

DOCKET NO.  
RM 2002.1  
COMMENT NO. 32

In the  
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Washington, D.C. 20540

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GENERAL COUNSEL  
OF COPYRIGHT

In re )  
NOTICE AND RECORDKEEPING FOR )  
USE OF SOUND RECORDINGS UNDER )  
STATUTORY LICENSE )

Docket No. 2002-1

### COMMENTS OF INTERCOLLEGIATE BROADCASTING SYSTEM

Intercollegiate Broadcasting System (IBS), on behalf of its member-stations, responds to the Office's NPRM herein, 67 Fed. Reg. 5761 (February 7, 2002), by urging that small non-profit webcasters affiliated with academic institutions be exempted from the record-keeping requirements as proposed in the notice or, alternatively, that the proposed requirements be substantially tailored to reduce the undue burden on the staffing and financial capabilities of such small entities. The reporting rules as proposed would be unduly and disproportionately burdensome on small, non-profit entities, and that burden would be in disproportion to the economic benefit afforded any rights holders.

In addition, the twenty-dollar filing fee would be an unnecessary and inappropriate burden to the smaller member-stations' webcasting operations. Such small webcasters should be exempted from such regulatory fees at the Copyright Office, just as all member-stations are exempted by statute from the FCC's annual regulatory fees, 47 U.S.C. § 159(h), and most member-stations are exempted by statute or Commission order from the FCC's filing fees. 47 U.S.C. § 158(d).

*Webcasters Affiliated with Educational Institutions are Different.*

Founded in 1940 IBS has provided sixty-two years of continuous service to educational radio. IBS counts among its members some 773 stations, all operating at domestic educational institutions. Many stations are part of the academic curriculum and operate with a faculty advisor or instructor. Among member-stations 558 hold licenses from the Federal Communications Commission as either commercial or non-commercial FM stations; one holds an AM broadcast license; a small number are unlicensed closed-circuit broadcasters operating under Part 15 of the FCC rules, 47 C.F.R., Part 15; twenty-three webcast only; and the balance broadcast through cable or over public address systems.

Of the 773 member-stations, 243 report webcasting. Approximately two hundred more are deterred from webcasting by fear of copyright consequences. Neither the founding fathers in the Copyright Clause, Art. I, § 8, cl. 8, nor Congress in amending the Copyright Act in 1995 intended to thus deter "the Progress of Science and useful Arts...." Section 114 was not intended to impose "new financial burdens on broadcasters or on any other broad class of users...."<sup>1</sup> Section 2 of the Regulatory Flexibility Act, 5 U.S.C. § 601 nt, admonishes the Office

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<sup>1</sup> Floor statement of Senator Hatch (R-Utah), Chairman of the Judiciary Committee, 141 Cong. Rec. S947 (daily ed. Jan. 13, 1995): "It should be initially noted, Mr. President, that this bill does not impose new financial burdens on broadcasters or on any other broad class of users who traditionally perform sound recordings. Those users will instead continue to be subject only to those financial burdens that they voluntarily undertake. The aim of this bill is simply to level the playing field by according to sound recordings most of the same performance rights that all other works capable of performance have long enjoyed."; S. Rpt. 128, 104 Cong. 1st Sess. 15 (1995) ("without imposing new and unreasonable burdens").

to differentiate any regulatory and informational collection requirements among entities by size to avoid such a result.<sup>2</sup>

*The Proposed Rules Would be Disproportionately Burdensome to Them.*

The rules as proposed would impose an undue burden on the operational and financial abilities of the member-stations. The average annual budget is \$ 9000. Revenues derived from webcasting, if any, are *de minimis*. These stations operate with largely unpaid student staffs.

The Office's proposal would impair realization of broader educational objectives through webcasting. The increasingly pervasive use of the Internet in our society makes it imperative that students learn to master this communication mode if they are to effectively compete in the job market. Webcasting has proliferated on campuses because it is inexpensive. For many institutions a traditional broadcast operation is unobtainable for lack of spectrum or is cost-prohibitive. In these situations, webcasting provides students the only opportunity for long-term, hands-on application of their learning. The interdisciplinary nature of this use of technology engages students from far-flung departments, such as computer science, management, marketing, graphic design, music, and library science, as well as broadcasting or journalism. Anything, such as the unworkable logging and reporting requirements as proposed in the Docket 2002-1 NPRM, would injure the education of the country's next generation by repressing IBS member-institutions' use of a modern technology. In addition, it would burden the education of the broader public, by deterring the broadcasters of educational programs from putting the program

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<sup>2</sup> All of IBS' members are small entities as defined by the Small Business Administration in 13 C.F.R. § 121.201 (2002). IBS has joined with Station WHRB in filing concurrently herewith a motion for issuance of an Initial Regulatory Flexibility Analysis meeting the specifications of Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603.

on the Web. Given the limited geographic reach of the stations at many educational institutions, their programming would not be otherwise available to potential auditors in outlying areas.

*The Rules Should Reflect the Characteristics of these Stations.*

The rules adopted by the Office should reflect the small size, limited resources, and public interests in the nature of the operation of webcasting programs at educational institutions. Outright exemption would be appropriate, given the disproportionate burden and the small amounts of royalties generated. But, in any event, there are less burdensome models for the Office to propose. Virtually all IBS members currently pay copyright performance fees to one or more of ASCAP, BMI, and SESAC. Of the three, only BMI requires reporting, and -- in contrast to the elaborate reporting scheme proposed in the NPRM -- that is just a simple seventy-two-hour song log. ASCAP and BMI do not require detailed reporting. As to the subset of licensed, non-commercial educational stations, Section 235.5(e) limits the burden by reporting a sample of the music being played.<sup>3</sup> Sampling of this nature could be used by the RIAA as a basis for compensating artists, to the extent that the amounts were more than *de minimis*.

Congress has already recognized that the public interest warrants relieving educational stations as a class of undue burdens. The Mathias amendment, Section 118, contains specific provisions exempting certain educational uses. The notes of the House Judiciary Committee in H. Rpt. 94-1476 (1976), printed at 17 U.S.C. 118 nt, reflect this public policy:

General Policy Considerations. The Committee is ... aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee

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<sup>3</sup> "A public broadcasting entity subject to this section shall furnish to ASCAP, BMI, and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI, and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports." 37 C.F.R. § 235.5(e).

determined that the nature of public broadcasting does warrant special treatment in certain areas.

This public policy is in turn reflected in Section 253.5 of the Office's regulations.

Conclusion

For the reasons stated, any rules to be adopted by the Office should exempt small, non-profit webcasters affiliated with academic institutions from the detailed reporting requirements proposed in the NPRM. Alternatively, these webcasters should be subject to a reporting requirement no more burdensome than that required by BMI or Section 253.5(e). In addition, the Office should exempt from its twenty-dollar filing fee those webcasters affiliated with educational institutions. Also it should require a periodic refiling requirement for claimants, e.g., at the end of every two years.

Respectfully submitted,

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<sup>4</sup> Required to be served under P.L. 89-332, 5 U.S.C. § 500(f).