

**Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, DC**

In the Matter of)	
)	
Notice and Recordkeeping for Use of)	
Sound Recordings Under Statutory)	Docket No. RM 2008-7
License)	

COMMENTS OF THE AMERICAN COUNCIL ON EDUCATION

To express its concern over the undue burden that the proposed mandate for ‘census reporting’ based on ‘actual total performances’ would impose upon college radio webcasters, the American Council on Education (“ACE”) respectfully submits these comments in response to the Copyright Royalty Judges’ (“CRJs”) Notice of Inquiry (“NOI”) concerning Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2008-7, published in the Federal Register on April 8, 2009.

Founded in 1918, ACE serves as higher education’s unifying voice, representing all types of accredited, degree-granting colleges and universities and higher education associations; together, ACE member institutions serve eighty percent of today’s college students. At many of these institutions, students benefit from the unique educational experience offered by participating in college radio.

Before placing any new recordkeeping burdens on college radio stations that webcast their signals, the CRJs should recognize that college radio stations differ in key respects from their larger, commercial counterparts. First and foremost, a core purpose of college radio stations is to educate students in the ways of broadcasting and media. For this reason, college radio stations are staffed primarily by students and other volunteers in the community. As one

college radio station, KKSM 1320 AM of Palomar College, explains on its website: “KKSM 1320 AM is a student operated station with students filling the positions of show hosts, newscasters, reporters, and sportscasters. Students also learn management skills as they become the station’s Program Director, Music Director, Production Manager, Promotion Director, PSA Director, News Director, and Sales Associates.”¹ Second, college radio stations operate on very small budgets and generate little, if any, revenue. Even seemingly modest increases in expenses can have a severe impact on their operations and ability to provide students with pre-professional experience in media and broadcasting. Third, college radio stations for the most part do not use automated playlists, which for larger broadcasters and Internet-only webcasters facilitate reporting on the use of sound recordings. Instead, student disc jockeys create playlists manually using native media such as CDs and records. Many college radio stations expressly embrace “freeform” radio, defined generally as a “radio format not restricted to a single genre or by a dependence on a specific format or pre-defined formula.”² The *New York Times* recently commented on the breadth of music played each day on college radio, reporting that “[f]or decades the lifeblood of college radio has been programming that veers between anarchic and insightful, as young D.J.’s indulge their whims free from the narrow formats of commercial stations.”³

As a result of their unique educational focus, small budgets, and flexible formats, college radio stations simply cannot afford to acquire the extraordinary resources that would be necessary to provide SoundExchange with year-round, census reporting and/or reporting based

¹ About KKSM 1320 AM, Palomar College, at <http://www.palomar.edu/kksm/about.html>

² WMFO 91.5 FM, Tufts University, at <http://www.wmfo.org/>

³ Ben Sisario, College Radio Maintains Its Mojo, *The New York Times*, Dec. 7, 2008, at <http://www.nytimes.com/2008/12/07/arts/television/07sisa.html>

upon the actual total performances of each sound recording. Data submitted in January 2009 to the CRJs by over two dozen college radio stations, as well as representatives of college radio stations such as College Broadcasters, Inc. (“CBI”) and Intercollegiate Broadcasting System (“IBS”), document the unreasonable burdens that these proposed changes in the recordkeeping regulations would impose on college radio stations. The comments of WESS Radio of East Stroudsburg University of Pennsylvania, submitted in response to the CRJs’ Notice of Proposed Rulemaking in this proceeding, are illustrative. That small college station operates on a budget of approximately \$20,000 per year, but would be required to spend at least \$30,000—150 percent of its budget—in staffing, software, and other equipment to provide year-round census reporting along with measurements of actual total performances of each sound recording.⁴ This recordkeeping-and-notice expenditure would dwarf the minimum, \$500 fee that WESS Radio pays annually to SoundExchange for use of the statutory license.⁵

Simply put, WESS Radio and scores of other college radio stations could be forced to cease webcasting their signals if the proposed, new notice-and-recordkeeping regulations are adopted. This turn of events would prevent affected colleges and universities from providing students with a comprehensive experience and education in radio, as webcasting is a common aspect of operating a radio station in the 21st Century.

In contrast to the harm that such new recordkeeping regulations would cause to college radio stations, the new regulations would provide little countervailing benefit to SoundExchange and its members. There is no evidence that the sampling methodology approved

⁴ See Comments of WESS Radio (90.3 FM, East Stroudsburg University of Pennsylvania), Docket No. RM 2008-7 (Jan. 26, 2009).

⁵ *Id.* at 2.

by the CRJs in 2006 does not provide adequate information on use of sound recordings to SoundExchange.⁶ Collective societies representing the copyright owners of musical compositions have used sampling methodologies for decades. Indeed, under the recordkeeping regulations governing the broadcast of musical compositions by noncommercial, college radio stations not affiliated with National Public Radio, such stations need only provide a music-use report upon request for one week of each calendar year, and ASCAP, BMI and SESAC can request such a report from no more than ten college radio stations each year.⁷

⁶ Under the current sampling methodology approved by the CRJs in 2006, college radio webcasters and other nonsubscription transmission services may provide a Report of Use based on two weeks of every calendar quarter, and may use Aggregate Tuning Hours (ATH) to determine use of each sound recording during that period. *See* Copyright Royalty Board, *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License: Interim Final Rule*, 71 FR 59010 (October 6, 2006), *codified at* 37 C.F.R. § 370.3. It is ACE's understanding that the sampling methodology approved in the 2006 regulations, while certainly less burdensome than the proposed census-based approach, itself creates a hardship for many college radio webcasters. Thus, while ACE here requests that the CRJs continue to allow college radio webcasters to report use of sound recordings based upon the 2006 regulations, it does not intend to preclude an inquiry into whether those regulations could be made less burdensome. At a minimum, given the challenges already faced with respect to the existing regulations, the CRJs should not impose new, more burdensome recordkeeping regulations on college radio webcasters.

⁷ *See* 37 C.F.R. § 381.5. *See also* Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 5 (Jan. 29, 2009) (providing a detailed comparison of the sampling methodology allowed under the recordkeeping regulations for the Section 118 statutory license to the proposed mandate of year-round, census reporting under the Section 114 statutory license, which will create an "unrealistic and unreasonable burden" on licensees).

CONCLUSION

To prevent an undue burden that would impede the educational mission of college radio stations, the American Council on Education respectfully requests that the Copyright Royalty Judges maintain the ability of college radio webcasters to report on use of sound recordings based upon the existing regulations adopted in 2006. Such a decision will fulfill the statutory directive that the Copyright Royalty Judges adopt regulations to provide for “reasonable notice” of the use of sound recordings under the statutory license, without needlessly disrupting the use of webcasting by college radio stations.

Respectfully submitted,



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