

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC

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| In the Matter of |) | |
| |) | |
| Determination of Royalty Rates for |) | |
| Digital Performance in Sound Recordings |) | 14-CRB-0005-RM |
| and Ephemeral Recordings |) | NPRM |
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**COLLEGE BROADCASTERS, INC.’S COMMENT IN RESPONSE TO THE
COPYRIGHT ROYALTY BOARD’S NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION

On May 2, 2014, the Copyright Royalty Board (“CRB”) published a “notice of proposed rulemaking” in response to two filings. *See* Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. 14-CRB-0005-RM, 79 FR 25038, 25039 (May 2, 2014) (“NPRM” or “Notice”).

The first was a joint petition (“Joint Petition”) filed by College Broadcasters, Inc. (“CBI”), American Council on Education (“ACE”) and Intercollegiate Broadcasting Systems, Inc. (“IBS”) (collectively “Petitioners”) on October 28, 2009, which had asked the CRB to clarify the final regulation it had issued on October 13, 2009. *See* 74 FR 52418. In particular this Joint Petition asked the CRB to clarify whether or not it had intended the exemption from census reporting to minimum-fee webcasters to include those services that did not also possess FCC licenses. *See* Joint Petition for Clarification at 2–3 (Oct. 28, 2009).

The second filing was a petition by SoundExchange (“SoundExchange Petition”) to make numerous changes to the rules pertaining to recordkeeping, Notices of Use (“NOU”) and Reports of Use (“ROU”).

CBI hereby files the following comments in response to the NPRM with respect to both filings and respectfully requests prompt action on the Joint Petition issue because the regulation bears directly on the issues implicated in Webcaster IV and the matters that those participants, including CBI, need to address.¹ *See* Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV), Docket No. 14-CRB-0001-WR (2016-2020), 79 FR 412 (Jan. 3, 2014).

II. BACKGROUND

Most of CBI’s members are small, independent webcasters with limited budgets and whose operations are based on volunteer efforts. As the CRB noted in crafting the exception in 2009, complying with recordkeeping requirements may pose serious logistical and financial difficulties for many of these stations. *See* 79 FR 25039-40. However the rule that the CRB promulgated to exempt certain webcasters from full census actual total performance (“ATP”) reporting arbitrarily excluded educational stations that did not have an FCC license, despite the fact that they warranted relief from recordkeeping obligations as much as their fellow FCC-licensed educational stations did. *See id.* Indeed, what defines the class of webcasters who need this relief is their educational character and the unique challenges inherent to these types of webcasters.

In light of the current rule providing relief only for some of these educational webcasters but not all who would equally need it or equally be entitled to it, but for their lack of an FCC license, CBI submitted the Joint Petition to request the CRB review and

¹ A prompt addressing of the issues implicated in the NPRM and this response, including the proposed regulations in Exhibit A, would, if adopted as proposed by CBI, greatly reduce the effort needed for the services and the collective to address non-rate issues as part of the rate-setting proceeding and likely encourage settlements, which would further conserve the resources of all involved.

reissue the regulation to include these non-FCC licensed stations otherwise qualifying for the exemption. *See* 79 FR 25039. In the absence of such review by the CRB at that time CBI then filed an appeal with the Court of Appeals for the D.C. Circuit seeking its review of the regulation as well. CBI also jointly moved with SoundExchange to have their mutual settlement (“Settlement”) reached under the Webcaster Settlement Act of 2009 (“WSA 2009”), Pub. L. No. 111–36, adopted as precedent and codified pursuant to 18 U.S.C. § 801(b)(7)(A) as the statutory rates and terms under Web III, which the CRB ultimately did on March 9, 2011, *see* 76 FR 13026, and reaffirmed in its April 25, 2014 final determination. *See* 79 FR 23102

Notably this Settlement included terms that provided even more effective relief from recordkeeping and ROU requirements than the CRB’s 2009 rule did. *See* 37 CFR § 380.23(g) & (h). It also applied it to the entire class of affected webcasters, whether FCC licensed or not, which, upon the CRB’s adoption of the Settlement as the statutory rates and terms, were characterized in the code as “non-commercial educational webcasters,” or “NEWS.” 37 CFR § 380.21.

These alternate terms have dramatically increased the ability of NEWS to report usage and for the collective to distribute royalties. Nevertheless, these alternate terms are set to expire at the end of 2015, and with it the relief they have provided NEWS to make sure all of them could continue to webcast. 37 CFR § 380.20(a). Once these terms do expire, these webcasters will instead need to avail themselves of the rules codified in § 370 *et seq.* that provide either lesser protection or no protection at all from unmanageably burdensome recordkeeping requirements, depending on whether they have an FCC license or not and whether the CRB also codifies the proposed changes sought by SoundExchange without any modifications that exempt NEWS.

CBI thus submits these comments to ensure that the rules codified at § 370 *et seq.* provide all NEWS with a means to report that is realistic for them to comply with, ideally by continuing to incorporate the rules currently at § 380 *et seq.* as the permanent rules at

§ 370 *et seq.*, but at minimum by adopting the changes proposed in the Joint Petition and minimizing the impact of the changes proposed in the SoundExchange Petition on NEWs.

III. DISCUSSION

a. The CRB should, at minimum, adopt the joint petition to apply to all non-commercial educational webcasters, even those without FCC licenses.

In the NPRM the CRB asks if, under the current, un-amended rule issued in 2009, any webcasters have ceased operation. 79 FR 25040. CBI is not aware of any having ceased operating as a result of the current rule, but none would have had to because they have been able to avail themselves of the recordkeeping relief obtained in the Settlement as codified in 37 CFR § 380.23(g), which is set to expire at the end of 2015. Nonetheless there is plenty of data to show that recordkeeping relief is integral for NEWs, including those without FCC licenses, to be able to continue to webcast.

In 2009 CBI had conducted a survey of educational stations² and reported that fewer than 12% of those that responded³ would be able to submit fully compliant reports of use, as proposed at the time by the CRB. Conversely, 88% of survey respondents reported that they would not be able to submit fully compliant reports of use due to unfamiliarity with the rules, their inability to calculate Aggregate Tuning Hours (“ATH”), and the unreasonable burden of compliance due lack of resources and other such challenges. In response to this current NPRM CBI again surveyed educational stations⁴ and learned that at least 85% of those responding to the survey report submitting

² See Comments of College Broadcasters, Inc., Docket No. RM 2008-7, at 4 (May 26, 2009).

³ While CBI is not aware of the entire universe of educational stations webcasting at the time, the sample was approximately 130 stations.

⁴ The 2014 survey identified 260 stations that were actively webcasting and met the requirements to be considered a NEW. Not all stations completed every question on the survey and a technical glitch may have caused some stations to not see the question regarding reporting. CBI also provided respondents with a certain level of comfort in reporting their answers by stating that it would not reveal their individual

ROU's in compliance with 37 CFR § 380.23(g), whether via proxy, voluntary reports, or required reports. In other words, while in 2009 CBI was able to identify fewer than 20 stations, or 12% of those who responded to the survey, who reported the ability to comply with the then-proposed rules regarding recordkeeping, in 2014 CBI found 223⁵ stations, or greater than 85% of survey respondents, that reported compliance with the recordkeeping rules under §380.23 (g). CBI attributes this enormous increase in reported compliance with the fact that the § 380.23(g) rules are simpler to follow and impose fewer obstacles than the generally applicable rules non-NEWs must comply with. In short, the adoption of the 37 CFR § 380.23(g) regulations gave NEWs needed relief from the more onerous reporting requirements while at the same time providing copyright owners and performers with more income simply because the regulations allowed more stations to webcast.

With regard to non-FCC licensed stations specifically, according to the responses received in CBI's latest survey, fewer than 13% of those stations reported that they are currently able to report ATP data. Furthermore, fewer than 18% of those stations reported that they would be able to find a means to comply with full census ATP reporting should the requirements codified at § 380.23 be allowed to expire and the amended regulations proposed in the Joint Petition not be adopted.

In short, the failure to extend any regulation providing recordkeeping relief to these stations will impose an unreasonable burden on more than 85% of NEWs that are currently paying royalties and are compliant with the recordkeeping and ROU rules under 380.23(g), without proper justification. The CRB should thus act to, at minimum, amend its regulation to apply the exemption from census ATP reporting to non-FCC licensed NEWs as the Joint Petition proposes.

results, in an effort to obtain the best possible overall completion rate for the survey. Nonetheless data was collected from 223 stations addressing how they report.

⁵ It is possible that the remaining 37 stations who did not answer the reporting question are nevertheless complying with their obligations, but in order to ensure it is not overstating the numbers CBI has assumed they are not.

b. The recordkeeping relief adopted as part of the statutory rates and terms in Web III should be the baseline adopted by this rulemaking.

As the data above suggests, the recordkeeping and ROU provisions in § 380.23 have been effective not only in improving the percentage of compliant educational stations but also in increasing the universe of educational stations webcasting and therefore more royalties collected and distributed. Although adopting the proposed change in the Joint Petition is the minimum that the CRB should do, the more effective solution to adequately protect these stations and ensure the greatest pool of collected royalties is to incorporate the recordkeeping terms currently available for NEWs under § 380.23 as the non-expiring rules set forth under § 370 *et seq.*⁶ Reporting as a NEW has not only allowed stations with limited resources, limited technical ability, and a lack of understanding of complicated regulations to webcast in a lawful way but also enabled SoundExchange to collect, and subsequently distribute, royalties from these entities.

Although the CRB has indicated that it would resist codifying negotiated terms unless and until they came into such standardized use as to effectively supersede the existing regulations, *see* 79 FR 25039, these alternative terms currently in § 380 *et seq.*, which were submitted to the CRB for adoption as the statutory terms as precedent, have clearly been widely adopted by this class of webcasters over the past five years. Furthermore, while the CRB has been reluctant in the past to allow the use of proxies, a key feature of the § 380 *et seq.* terms, having at times referred to the use of them as an “exemption” from reporting requirements, *see, e.g.*, 74 FR 52421-2, it is now clear that both the CRB and SoundExchange accept the need for proxies in limited situations in

⁶ CBI attaches to this comment Exhibit A outlining proposed § 370.5 and § 370.6(b) regulations that essentially mirror the current relevant sections of § 380 *et seq.*

order to both collect and distribute collected royalty payments.⁷ Providing the smaller NEWs this sort of recordkeeping relief is one such limited situation where they would be appropriate.

By allowing continued reporting via proxy, as CBI proposes, the CRB would not be creating an exemption but rather codifying an option already allowing for the continued collection and distribution of royalties in a way that has already proven effective for both this limited group of services and the artists that benefit from their continued webcasting. The stations that currently pay a proxy fee in lieu of providing ROUs are not being exempted from reporting requirements; they are simply reporting via proxy, something that has been allowed by Congress, been a prominent feature of settlement agreements, been accepted by the collective, and been adopted by the CRB.⁸ In sum, adopting the current terms codified in § 380 *et seq.* as the regulations articulated in § 370 *et seq.*, as CBI proposes, would not be trading new ground.⁹ Incorporating the

⁷ See the proposed regulations at § 370.6(b) of the NPRM, which propose to allow the collective to distribute royalties via proxy in instances where it has not received an ROU that would permit it to distribute royalties in any other way.

⁸ The CRB and SoundExchange also propose distributing by proxy as a rule, rather than on a case-by-case basis. *See, e.g.*, § 370.6(b) in the proposed regulations in the NPRM.

⁹ There is also a long history of allowing webcasters to report by proxies. For instance, the non-commercial settlement under the Small Webcaster Settlement Act provided for reporting by proxy for many types of non-commercial services (regardless of FCC license status). *See* Notification of Agreement under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,008–12 (June 11, 2003). Also, in 2004 the CRB allowed for the use of proxies for a past period where reports had not been submitted, stating that “there was little likelihood of obtaining any useful and meaningful data by requiring services to report information.” 69 FR 58,261 (Sep. 30, 2004). Then in 2011, SoundExchange filed with the CRB a petition for rulemaking to consider adopting regulations similar to what is being considered now to authorize SoundExchange “to use proxy reporting data to distribute to copyright owners and performers certain sound recording royalties for periods before 2010 that are otherwise undistributable due to licensees’ failure to provide reports of use’ or their provision of ‘reports of use that are so deficient as to be unusable.’” Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Final rule, Docket No. RM 2011-5, 76 FR 45695 (Aug. 1, 2011). In addition, the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, specifically extended previous settlements including those that incorporated proxy reporting. The Webcaster Settlement Act of 2008, Pub. L. No. 110-435, also did not preclude proxies, and in fact the settlements for the Corporation for Public Broadcasting, 74 FR 9294 (Attachment 1) (March 3, 2009), Broadcasters, *id.* at 9299 (Appendix B), and Small Webcasters, *id.* at 9304 (Appendix C) all included them, as did the Settlement between CBI and SoundExchange made under the WSA 2009, which the CRB adopted as regulation and precedent. Likewise, the WSA settlement by Noncommercial Webcasters included the ability to report via proxy. *See* 74 FR 40627-8 (August 12, 2009).

§ 380 *et seq.* rules as the default rules would simply provide all NEWs with certainty concerning the requirements they will face in the future and while simultaneously ensuring SoundExchange can continue to collect and distribute royalties from the most stations possible.

c. SoundExchange’s proposed amendments should not be adopted in a way that affects non-commercial educational webcasters.

In its petition SoundExchange has proposed substantial regulatory changes, which they characterize as necessary to fix “important operational problems.” CBI has no comment as to how these proposed changes might affect non-NEWs. However, to the extent that the regulations proposed in the NPRM would affect NEWs CBI has the following objections:

1. The “audience measurement type” specification should require SoundExchange to supply updated templates and incorporate additional reporting options appropriate to NEWs.

As long as SoundExchange is obligated to supply updated templates incorporating the header information it requests be required by regulations, CBI would not object to this amended regulation, provided that the header for “audience measurement type” include not only the options proposed by SoundExchange but the other types of reporting NEWs are eligible to use.

2. The checksum requirement is confusing and inapplicable to any minimum fee broadcaster not reporting ATP, including many NEWs.

For minimum fee broadcasters, including NEWs, reporting either ATH or no audience measurement, the proposed checksum requirement serves no useful purpose and should not be required. Such a requirement would simply cause confusion and provide no benefit to either SoundExchange or any royalty recipient. Therefore any final regulation should exempt any service reporting ATH from having to include a checksum.

3. NEWs should not be required to identify the encoding format in order to make their ROUs compliant.

The ROUs produced by NEWs are likely to be generated by students who may barely understand the complex reporting requirements. Expecting them to understand different types of character reporting encoding formats and then successfully identify which are being used in their ROUs is unlikely to result in compliant reporting, at least not without first causing confusion and a deluge of questions to the collective and any other supporting organization such as CBI, whose resources should not be so taxed when the current rules, which does not require reporting the type of encoding, is apparently working to a large degree.

To the extent that a NEW knows which character encoding format is used in their ROUs, they should be encouraged to report that data element but avoiding the non-compliant ROU “fine” should not be conditioned on doing so. Particularly if the NEW reports in a format that SoundExchange previously prescribed as its preferred formats, SoundExchange should be capable of recognizing it without the service needing to specifically identify it.

4. The electronic signature requirement is reasonable provided that it only require typing a signature.

The proposed regulations allow for a “typewritten name and title of the person signing the Report, and by the date of signature” to substitute for a handwritten signature. This proposed regulation is appropriate and supported by current practices. CBI would oppose any other requirements associated with producing an “electronic signature.”

5. The requirement to report ISRC is rarely feasible for NEWs and should not be required of them.

The proposed regulations require services to report the ISRC, “where available and feasible.” However, reporting the ISRC is rarely feasible for NEWs. The ISRC code is not universal, cannot be used on analog recordings, is proprietary, and can be misreported. CBI’s

survey shows that nearly 85% of the respondent stations who appeared to qualify as a NEW reported that they cannot report ISRC data. For this reason, the regulation to report it should not apply to them.

6. The proposed fields concerning classical music would place inappropriate burdens on NEWs.

Although CBI acknowledges the reasons SoundExchange cites for reporting additional data concerning classical sound recordings, this reporting requirement presents an unreasonable burden for NEWs, particularly the ones who may only program the occasional classical recording or whose programming contains only a small portion of classical recordings. It is also unclear what would constitute a “classical” recording.

Even if a reasonable definition of “classical” can be defined, there should also be a threshold level of classical programming required before this reporting requirement should apply. It would not be reasonable, for instance, if a station that programs 168 hours a week and plays a total of 4 hours of classical music should be required to bear the burdens and costs of substantially changing its practices and software to comport with the proposed new requirements.

According to CBI’s recent survey, if this proposed regulation were to be adopted without clarifying the definition of “classical” music and setting a threshold for introducing classical-specific reporting requirements, nearly 50% of NEWs that currently play what they reasonably consider classical music reported that would stop playing it.

7. The proposed NLR and DL reporting requirements are unnecessarily burdensome and likely to be reported inaccurately by NEWs.

The proposed requirement to report “NLR” (for “no license required”) if the Service has excluded the sound recording from its calculation of statutory royalties, or the letters “DL” (for “direct license”) if the Service has excluded the sound recording from its calculation of statutory royalties, does not adequately take into account the impact such a requirement would have on NEWs’ operations.

More than 70% of the surveyed NEWs reported playing some or all of their music via native media, which means they would need to capture this data on the fly. However because the majority of NEWs rely on students, who have no legal background, the data would be unreliable, at best.¹⁰ The vast majority of educational stations surveyed doubted they could reliably and accurately report such data.

8. The proposed late fees for “deficient” ROUs are not appropriate to be applied to NEWs.

The language in the proposed “§ 370.6 Late reports of use” section seems to suggest that not only would a late ROU be subject to a late fee, but so would one be that is not “fully compliant.” The regulation, however, does not clearly define what constitutes a fully compliant ROU. Such a definition should be included in any regulation imposing obligations on a NEW and not be left to the subjective decision of any collective.

9. The proposed change to the ROU due date is unduly burdensome on NEWs.

The proposed change would reduce the amount of time NEWs have to prepare ROUs and make corrections and adjustments from 45 days to 30 days. This reduction in time will place a burden on these student-staffed operations whose primary focus is their educational endeavors.¹¹ The proposal would also require stations to take less time preparing their ROUs which will likely result in more inaccuracies within them, particularly if the ROUs become more complicated through the adoption of the added elements proposed in the NRPM.

IV. CONCLUSION

Without adequate protection for NEWs to ensure that they can comply with the recordkeeping and ROU terms of the statutory license many will be forced to abandon

¹⁰ Furthermore, so long as pre-1972 recordings are not covered by the license the difficulty in complying with this rule is exacerbated, as students playing from native media will not readily be able to tell, for purposes of reporting, if that particular piece of music is covered or not.

¹¹ This burden will be even more acute if ultimately NEWs are required to comply with reporting requirements more stringent than what they have under the rules codified at § 380.23(g).

playing music subject to the license or even cease webcasting – which, in the case of non-FCC licensed stations, would lead to them being shuttered entirely. Such a result would provide no party any benefit and would be contrary to the intent of Congress and the statutory requirement behind copyright policy to “promote the Progress of Science and useful Arts.” Depleting the number of educational webcasters would stifle the ability of the public to access the works and performances by the artists played predominantly by, or even only by, educational stations, stations that have a long and demonstrated history of exposing new artists and artists who are not often played through other channels. The CRB should therefore take steps to ensure these educational webcasters are adequately protected by, at minimum, adopting the regulations as proposed in the Joint Petition and, more appropriately, by adopting the respective terms codified at § 380.23(g), as proposed by CBI in the attached Exhibit A, while at the same time also constraining the changes proposed by SoundExchange so as not to affect this class of webcaster.

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Respectfully submitted,

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EXHIBIT A to CBI's Comment in Response to NPRM

CBI Proposed Regulations

§ 370.5 Reports of use of sound recordings under statutory license for Noncommercial Educational Webcasters

(a) *General.* This section prescribes rules for the maintenance and delivery of Reports of Use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, by Noncommercial Educational Webcasters.

(b) *Definitions.*

(1) *Aggregate Tuning Hours* are the total hours of programming Noncommercial Educational Webcaster has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of transmissions by means of a Noncommercial Educational Webcaster, less the actual running time of any sound recordings for which the Service has obtained direct licenses apart from 17 U.S.C. 114 or which do not require a license under United States copyright law. For example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

(2) A *Noncommercial Educational Webcaster* is a Nonsubscription Transmission Service whose payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114; and

(i) Is directly operated by, or affiliated with and officially sanctioned by a domestically accredited primary or secondary school, college, university or other post-secondary degree granting educational institution; and

(ii) The digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled in such institution; and

(iii) 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; and

(iv) Is exempt from taxation under section 501 of the Internal Revenue code, has applied for such exemption, or is 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.

(3) A *Performance* is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the Service has previously obtained a license from the copyright owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(4) *Play Frequency* is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the reporting period, then the Play Frequency is one. If the sound recording is transmitted 10 times during the reporting period, then the Play Frequency is 10.

(c) *Delivery*. Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges.

(d) *Report of Use*. (1) Types of Reports -

- (i) *Report by Proxy*. A Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of \$100 in lieu of reports of use for the calendar year for which it would otherwise be required to submit under this section. A Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year.
- (ii) *Sample-basis reports*. A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter).
- (iii) *Census-basis reports*. If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this paragraph (d)(1)(iii):
 - a. The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;
 - b. The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or
 - c. (iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (d)(1)(i) or (ii) of this section. A Noncommercial Educational Webcaster required to report pursuant to this paragraph (d)(1)(iii) shall provide reports of use to the Collective quarterly on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant quarter),

(2) *Content.* For a Noncommercial Educational Webcaster that transmits sound recordings pursuant to the statutory license set forth in section 114 of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (d)(1)(iii) of this section, whether or not the Service is paying statutory royalties for the particular sound recording;

- (i) The name of the Noncommercial Educational Webcaster making the transmissions;
- (ii) The featured artist;
- (iii) The sound recording title;
- (iv) The International Standard Recording Code (ISRC), where available and feasible;
- (v) The album title;
- (vi) The marketing label;
- (vii) If feasible, the actual total Performances of the sound recording during the reporting period or, alternatively, if feasible, the Aggregate Tuning Hours, except where actual total performances or ATH are required under (d)(1)(iii)(c);
- (viii) Channel or program name;
- (ix) Play Frequency, except Play Frequency need not be reported if actual total performances are reported;

(3) *Report Submission.* A Report of Use shall be submitted;

- (i) no later than the 45th day after the end of each calendar quarter if census-based; or
- (ii) no later than January 31st of the year immediately following the year to which they pertain, if sample-based;
- (iii) by January 31st of each calendar year, if reporting by proxy, except that payment of the Proxy Fee by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so.

(4) *Signature.* Reports of Use shall include or be accompanied by a signed statement by of an officer or another duly authorized faculty member or administrator of the applicable educational institution. The signature shall be the printed or typewritten name and the title of the person signing the Report, and by the date of the signature.

(5) *Documentation.* A Service shall, for a period of at least three years from the date of service or posting of a Report of Use, keep and retain a copy of the Report of Use. During that period, a Service shall also keep and retain in machine-readable form unsummarized source records of usage underlying the Report of Use, such as server logs. If the Service uses a third party contractor to make transmissions and it is not practicable for the Service to obtain and retain unsummarized source records of usage underlying the Report of Use, the Service shall keep and retain the original data concerning usage that is provided by the contractor to the Service.

(e) *Format and delivery.* (1) *Electronic format only.* Reports of Use must be maintained and delivered in electronic format only, as prescribed in paragraphs (e)(2) through (7) of this section. A hard copy Report of Use is not permissible.

(2) *File format: facilitation by provision of spreadsheet templates.* All Report of Use data files must be delivered in text or XML (Extensible Markup Language) format, with character encoding in the UTF-8

format if feasible. To facilitate such delivery, SoundExchange shall post and maintain on its Internet Web site a template for creating a Report of Use using Microsoft's Excel spreadsheet and instruction on how to convert such spreadsheets to UTF-8 text files that conform to the format specifications set forth below. Further, technical support and cost associated with the use of the spreadsheets is the responsibility of the Service submitting the Report of Use.

(3) *Delivery mechanism.* The data contained in a Report of Use may be delivered by any mechanism agreed upon between the Service and SoundExchange, or by File Transfer Protocol (FTP), e-mail, or CD-ROM according to the following specifications:

- (i) A Service delivering a Report of Use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall maintain on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.
- (ii) A Service delivering a Report of Use via e-mail shall append the Report as an attachment to the e-mail.
- (iii) A Service delivering a Report of Use via CD-ROM must compress the reporting data to fit onto a single CD-ROM per reporting period.

(4) *Delivery address.* Reports of Use shall be delivered to SoundExchange at the physical or electronic mail address posted on its Web site or identified in its Notice of Designation as Collective under statutory license pursuant to § 370.4(b). SoundExchange shall forward electronic copies of these Reports of Use to any other Collectives defined in this section.

(5) *File naming.* Each data file contained in a Report of Use must be given a name by the Service, consisting of the most specific service name appropriate to the scope of usage reflected in the Report of Use and statement of account, followed by the start and end date of the reporting period. The start and end date must be separated by a dash and in the format of year, month, and day (YYYYMMDD). Each file name must end with the file type extension of ".txt". (*Example:* AcmeMusicCo20050101-20050331.txt).

(6) *File type and compression.*

- (i) All data files must be in text or XML (Extensible Markup Language) format, with character encoding in the UTF-8 format if feasible.
- (ii) A Report of Use must be compressed in one of the following zipped formats:
 - (A) .zip—generated using utilities such as WinZip and/or UNIX zip command;
 - (B) .Z—generated using UNIX compress command; or
 - (C) .gz—generated using UNIX gzip command.
- (iii) Zipped files shall be named in the same fashion as described in paragraph (e)(5) of this section, except that such zipped files shall use the applicable file extension compression name described in this paragraph (e)(6).

(7) *Files with headers.* (i) Services shall submit files with headers, in which the following elements, in order:

- (A) Name of Service as it appears on the relevant statement of account, which shall be the most specific service name appropriate to the scope of usage reflected in the Report of Use and statement of account;
- (B) The account number assigned to the Service by the Collective for the relevant Service offering (if the Service has been notified of such account number by the Collective);
- (C) Name of contact person;

- (D) Street address of the Service;
- (E) City, state and zip code of the Service;
- (F) Telephone number of the contact person;
- (G) E-mail address of the contact person;
- (H) Start of the reporting period (YYYYMMDD);
- (I) End of the reporting period (YYYYMMDD);
- (J) Station call letters, if multiple broadcast stations are included in the Report of Use, or otherwise a blank line;
- (K) Number of rows in data file, beginning with 18th row;
- (L) A blank line;
- (M) Audience measurement type ATP (if the Service reports Actual Total Performances), ATH (if the Service reports Aggregate Tuning Hours), if applicable, otherwise a blank line;
- (N) Blank line
- (O) Digital signature pursuant to paragraph (d)(4) of this section, if included in the Report of Use;
- (P) Blank line; and
- (Q) Report headers (Featured Artist, Sound Recording Title, etc.).

(ii) Each of the rows described in paragraphs (e)(7)(i)(A) through (G) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (e)(7)(i)(H) and (I) of this section should not exceed eight alphanumeric characters.

(iii) Data text fields, as required by paragraph (d)(2) of this section, begin on row 18 of a Report of Use. A carriage return must be at the end of each row thereafter. Abbreviations within data fields are not permitted.

(iv) The text indicator character must be unique and must never be found in the Report's data content.

(v) The field delimiter character must be unique and must never be found in the Report's data content. Delimiters must be used even when certain elements are not being reported; in such case, the Service must denote the blank data field with a delimiter in the order in which it would have appeared.

Proposed conforming amendment to the CRB proposed amendment (§ 370.6).

(b) Proxy distribution.

(1) In any case in which a Service has not provided a compliant Report of Use required under this part for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, and the board of directors of the Collective determines that further efforts to seek missing Reports of Use from the Service would not be warranted, the Collective may determine that it will distribute the royalties associated with the Service's missing Reports of Use on the basis of a proxy data set approved by the board of directors of the Collective.

(2) Proxy fees collected from Noncommercial Educational Webcasters the Collective shall be distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.