their radio programming online, and are staffed substantially by students.

The NRBNMLC is commenting on the SoundExchange-CBI proposal not because it takes issue with the bottom-line result of the proposal, which would appear to ensure that all NEWs will pay a flat annual \$500 fee and be exempt from any sound recording reporting requirements over the five-year term of the license. The NRBNMLC believes that a \$500 flat fee and a complete reporting exemption constitute workable rates and terms for NEWs. Rather, the NRBNMLC comments on three specific aspects of the proposal – *i.e.*, the definition of Aggregate Tuning Hours (“ATH”) and the ATH thresholds used to determine eligibility for the NEW fee and eligibility for the exemption from reporting sound recording usage – to make clear that while these provisions are ones that SoundExchange, as a willing seller, has demonstrated that it will accept, they are not ones that noncommercial webcasters overall would accept or should be required to accept.

With respect to the ATH definition proposed by SoundExchange and CBI, the definition properly excludes sound recordings not subject to the Statutory Licenses, but it does not unambiguously exclude other programming that does not include sound recordings at all, such as news, talk, and sports programming. NEWs receive no benefit under the Statutory Licenses from transmitting such programming, so their transmission of that programming should not adversely affect their fee liability under the Statutory Licenses in any way. Where ATH thresholds are used to affect the fees that NEWs must pay and the reporting requirements that they must follow, discrete programming blocks that do not include sound recordings subject to the Statutory Licenses should not count toward meeting these thresholds. Because, however,

NEWs all appear to stream at listener levels below the ATH threshold for determining eligibility for the NEW fee even under an expansive interpretation of the proposed ATH definition, the NRBNMLC merely points out this flaw in the definition but does not formally object to it.

With respect to the specific ATH thresholds proposed by SoundExchange and CBI to determine eligibility for both the flat annual fee and the exemption from reporting sound recording usage, those thresholds show that SoundExchange is willing to offer the proposed rates and terms to NEWs streaming at at least these levels. They do not, however, necessarily show the maximum thresholds that SoundExchange would have been willing to accept because NEWs had little to no economic incentive to seek to raise them. Specifically, SoundExchange has acknowledged that fully 97% of NEWs stream fewer than 55,000 monthly ATH. In a recent submission in the Copyright Royalty Judges' ("Judges'") rulemaking to determine notice and recordkeeping requirements applicable to the Statutory Licenses, it stated that "[f]or 2013, 97% of Noncommercial Educational Webcasters elected th[e] reporting waiver" under the current rates and terms applicable to NEWs, which are only available to NEWs streaming fewer than 55,000 monthly ATH. *See* Comments of SoundExchange, Inc., Docket No. 14-CRB-0005 (RM), 3 (June 30, 2014) (Ex. 1). Moreover, according to SoundExchange's own licensee payment records, not a single NEW paid more than the minimum fee over the past three years. *See* SNDEX0051676 (emphasis added).¹ In other words, fully 100% of NEWs streamed at levels below the 159,140 ATH threshold, which was the threshold for determining whether a station owed fees in excess of the minimum fee for those years. *See* 37 C.F.R. § 380.22(b).

¹ The cited Bates page is an Excel spreadsheet produced by SoundExchange in this proceeding that has been marked Restricted under the governing Protective Order because it includes licensee-specific payment information. To ensure that the entirety of the NRBNMLC's submission is available to the public, consistent with the Judges' directive in the Protective Order, the NRBNMLC has not attached a copy of this document as an exhibit. It stands ready, however, to provide the Judges a copy of this document if so requested.

Given these modest listenership levels, NEWs had no economic incentive to negotiate the proposed 159,140 and 80,000 monthly ATH thresholds to the highest level that SoundExchange would accept. Rather, so long as the thresholds were high enough to ensure that NEWs qualified for the \$500 flat fee and the reporting exemption, NEWs had no further incentive to press SoundExchange to raise these thresholds further. Therefore, the thresholds are likely much lower than those that willing noncommercial buyers with an economic interest to seek higher thresholds would negotiate with a willing seller in an effectively competitive marketplace.

COMMENTS ON SPECIFIC PROVISIONS

I. WHILE PROGRAMMING BLOCKS THAT LACK SOUND RECORDING PERFORMANCES PROPERLY SHOULD BE EXCLUDED IN DETERMINING ATH, THE SOUNDEXCHANGE-CBI ATH DEFINITION APPEARS TO BE WORKABLE FOR NEWS, WHICH APPEAR NOT TO REACH THE SPECIFIED ATH THRESHOLDS EVEN WHEN SUCH PROGRAMMING IS COUNTED.

The SoundExchange-CBI proposal uses ATH as a threshold for determining eligibility for (a) the \$500 annual flat fee that they propose for NEWs and (b) partial or full relief from the requirement to report sound recording usage. As a general matter, there is no principled basis why programming content not subject to the Statutory Licenses at all – such as news, talk, or sports programming – should have any bearing on the rates and terms that apply to statutory licensees. By definition, any value that NEWs receive from such programming is not attributable to sound recordings performed pursuant to the Statutory Licenses, so such programming should not count in any way against NEWs when their eligibility for the proposed \$500 flat NEW fee or for reporting relief is determined. Rather, such programming should be expressly excluded when calculating ATH.

The ATH definition that SoundExchange and CBI proposed recognizes this principle in one respect by excluding sound recordings not subject to the Statutory Licenses from the ATH count. *See* 79 Fed. Reg. at 65610 (proposing to carry forward the ATH definition for NEWs

found in 37 C.F.R. § 380.21); 37 C.F.R. § 380.21 (excluding from the ATH definition “the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law”). It is less clear, however, whether the definition excludes programming that does not contain sound recordings at all when calculating ATH. In pertinent part, that definition reads as follows:

ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law.

37 C.F.R. § 380.21.

While the provision appears to define ATH comprehensively as the “total hours of programming ... transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming,” it also requires that programming to include sound recordings subject to the Statutory Licenses – *i.e.*, the programming counted as ATH must include at least some “Eligible Transmissions.” *See* 37 C.F.R. § 380.21 (“*Eligible Transmission* means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.”); 17 U.S.C. § 114(j)(6) (defining “eligible nonsubscription transmission” as “a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings”). It is unclear from this definition whether all programming across all stations and channels is all counted as ATH so long as a single sound recording subject to the Statutory Licenses is

transmitted on one channel during a relevant period or whether a licensee may reasonably exclude discrete programming blocks from the ATH count if they do not include such recordings.

There is no justification for including programming hours in the ATH count that are not subject to the Statutory Licenses – if programming does not include sound recordings subject to the Statutory Licenses, it should have no effect on the royalties that NEWs must pay or the reporting requirements that apply to them. A definition that would make this principle more explicit would be as follows, which the NRBNMLC proposed in its written direct statement:

Aggregate Tuning Hours means the total hours of programming transmitted by or on behalf of a Noncommercial Educational Webcaster during the relevant period to all listeners within the United States of eligible digital transmissions from a single AM or FM radio station or single channel. In computing Aggregate Tuning Hours, a Noncommercial Educational Webcaster may exclude any discrete programming segments and any half-hours of programming that do not include any Performance. By way of example, if a service transmitted one hour of programming containing Performances to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If one half-hour of that hour did not include any Performance, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 5. As an additional example, if one listener listened to a service for 10 hours and all 10 hours contained Performances, the service's Aggregate Tuning Hours would equal 10.

The above definition would allow licensees to exclude programming in discrete segments or segments of 30 minutes or greater from the ATH count if they do not contain any "Performance" (with the definition for "Performance" carried forward from the current license period and delineating those sound recording performances that are subject to the Statutory Licenses). Even though the NRBNMLC believes that this definition is superior to the one proposed by SoundExchange and CBI, it does not formally object to the SoundExchange-CBI definition in the context of the SoundExchange-CBI settlement for NEWs because it appears to have no economic effect on NEWs, as all of them stream at levels below the 159,140 monthly ATH eligibility threshold, and virtually all stream at levels below even 55,000 monthly ATH. It

thus appears that NEWs will not be adversely affected by the ATH definition even if it is construed to include talk and other programming that does not include sound recordings in the ATH count.

II. THE PROPOSED ATH THRESHOLDS SHOW SOUNDEXCHANGE'S WILLINGNESS TO ACCEPT \$500 ANNUALLY FROM NEWS AND EXEMPT THEM FROM REPORTING BUT REVEAL LITTLE REGARDING APPROPRIATE MAXIMUM THRESHOLDS.

SoundExchange and CBI have proposed to carry forward the same 159,140 monthly ATH threshold that has been in place since 2006 for determining those NEWs that would pay a \$500 annual flat NEW fee as opposed to more general noncommercial rates to be set by the Judges. *See* 79 Fed. Reg. at 65611 (providing that NEWs who unexpectedly exceed 159,140 ATH in any given month must pay royalties otherwise applicable to noncommercial webcasters for the remainder of the calendar year). They also have proposed to increase from 55,000 to 80,000 the monthly ATH threshold for exempting NEWs from reporting requirements in exchange for payment of a \$100 annual proxy fee. *Compare* 79 Fed. Reg. at 65612 (proposing a reporting exemption cap of 80,000 monthly ATH per channel or station) *with* 37 C.F.R. § 380.23(g) (setting reporting exemption threshold at 55,000 monthly ATH per channel or station).

While this proposal reveals the rates and terms that SoundExchange, a willing seller acting on behalf of copyright owners, is willing to accept from NEWs – *e.g.*, a \$500 annual flat fee and no reporting – it reveals little about the maximum ATH thresholds that should apply to noncommercial webcasters in order to remain eligible for these rates and terms.

As previously discussed, fully **100%** of NEWs paid a flat \$500 annual fee per channel for 2011-2013 and thus streamed no more than 159,140 monthly ATH over that three-year period. Indeed, according to SoundExchange, fully **97%** of NEWs streamed fewer than 55,000 monthly

ATH – a level of less than 35% of the 159,140 amount. *See supra* p. 3. Therefore, these NEWs had some economic incentive to negotiate a higher monthly ATH threshold for the reporting exemption than 55,000 – and did so, setting it at 80,000 – but they had no economic incentive to seek to increase the 159,140 threshold, as they all are below that threshold already, or to seek to increase the reporting exemption threshold above a level that addressed their concerns. So long as the monthly ATH thresholds were above their listenership levels, they understandably did not care what the precise numbers were. CBI’s willingness to accept these thresholds therefore provides no indication of how high these thresholds should actually be for noncommercial webcasters with an economic incentive to negotiate higher thresholds.

There are strong indications that these thresholds actually should be set higher than the proposed levels. The 159,140 ATH amount, for example, was based on a now ten-year-old survey of average stream listenership on National Public Radio (“NPR”) stations. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 72 Fed. Reg. 24084, 24099-100 (May 1, 2007) (observing that according to a 2004 NPR survey, “NPR stations averaged 218 simultaneous streaming listeners per station (or the equivalent of 159,140 ATH per month)”). SoundExchange President and CEO, Michael Huppe, however, testified that “the online radio audience has more than doubled from an estimated 49 million to 124 million listeners over the past 7 years and the average time spent listening has doubled in the past 5 years to more than 13 hours a week currently.” Test. of Michael Huppe ¶ 13 (Oct. 6, 2014) (Ex. 2). This passage of time and concomitant webcasting growth suggests that any threshold for distinguishing noncommercial webcasters from commercial webcasters should grow as well.

Similarly, there is little justification for exempting some noncommercial licensees who pay a \$500 flat annual fee from reporting requirements while requiring other such licensees to provide such reports. Small noncommercial webcasters paying a \$500 fee typically are the least equipped to prepare such reports, making the burden imposed on them in preparing the reports and on SoundExchange in processing them relatively greater as compared with other licensees. Moreover, SoundExchange's Chief Operating Officer, Jonathan Bender, estimated SoundExchange's annual administrative costs to be \$1,900 per channel or station and asserted that larger services "in effect subsidize the costs associated with processing payments and information from smaller services that typically pay only the minimum fee."² Test. of Jonathan Bender at 16, 18 (Oct. 6, 2014) (Ex. 3). These relatively higher reporting and processing costs and relatively lower royalty fees when compared with larger commercial entities indicate that all noncommercial webcasters who pay only \$500 in annual royalties should be exempt from such reporting.

Notwithstanding the NRBNMLC's concerns that the proposed ATH thresholds are lower than what willing noncommercial buyers would negotiate with willing sellers in an effectively competitive marketplace, it supports the bottom-line result of the SoundExchange-CBI proposal – *i.e.*, that NEWs pay a flat annual \$500 fee and not be required to provide reports of sound recording usage.

² The NRBNMLC does not concede that SoundExchange's annual minimum cost per channel or station is \$1,900.

CONCLUSION

The NRBNMLC appreciates the Judges' consideration of its comments.

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November 26, 2014

EXHIBIT 1

**Before the
United States Copyright Royalty Judges
Library of Congress**

In the Matter of:

Notice and Recordkeeping for Use of Sound
Recordings under Statutory License

Docket No. 14-CRB-0005 (RM)

COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. (“SoundExchange”) is pleased to provide these Comments in response to the Copyright Royalty Judges’ Notice of Proposed Rulemaking (“NPRM”) concerning notice and recordkeeping issues under the statutory licenses provided by Sections 112 and 114 of the Copyright Act. *See* 79 Fed. Reg. 25,038 (May 2, 2014). SoundExchange appreciates the Judges’ commencing this proceeding based in significant part on SoundExchange’s petition described in the NPRM (the “Petition”).

As the NPRM notes, SoundExchange is “the sole Collective designated by the Judges to collect and distribute sound recording royalties under the section 112(e) and 114 licenses.” 79 Fed. Reg. at 25,039. As such, the issues addressed in the NPRM are critically important to SoundExchange. The notice and recordkeeping regulations that the NPRM proposes to amend provide the basis for much of what SoundExchange does.

Because the Petition describes SoundExchange’s views concerning almost all of the issues raised in the NPRM, these Comments only briefly address a few points. The discussion of each follows the order of, and is captioned with reference to, the NPRM. SoundExchange anticipates providing more extensive reply comments after considering the initial comments provided by other interested parties.

III. Joint Petition

As the NPRM explains, College Broadcasters, Inc., the American Council on Education and Intercollegiate Broadcasting Systems, Inc. filed a motion in October 2009 seeking “clarification” that the exemption from census-based reporting in Section 370.4(d)(3)(i) of the current regulations extends to Internet-only “minimum fee webcasters,” as well as those that are licensed broadcasters. The Judges have determined to treat the motion as a petition for a rulemaking (the “Joint Petition”). 79 Fed. Reg. at 25,039-40. Section 370.4(b)(2) of the proposed regulations set forth in the NPRM implement the Joint Petition. 79 Fed. Reg. at 25,046.

As a threshold matter, it is important to recognize that census reporting is, in general, a critical aspect of the statutory licenses. Artists and copyright owners should be paid as accurately as practicable for the use of their recordings, and census reporting is what makes that possible. As the Judges have noted, “[t]he failure to report the full actual number of performances of a sound recording is at odds with the purpose of the recordkeeping requirement to the extent that, as a result, many sound recordings are under-compensated or not compensated at all from the section 114 and 112 royalties.” Notice and Recordkeeping for Use of Sound recordings under Statutory License, 73 Fed. Reg. 79,727, 79,728-29 (Dec. 30, 2008). SoundExchange believes that the Judges were right in 2009 when they extended census reporting to almost all statutory license usage, and SoundExchange urges extreme caution when considering possible deviations from census reporting.

SoundExchange also believes that the Joint Petition is moot through 2015. The Joint Petition was filed in late 2009, right after the conclusion of the Judges’ last wide-ranging examination of the notice and recordkeeping regulations. The *Webcasting III* rate proceeding

was pending before the Judges at that time. Subsequent to the filing of the Joint Petition, the issues raised by the Joint Petition were fully addressed in *Webcasting III*. Pursuant to 37 C.F.R. § 380.23(g)(2), a “Noncommercial Educational Webcaster” with usage at a level covered by the minimum fee is currently permitted to provide reports of use on a sample basis just as contemplated by Section 370.4(b)(2) of the proposed regulations in the NPRM, and is even excused from reporting its aggregate tuning hours or actual total performances.¹ Moreover, the vast majority of Noncommercial Educational Webcasters are not even required to do that. Pursuant to 37 C.F.R. § 380.23(g)(1), Noncommercial Educational Webcasters with the lowest intensity of usage may elect to pay a “proxy fee” of \$100 and forgo providing reports of use altogether. For 2013, 97% of Noncommercial Educational Webcasters elected this reporting waiver, and were not required to provide any reports of use at all. Sections 380.23(g)(1) and (2) will remain in effect through at least the end of 2015, at which point the terms to be determined in the *Webcasting IV* proceeding will become effective.

All that said, SoundExchange does not oppose the definition of “Minimum Fee Broadcaster” set forth in Section 370.4(b)(2) of the proposed regulations in the NPRM.² Usage by internet-only educational webcasters represents only a tiny sliver of the market. And while the proposed changes to the definition would deviate from the principle of census reporting, they would do so only in a way that is currently permitted by Section 380.23(g)(2). Because the

¹ Such services report play frequency in lieu of reporting aggregate tuning hours or actual total performances.


² SoundExchange notes that in Section 370.4(b)(2)(ii), there should be a comma following the phrase “officially sanctioned by,” and that in Section 370.4(b)(2)(iv), the reference should be to Section 118(f). SoundExchange also suggests that because the category of licensees entitled to provide sample reporting would be expanded to include service providers that are not “broadcasters,” the defined term used to denote such a licensee would more accurately be something like “Eligible Minimum Fee Webcaster.”

CONCLUSION

SoundExchange appreciates the opportunity to provide these Comments and looks forward to participating in further proceedings concerning the important issues raised by the NPRM.

June 30, 2014

Respectfully submitted,



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EXHIBIT 2

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

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) **DOCKET NO. 14-CRB-0001-WR**
) **(2016-2020)**
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TESTIMONY OF

MICHAEL HUPPE

President & CEO,
SoundExchange, Inc.

Witness for SoundExchange, Inc.

in the webcasting industry. The promise of a strong statutory license – one that fairly compensates rightsholders and creates an efficient process through which webcasters can license music – serves an important role in this transition.

13. The webcasting industry has grown over the last decade under the statutory system. Based on one recent survey, the online radio audience has more than doubled from an estimated 49 million to 124 million listeners over the past 7 years and the average time spent listening has doubled in the past 5 years to more than 13 hours a week currently.⁷ Since the last webcasting rate-setting proceeding, the number of statutory licensees has increased significantly and is now well over 2,500 licensees today.⁸

14. SoundExchange and the availability of the statutory license have contributed to this growth. We offer a “one stop shop” that eases the way for new webcasters to start a new statutory service. Through SoundExchange, new webcasters can make a single payment and obtain licenses that apply to thousands of individual copyright owners. We handle this operational function for webcasters, which frees up resources and allows them to spend more time and money growing and investing in their business, rather than engaging in individual licensing discussions with a multitude of rightsholders before they can legitimately operate. And we handle the apportionment and distribution of the royalties (with all the attendant data issues, tax considerations, and so forth) to tens of thousands of payees, a function the webcasters would otherwise be required to undertake.

⁷ 2014 Infinite Dial Survey, conducted by Edison Research *available at* <http://www.edisonresearch.com/wp-content/uploads/2014/03/The-Infinite-Dial-2014-from-Edison-Research-and-Triton-Digital.pdf> (last visited Sept. 30, 2014).

⁸ See Testimony of Jonathan Bender at Figure 1.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: Oct. 6, 2014


Michael Huppe

EXHIBIT 3

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

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) **DOCKET NO. 14-CRB-0001-WR**
) **(2016-2020)**
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TESTIMONY OF

JONATHAN BENDER

Chief Operating Officer, SoundExchange, Inc.

Witness for SoundExchange, Inc.

position in prior proceedings, I agree that the minimum fee should ensure that every licensee makes an appropriate contribution to the costs of administering the statutory license, as well as a reasonable payment for the usage of sound recordings. After all, if the minimum fee covered only administrative expenses, then copyright owners and performers collectively would receive no payment for the use of their sound recordings by the many services (the majority of licensees, in fact) that are paying only the minimum fee. Those payments would in effect be completely consumed by costs of administration. SoundExchange, however, has never sought to collect all of its costs from minimum fee payments. Payments from services that pay larger amounts of royalties in effect subsidize costs associated with processing payments and information from smaller services that typically pay only the minimum fee.

SoundExchange's per-service or per-station or per-channel administrative costs are difficult to quantify. The expenses that SoundExchange incurs in relation to particular services vary widely depending, for instance, on the quality of the data that a service provides to SoundExchange and on the additional work that SoundExchange may need to do when it receives poor quality data. In addition, some larger station groups submit separate statements of account and reports of use for each of their individual stations. This means that we need to process each such station individually, rather than as a group, which necessarily adds time to SoundExchange's efforts. Our costs also vary depending on the breadth and obscurity of a service's repertoire, with services that play a great deal of repertoire that is relatively unique imposing greater research costs. In addition, many of our costs are effectively shared across services – including things like research of repertoire used by multiple services, costs of artist outreach and distributing royalties once individual services' allocations are loaded, information technology and corporate overhead. SoundExchange does not track its administrative costs on a

licensee-by-licensee, station-by-station, or channel-by-channel basis and, as a result, there is no precise way to determine exactly what we must spend on such a basis.

Despite these difficulties, as a check on whether the minimum fees proposed in this proceeding are reasonable in light of our administrative costs, SoundExchange nonetheless estimated our administrative costs per service. Based on current records, SoundExchange's expenses for 2013 were approximately \$30 million. This amount includes SoundExchange staff, facilities, operating expenses, equipment depreciation, amortization of costs of rate-setting proceedings, and other costs. In 2013, based on information available in September 2014, SoundExchange had 2,547 licensees (at the statement of account level) of all license types. When SoundExchange's operating costs are divided by the number of licensees, the result is a per licensee cost of approximately \$11,778.

While the overwhelming majority of these licenses (about 2,200) operated only one station or channel, some operated multiple stations or channels. The number of individual channels or stations on a licensee's service is often an indicator of greater complexity required to handle such payments and reporting. Despite this, we have been willing to agree to a cap on the minimum fee corresponding to 100 channels or stations per licensee, and propose such a cap for commercial webcasters in this proceeding.

As a further check on our proposed per channel or per station minimum fee, we tried to determine the average number of channels or stations per webcaster licensee. Calculating the average number of channels or stations per webcaster is necessarily an inexact exercise. Services do not always report the total number of channels or stations, and, for services that allow users to create channels, it is unclear (in part because it is unreported) how many "stations" there actually are. In estimating the average number of stations or channels per webcaster, we

used actual numbers where that information is reported to us. Where that information is not reported to us, but where a service provides information about the number of its stations or channels on a publicly available website, we used that information. For the small number of services for which we lack information about their total number of stations or channels, but for which we are generally aware that they have a large number of stations or channels, we assumed 100 stations or channels. The assumption of 100 stations or channels is consistent with SoundExchange's proposal of a \$50,000 cap on minimum fees for commercial services with 100 or more stations or channels where the minimum fee is \$500.


Based on the foregoing information, we determined that there is an average of about six channels or stations per webcaster licensee at the statement of account level. If we divide the average cost at the licensee level by the average number of channels or stations per licensee, SoundExchange's average per channel or station cost for webcasters in 2013 was approximately \$1,900 (\$11,778 divided by 6). One could do the analysis differently. For example if one capped at 100 the number of channels or services known to have a much larger number of channels, one would get a lower average number of channels or stations per webcaster licensee at the statement of account level and a correspondingly higher average per channel or station cost.

The exact cost imposed by any particular licensee varied widely. Every single statement of account and every single report of use must go through the entire process described above – the payments and statements of account must be reviewed, verified, and recorded; and the reports of use must likewise be reviewed, tested, logged, and loaded into the distribution engine. Any problems with paperwork or logs can introduce problems and cause delay.

Nonetheless the estimates described above demonstrate that SoundExchange's proposed minimum fee of \$500 per station or channel is below our estimated per station or

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: October 6, 2014


Jonathan Bender

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2014, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

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