Before the
COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, DC 20540

In the Matter of	)	
	)	Docket No. 2009-1 CRB DTRA
Adjustment of Rates and Terms for Digital Performance Right in Sound Recordings and Ephemeral Recordings	)	Webcasting III

IBS' PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW

These proposed findings and conclusions are proffered by the Intercollegiate Broadcasting System, a Rhode Island non-profit corporation. IBS is the largest association of American college and high school broadcasters and webcasters. (Kass written testimony ¶ 6 [IBS Exhibit 4]; Kass testimony, 4 transcript 760:14-19; 762: 9-763:22.) It has participated fully in all phases of the instant hearing.

IBS' membership embraces all sizes and types of educationally affiliated and other non-commercial broadcasters and webcasters. Its membership is principally comprised of student broadcasting and webcasting operations that have no employees but are staffed by student volunteers. The principal purpose of these stations is educational, *i.e.,* to provide to the student-staffers opportunities to explore and gain hands-on experience with programming and program production, sportscasting, organizational management, and engineering, etc., so that the students will be better able to compete in the global, technically based commerce of the future. (Kass written testimony, ¶ 7 [IBS Exhibit 4]; Kass testimony, 4 transcript 760:8-20; Murphy testimony, 3 transcript 568:13-569:20)

The principal objective of these operations is to educate the members of the student staffs rather than to deliver commercially competitive programming. Their days and hours of operation are keyed to the institutional calendars of the affiliated educational institutions; many operate only for limited hours on weekdays during the school year. These stations do not "sell" music to gain audiences for monetary gain. The typical IBS member-webcaster has an audience of about four continuous listeners, except during sportscasts of varsity games and broadcasts of on-campus events. (Kass written testimony ¶¶ 7, 9 [IBS Exhibit 4]; Kass testimony on cross-examination, 4 transcript 784:13-14; Murphy testimony, 3 transcript; 575:12-22, 579:13-19). Counsel for SoundEx has admitted in oral argument that educational webcasters derive from "the sort of unique hybrid nature of many college radio stations." (5/5/2010 Transcript at 30:11-12). John Murphy capsulated the difference between commercial and college stations saying, "It's a fundamentally different use that has nothing to do with commercial thinking." (Murphy testimony, 3 transcript 571:21-572:1 ([April 21, 2010]).

IBS' concern is that the Judges not adopt rates and recordkeeping and reporting requirements that become barriers to entry by small, educationally affiliated webcasters. The students' needs for hands-on experience is just as important for those students who attend high schools and small colleges as for those students who attend larger educational institutions. This hands-on experience should not be denied these students by reason of rates and record-keeping and reporting requirements that are disproportionate to the use of digitally recorded music in the smaller institutions.

IBS itself is an all-volunteer organization; it has no paid staff. (Kass testimony 757:4-758:11 [IBS Exhibit 4]). Its purpose is to encourage student broadcasters and webcasters, principally through their attendance at the annual national conference and at regional

conferences. At these conferences volunteers typically participate in panels discussing topics of interest to student webcasters and prospective student webcasters. In fact, SoundExchange has sent its Executive Director (CEO) John Simpson and various staffers to some of these conferences to talk about music licensing. Typically these volunteer participants learn about the practical problems of student webcasters through Q-and-A with the panelists and informal conversations held in hallways. (Kass testimony, 4 transcript 756-602, 817, 818 [April 22, 2010]); Murphy testimony, 3 transcript 566:14-568:13)

Summary of IBS' Case

The Small and Very Small College and High School webcasters[1]comprise a type of webcasters whose operations are distinguishable from those of any of the commercial webcasters and from the large educational, noncommercial affiliated webcasters. These small webcasters' purposes, internal organizations, and uses of digitally recorded music, reflect distinctive differences that are of such significance as rise to define a different "type" of webcasting to be classified under 17 U.S.C. § 114(f)(2). There is an inadequate basis in the record showing that SoundEx's costs in granting them statutory licenses are calculated on the basis of SoundEx's *actual* treatment of their reports of use.

SoundEx has recognized a wide range of users of digitally recorded music over the Internet, *e.g.,* for public (CPB-qualified) stations, 74 Fed. Reg. 40,614, 40620 (Aug. 12, 2009); for small, commercial webcasters, for college stations with professional staffs. 74 Fed. Reg., 40,614, 40616 (Aug. 12, 2009), and SoundEx's "default" proposal, filed July 24, 2010. Each group has its own special rates and terms. In fact, we understand Ms. Kessler's answer on cross

[1] The distinction between the small and very small webcasters and all others is defined in IBS' amplified rate proposal, filed with the Judges on June 28, 2010, a copy of which has been appended hereto for the convenience of the Judges.

to be that less than only three percent of SoundExchange's webcasting royalties received in 2000 were at the undiscounted, statutory rate. (Kessler testimony, 3 transcript 495:1-497:19) There is no lower annual minimum fee in SoundExchange's proposal for the small and very small noncommercial webcasters with 15,914 ATH per month (10% of the minimum $500 rate) and 6,365 ATH per month (4% of the annual minimum $500 rate).

In contrast to these special deals, only the more numerous non-profit[2] webcasters, *viz.*, the small and very small educationally affiliated webcasters and private hobbyists, have been left without a specific rate classification. To fill this void, the Judges should adopt IBS' rate proposal for the small and very small webcasters, as amplified July 28, 2010 (attached hereto).

I. THE JUDGES SHOULD RECOGNIZE SMALL AND VERY SMALL NON-COMMERCIAL WEBCASTERS AS A DISTINCT TYPE OF USER UNDER SECTION 114(f)(2) OF THE ACT.

A. Small And Very Small Educationally Affiliated Webcasters Are Readily Distinguishable From Their Larger Compatriots.

Unlike the larger webcasters who select their music to draw in listeners, the small and very small webcasters' purpose is educating their voluntary student staffs in operational, programming, production, technical, journalistic techniques centers on making the student staff members upon graduation more effective and experienced in a digital world. For these webcasting operations, the emphasis lies not on "delivering" recorded music as a product but rather as means of educating the station staffs so that the "on air" staff members learn how to construct interesting programming that shares specialized knowledge among primarily their fellow students at the host institution. Generally these webcasters do not carry advertising, so there is no motive to build ratings just to make the station's air more attractive to advertisers. Generally these webcasting operations carry a variety of programming, not only particular genres

[2] See 17 U.S.C. § 114(f)(5)(E)(i) (defining "noncommercial webcaster").

of music (such as country and western or the Top 10), but rather varsity sports, on-campus speakers, and instructional programs such as "Music I Listening Labs" before final examinations. (Murphy testimony, 3 transcript 573:4-4, 579:13-:19; Shaiken testimony, 3 transcript 612:3-613:13, 615:14-618:11)

These webcasters generally do not operate 24/365 but rather program only during term-time The smallest webcasters tend to program the fewest hours per week, *e.g.*, not more than five days per week and only a few hours per day.

As a result they are a "type" of webcaster that should be recognized in the Judges' rate determination within the meaning of Section 114(f)(2).

IBS' experience and the best figures from Webcasting II and III suggest that the average instantaneous listenership to small and very small non-commercial webcasters is just under four. (Kass written direct testimony, ¶ 9, 155 Exhibit 4; Kass testimony, 4 transcript 784:13-14 [April 22, 2010)] Even this estimate of four instantaneous listeners tends to overstate the amount of licensable listening to these smaller operations. Many smaller stations program recorded music directly licensed to them or through a clearinghouse arrangement, which further reduces the average listeners for performances licensable by SX. Considering that many educationally affiliated webcasters attract their peak listening audiences with varsity sports coverage and on-campus lectures and instructional programming, Kass testimony, 4 transcript 764:10-765:7; Murphy testimony, 3 transcript 574:16-18, the actual number of performances involving digitally recorded music would be proportionately less. To the extent that the primary purpose of some such webcasting operations is for course credit or as an extra-curricular activity – "learning by doing" – their instantaneous audiences for digitally recorded music may be yet smaller. These

are truly "small entities" as defined by Section 601(6) of the Small Business Regulatory Fairness Act of 1980, as amended, 5 U.S.C. § 601(6), discussed below under heading II.

One of the two principal obstacles to the smaller webcasters' operations under the revised SoundEx proposal filed June 23, 2010, arises from SoundEx's failure to scale the base minimum annual rate ($500) to the actual use of digitally recorded music by the smaller stations. The specification of such a large annual minimum rate creates a disproportion between the actual use of digitally recorded music made by the larger affiliated webcasters and the actual use of digitally recordings by the smaller college and high school webcasters. For example, a small webcaster paying SoundEx $500 to cover its 22,916,140 annual actual performances would be paying $0.00166667 per performance under the SoundEx proposal, while a larger educational webcaster fully utilizing the allowed performances allowed annually upon payment of $500 would be paying only $0.0000218187 per performance under the rates proposed by SoundExchange. The very small webcaster would be paying 76 times more for the use of the statutory license than the webcaster fully utilizing the $500 minimum for 159,140 ATH or 22,916,140 statutory performances per year.

II. THE JUDGES SHOULD REJECT THE $500 MINIMUM FEE.

A. The Judges Should Reject Sound-Ex's Rate Proposal.

The Judges should not apply so much of SoundEx's second revised rates and terms filed June 23, 2010, as are not appropriate for the educationally affiliated "small webcasters" and "very small webcasters."[3] In particular the across-the-board minimum fee of $500 is not appropriately scaled to reflect the amount and nature of the usage of digitally recorded music by

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[3] IBS' amplification of its restated rate proposal, filed July 28, 2010, would define these terms as follows: A small, noncommercial webcaster is a noncommercial webcaster whose total performances of digitally recorded music is less than 15,914 ATH per month or the equivalent. A very small noncommercial webcaster is a noncommercial webcaster whose total performance of digitally recorded music is less than 6,365 ATH per month or the equivalent.

the educationally affiliated "small webcasters" and "very small webcasters." It ignores that fact that for many of these webcasters the discrepancy between SoundEx's proposal for a minimum fee of $500 and their ability to pay becomes a barrier to entry. (Murphy testimony, 3 transcript 569:8-14 (April 21, 2020.) Such a barrier to entry is not consonant with Congressional policy embodied in the Regulatory Flexibility Act, as amended, 5 U.S.C. Chapter 6.[4]

SoundEx, through its witnesses Barrie Kessler and W. Tucker McCrady, advocated a uniform minimum annual license fee of $500 for all educational webcasters. Five hundred dollars is at such a high level that it (i) is disproportionate to their use of digitally recorded music and (ii) is for many smaller webcasters or would-be webcasters a barrier-to-entry. As such it contravenes the statutory requirement in Section § 114(f)(2) that there be *"a minimum fee for each such type of service,* such differences in minimum fees to be based on criteria including, not limited to, the quantity and nature of the use of sound recordings" made by each type of service.

The instantaneous listening to the small and very small educational webcasters' webcasts of licensable music is so small, that their substitutional effect on record sales is *de minimis* under Subsection (f)(2). IBS would argue that the statute does not purport to protect other webcasters as such from substitutional effect but protects only "the purchase of phonorecords by consumers." The term phonorecord, as we understand it, requires fixation of sound in a tangible object, and that seems to be the way Congress defined it in Section 101 of the Copyright Act. It does not seem to extend protection to competing streams.

Sound-Ex's proposal provides for a $500 annual minimum fee for stations with annual statutory performances per channel in excess of 22,916,160 of annual actual performances per

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[4] The popular name for the Act, as it now stands is Regulatory Flexibility Act. It has been amended several times by acts given variant names in the amending legislation. For convenience of the Judges, it will be referred to collectively under that name, as it appears now in U.S.C.A., unless the context requires greater specificity.

channel; and the agreement between Collegiate Broadcasters, Inc., also published on August 12, 2009, provides for a $500 annual minimum fee for up to 22,916,160 annual performances; but there is no lower annual minimum fee for the small and very small noncommercial webcasters with 15,914 ATH and 6,365 ATH performances per month, respectively. The small and very small webcasters are left to default to either Sound-Ex's proposed rate or to those in the Sound-Ex-CBI agreement, though their usage does not even approach the annual number of 22,916,140 actual performances that are allowable annually under the minimum fee of $500. Below is a chart of the IBS minimum rates and allowed usage of statutory music.[5]

Proposed Rate Category	Monthly ATH covered for the fee	Maximum Annual Statutory Performances included in fee	Rate (fee) per statutory performance if maximum performances are purchased by noncommercial webcaster
$500.00 Annual Minimum	159,140 ATH	22,916,160 Statutory Performances	$0.0000218187 per statutory performance
Small Noncommercial Webcaster Rate: $50 Annual Minimum for Small Noncommercial Webcasters (10% of the $500 min.)	15,914 ATH per month	2,291,616 Statutory Performances	$0.0000218187 per statutory performance
Very Small Noncommercial Webcaster Rate $20 Annual Minimum for Small Noncommercial Webcasters (4% of the $500 min.)	6,365 ATH per month	916,646 Statutory Performances	$0.0000218187 per statutory performance

[5] Also taken note in IBS' rate proposal is the IBS offer to pay SoundExchange an annual minimum aggregator fee, much like Live365 currently pays SoundExchange an aggregator fee by agreement with SoundExchange ($50,000 for unlimited streams). The record shows that there were 5,000 such Live365 streams when the SX-Live365 agreement was made, or an effective rate of $10 annual minimum per stream. The record shows that the current number of Live365 streams has risen to over 6,000 streams, or $8.33 minimum for use of the statutory license. Press reports state the current number of streams for Live365 exceeds 7,000 or a $7.14 annual minimum fee for a current Live365 customer. (Funn Rebuttal Testimony, cross-examination, 3 transcript 481:9-483:18 [August 2, 2010]).

The non-scalability issue is one that the Judges should consider under the public policy of the United States with respect to "small entities" entitled to the protection of the Regulatory Flexibility Fairness Act, Title II of P.L. 104-121, 110 Stat. 847 (1996), amending the Regulatory Flexibility Act of 1980, P.L. 96-354, 94 Stat. 1164 (1980). The purpose of the Act is described in Section 2 of P.L. 96-354:

Congressional Findings and Declaration of Purpose

> (a) The Congress finds and declares that —(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;
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> (2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;
>
> (3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;
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> (4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
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> (5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
>
> (6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;
>
> (7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;
>
> (8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act [enacting this chapter and provisions set out as notes under this section] to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Application of the statutory provisions has been amplified in E.O. 13272 (Proper Consideration of Small Entities in Agency Rulemaking), 67 Fed. Reg. 53,461 (August 13, 2002).

Given the purposes of the Regulatory Flexibility Act, the Copyright Royalty Judges, constitute an administrative agency within the meaning of Section 1 of the Administrative Procedure Act of 1946, codified as 5 U.S.C. § 551(1). It no longer is – if, indeed, it ever was – within the exemption for "Congress" in Section 1 of the APA. To the extent the Judges exercise rulemaking authority, the separation of powers under the Constitution, *cf. Bowsher* v. *Synar,* 47 8 U.S. 714 (1986), excludes them from the legislative powers of Congress. *Cf.* 17 U.S.C. § 701(e) (Register of Copyrights subject to APA).[6] Construction of this provision of the APA is governed by the historical understanding that rate-making is "rule making," incorporating the common understanding that rate making, being prescriptive (forward-looking) rather than adjudicatory (declaring the effects of past actions). *See* the definitions in 5 U.S.C. § 551(4)(rule) and (5)(rulemaking). The CRJs sit in the crossfire, so to speak, between the constitutional doctrine of separations of power, *Bowsher* v. *Synar,* 478 U.S. 714 (1986), and the appointments clause, *Buckley v. Valeo,* 424 U.S. 1 (1976). *Cf. Sound Exchange* v. *Librarian*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, C.J., concurring).

[6] The implication is that the exercise of other executive functions within the Library by appointees of the Librarian are similarly subject to the Act.

The Regulatory Flexibility Act applies to any rule subject to notice and comment rulemaking under Section 4(b) of the APA or any other law. It is sufficient that the agency's "own administrative rules that require notice and comment even though the agency's rules may be exempt from the APA notice and comment requirement." SBA Office of Advocacy: A Guide for Government Agencies 5 (May 2003).

Even were the Judges not considered an administrative agency in that capacity, as part of the United States government they are obligated to give weight to the Congressional policy embodied in Section 2(a) of the Regulatory Flexibility Act of 1980.

Taking into account the distinctive use of, and audience for, digitally recorded music by the small and very small educational webcasters, SX's proposed $500 minimum is disproportionate to the actual usage of licensable music by the small and very small educational webcasters. Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type of service in accord with the general public policy favoring small businesses. This disproportion here exists not only in disproportionate rates but in the recordkeeping[7] and reporting requirements contained in SoundEx's proposed rates and terms. Taking into account the distinctive use of, and audience for, digitally recorded music by the small and very small educational webcasters, SX's proposed $500 minimum is disproportionate to the actual usage of licensable music by small and very small educational webcasters. Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type of service in accord with the general public policy favoring small businesses. This disproportion exists not only in rates but in cost-benefit analysis of prescribed recordkeeping and reporting prescribed.

[7] As defined in 5 U.S.C. § 601(8) (recordkeeping requirements).

Such analysis is required in laws appearing in the U.S. Code, Title 5, Ch. 6, implementing Congress' legislative intent to protect small businesses from "unnecessary burdens" and that this purpose is made explicit in Section 2 of P.L. 96-354.

For these reasons, IBS submitted on July 28, 2010, pursuant to Section 351.49c, of the rules, the amplification of IBS' revised proposal that attempted to match the rates and requirements to the scale of these small and very small operations. IBS' revised rate proposal, as discussed below under point IV, provided in essence for base rates applicable to small webcasters and very small webcasters proportionate to their actual use of the copyrighted material.

Although educationally affiliated webcasters are non-profit[8] they are classified as "small entities" under the Regulatory Flexibility Act, 5 U.S.C. § 601(6). The SBA size classifications are binding unless the government agency is authorized by Federal statute to use something else under 15 US.C. § 632(a). SBA considers that "small entities" engaged in webcasting (NAIDS Code 519130)[9] are those employing fewer than 500 employees.[10] Most IBS members have fewer than 5 employees and average revenues of only $9000 per annum. (Kass direct testimony, IBS Exhibit 4, ¶ 19; Kass testimony, 4 transcript 835:15-22 [April 22, 2010]).

Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation. To this end, the RFA requires agencies to analyze the economic impact of draft regulations when there is likely to be a significant economic impact on a substantial number

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[8] *See* 17 U.S.C. § 114(f)(5)(E)(i).

[9] (Internet Publishing and Broadcasting and Web Search Portals). NAICS definitions are revised by the Census Bureau every five years. The current definition (2997) includes "Internet radio stations." http://www.naics.com/censusfiles/ND579139.htm

[10] SBA: Table of Small Business Size Standards Matched to North American Industry Classification System Codes (Aug. 22, 2008), as posted on the SBA's website.

of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities. *See* 6 U.S.C. § 604(5).

B. SX's Proposed Minimum Rate for Small and Very Small Webcasters are not Justified as Cost-Based.

Even assuming that a minimum fee could be justified on a cost-basis, SoundEx has made no showing that any rate structure that is cost-effective would be supported by its showing as to costs. Only by positing a cost-structure for administrative costs that make such a structure that not cost-effective as to the small and very small webcasters could SX generate administrative fees that recovered a minimum rate of $500. SX's own figures show that their average administrative costs per performance analyzed are on the order of $0.000001658.[11] Again assuming that a small educational webcaster would generate no more than 2,291,616 performances per year, that would generate proportional costs of $3.80 – far less than the $500 per year minimum rate. For a very small webcaster the figure is $1.52, even more disproportionately falling on the very small webcaster. Without scaled rates a five hundred-dollar minimum would leave the small educational webcaster paying for a large number of performances it couldn't use.

[11] Using non-restricted figures available from the examination of Ms. Kessler in Web III and from SoundEx's annual report for 2009 (Live.365 Exh. 48 [received TR 519]), pages 6-7, SoundEx's gross statutory revenues were $201,740,275, and its total expenses were $16,692,605, yielding an administrative rate of 7.6 percent. In addition to the statutory revenues, SoundEx received additionally non-statutory revenues. The SX minimum proposed noncommercial webcast rate is $500.00 for 159,140 ATH per month. The SX minimum rate ($500) is a bulk sale (willing seller) of 22,916,160 annual performances (159,140 ATH times 12 performances per hour times 12 months) for $500.00. The per performance rate is therefore $0.000021819. Applying the SX expense percentage of 7.6% to this rate establishes, using SX figures, a $0.000001658 per performance SX expense allocation. The small noncommercial webcaster limited to (10%)($50 worth) of the $500 SX bulk rate, or 2,291,616 performances, times the $0.000001658 per performance SX expense allocation, would contribute, using SX figures, $3.80 annually to SX overhead. The very small noncommercial webcaster using SX figures would contribute $1.52 annually to SX overhead.

Anything other than a cost-effective rate structure would run counter to Congress' intention in replicating in Section 114, as amended by DMCA, as nearly as possible the action of a competitive buyer-seller market. If a supplier could not service the needs of a small buyer profitably on at least marginal basis, then there would be no sale at that price for want of a willing buyer. In a perfectly competitive market only as forced by governmental regulation would a seller agree to sell for less than his marginal costs.

More importantly, the cost figures that Ms. Kessler testified to are averages, Kessler testimony, 3 transcript 525:1677 [April 21, 2010], which overstate SoundEx's expenses in the abbreviated processing SoundEx afford to reports of use from small and very small noncommercial webcasters. Id. at 547:7-11, 18-548:1, 548:7-18.

III. THE CBI-SOUNDEX PETITION SHOULD BE DENIED.

The settlement agreement between SoundExChange and CBI does not meet the statutory standard for board approval. The CBI-SoundEx agreement is appropriate for the larger educationally affiliated webcasters, but it is not properly scaled to the needs of the small and very small webcasters. CBI has nothing to gain from this waiver provision – in fact CBI, having nothing to gain or lose by proceeding under Section 801(b)(7)(A) does not have standing as a user. In contrast, SoundEx's motive in going this further step is pretty obvious from their making the terms precedential in the instant proceeding, thereby by-passing via Section 801(b)(7)(A) a determination of rates and terms on the record by the Judges pursuant to Section 114(f)(2).

A. The CBI-SoundEx Petition Does Not Properly Invoke § 801.

The CBI-SoundEx petition should not be granted under Section 801(b)(7)(A) of the Act. On July 23, 2009, SoundExchange and the College Broadcasters. Inc., signed a settlement agreement under the Webcasters Settlement Act of 2009, codified to 17 U.S.C.§ 114(f)(5)(A).

Notice was published by the Register of Copyrights in the Federal Register, 74 Fed. Reg., 40,614 (August 12, 2009). Thereupon "the terms of such agreement [became] available, as an option, to any … noncommercial webcaster meeting the eligibility conditions of such agreement." Section 114(f)(5)(B). Such publication had the effects of (i) "estopping" under subparagraph (B) all copyright owners of sound recordings and other persons entitled to payment under this section "from claiming a rate other than the terms of "such agreement" and (ii) holding SoundExchange harmless from a claim against by it by "any copyright owner of sound recordings or any other person entitled to payment under this section for having entered into such agreement." Subparagraph (A). The essence of (i) is to assure non-discrimination among other like users by compelling SoundExchange to make the terms of the agreement "available, as an option to any … webcasters meeting the eligibility conditions of such agreement."[12] *Cf.* Section 2(a) of the Robinson-Patman Act of 1936, 15 U.S.C. § 21a, outlawing price discrimination. These effects follow by force of law upon publication. Subparagraph (C) provides that such agreements may not be introduced as precedential in any subsequent proceeding to set rates, unless the parties agree to waive confidentiality. In Section 6.2 of the agreement the two parties did so.

Thereafter on August 13, 2009, CBI filed in Web III a copy of the joint motion for adoption by the Judges as a global settlement binding all non-signatory users to its terms under Section 801(b)(7)(A). CBI lost any standing in the joint motion based on fiscal interest upon publication under Section 114(f)((5)(A) by the Register on August 12, 2009, 74 Fed. Reg., 40,616. Article 2 of the agreement provided that eligible users might "elect" coverage under the agreement. It is contradictory in terms to provide that non-electing users could be "bound" under Section 801(E)(7)(A) to an agreement that is elective. It is equally contradictory to say that such

[12] This statutory provision assured price non-discrimination between users; it was not intended to confer any benefit on the receiving agent.

approval by the Judges under Section 801 would change what was already in effect by virtue of publication under Section 114(f)(5)(B). Technically, Section 801(b)(7)(A) would not apply to the SX-CBI agreement by reason of Section 801(b)(7)(B) if Section 114(f)(3) were found to apply.

The Register's publication of the agreement between SoundEx and CBI gave CBI all the benefits from the agreement that CBI was entitled to as a result of signing the agreement. By such publication , CBI had gotten all the benefits it could derive from the settlement agreement. Notwithstanding the lack of benefit to it, CBI filed the joint motion of SoundEx and CBI filed as part of its direct case in Web III. The Judges thereupon set for hearing on May 5, 2010, the question of approving the rates set forth in the CBI-SoundEx agreement as a partial litigational settlement under Section 801(b)(7)(A). IBS filed comments on April 22, 2010; IBS notice of witness and exhibits for the May 5 hearing, filed April 30, 2010.

At the May 5 hearing, before any witnesses were sworn, the Judges raised questions about the legal effect of their approval and its preclusive effect on the educational webcasters that were not parties to the agreement and by what factors were they to judge whether it "provide a reasonable basis for setting statutory terms or rates." The Judges asked whether it would be fair or reasonable to allow an association representing a minority of educational webcasters (CBI) to foreclose the presentation of evidence on behalf of the majority of educational webcasters (IBS). At the conclusion of the hearing mid-day, counsel had argued the foregoing issues, and the Judges reserved the legal question. Thus the hearing was concluded with no testimony having been taken from the parties' witnesses standing by. May 5, 2010 Xscript at 83:20-84:3. As a result the agreement was never authenticated and admitted into evidence.

B. The CBI-SoundEx Agreement Is Not A Reliable Benchmark.

The agreement between SoundEx and CBI is not an appropriate benchmark to use in setting a minimum fee for the overwhelming majority of the small and very small educational webcasters, because CBI's membership has significantly different characteristics from the small and very small noncommercial webcasters. Section 801(b)(7)(A) was never intended to allow the majority among users on an issue to be found involuntarily by a minority of users. The CBI-SoundEx petition should not be granted over the objection of IBS, which was not a party to the agreement and which has objected to its being approved by the Judges under Section 114(f)(5). It does not take much imagination on the part of the Judges to read the motive between the lines of the July 2009 agreement.

The substantive objection to extending the SX-CBI rates and terms to smaller educational webcasters is that CBI represents primarily large educational webcasters having a very different profile from the more numerous small and very small non-commercial entities. Such small entities do not have a staff that is in part paid by the entity or by the educational institution of which the entity is a part. In contrast IBS has the larger membership and represents a broader spectrum of users and would-be users in high schools, academies, universities and colleges, etc. The hours-of-operation of individual IBS members likewise covers a wide spectrum, ranging from (i) a college station simulcasting 24/7/365 to (ii) a high school webcasting-only entity that operates one or two hours each weekday during the school year. A back-of-the-envelope calculation would be that such a smaller entity could program at a max no more than 600 works per month.[13]

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[13] This figure is calculated as follows: 2 hours per month times 12 performances per hour (ATH conversion figure) = performances per day. Twenty-four performances times 25 week-days per month equals 600 works per month.

This estimate tends to overstate the amount of licensable listening to these smaller operations. IBS' experience and the best estimates from Webcasting II and III suggest that the average instantaneous listenership is just under four. Many smaller stations program recorded music directly licensed to them or through a clearinghouse arrangement, which further reduces the instantaneous listenership for performances licensable by SoundEx. Considering that many educationally affiliated webcasters attract their peak listening audiences with varsity sports coverage and on-campus lectures and instructional programming, the actual number of performances involving digitally recorded music would be proportionately less than four. To the extent that the primary purpose of some such webcasting operations is for course credit or as an extra-curricular activity – "learning by doing" – their instantaneous audiences for digitally recorded music might be yet smaller. These are truly "small entities" as defined by the Small Business Administration and entitled to the protection of the Small Business Regulatory Fairness Act, discussed above.

IV. THE JUDGES SHOULD ADOPT IBS' RATE PROPOSAL.

IBS' rate proposal satisfies Section 114(f)(2)(B)'s requirement that it shall distinguish among[14] the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for such type of service.

Taking into account the distinctive use of, and audience for, digitally recorded music by the small and very small educational webcasters, SX's proposed $500 minimum is disproportionate to the actual usage of licensable music by the small and very small educational webcasters. Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type

[14] From Congress' use of the preposition "among" in both § 14(f)(2)(A) and (B), the Judges' rate determinations must necessarily embody provisions for at least three types of services, for otherwise the grammatically appropriate preposition would have been "different" in the case of two types, and the statutory language does not admit the possibility that there is only one type.

of service in accord with the general public policy favoring small businesses. This disproportion exists not only in rates but in cost-benefit analysis of the recordkeeping and reporting prescribed.

Congress, in enacting the DCMA itself, took pains to indicate that "such rates and terms shall distinguish *among the different types* of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of sound recordings affected by this paragraph" (§ 114[f][2][A, B]) (emphasis added), giving due weight to substitution for CD sales. IBS' position is that SX has not tied its proposed minimum in any meaningful way to substitution for CD sales.

Section 114(f)(5)(A) provides that where copyright owners and a user enter into a private agreement on rates and terms, the parties to such agreement may submit it to the Register and upon publication the rates and terms of that agreement are available to any other webcaster "meeting the eligibility conditions ... as an option." In fact, SoundEx and CBI did just that, and the Register published the agreement in substantial part in 74 Fed. Reg., 40,616. While Section 114(f)(5)(C) bars precedential use of such agreements in rate determination hearings, this agreement contained an express provision in § 6.2 expressly authorizing the precedential use of such agreement in a rate determination proceeding.

Because the deficiencies in SoundEx' proposed rates and terms have become more evident as testimony have piled up in the record, IBS on May 21st submitted a new proposal for rates in Web III pursuant to Section 351.4(c) of the Rules, *viz.:*

> In view of (i) the direct testimony heard so far and (ii) the CRJs' rate determination published in the Federal Register of May 1, 2007, IBS herewith respectfully submits a superseding restated rate proposal in Web III pursuant to Section 351.4 of the Rules.
>
> The general principle driving IBS' proposal is that small, noncommercial webcasters should pay only for the performances of music subject to statutory license that they actually webcast. The proposal consists of three parts:

Definitions that identify small, noncommercial webcasters as those whose small listening audiences and hours of operation are such as would reflect actual *de minimis* use of music under statutory license;

Flat annual rates;

An exemption from recordkeeping requirements and reporting requirements.

The general principle driving IBS' proposal is that small, noncommercial webcasters should pay only for the performances of music subject to statutory license that they actually webcast. The proposal consists of three parts:

(i) Definitions that identify small, noncommercial webcasters as those whose small listening audiences and hours of operation are such as would result in *de minimis* use of music under statutory license;

I. Definition of New Terms

Definition: A *small, noncommercial webcaster* is a noncommercial webcaster whose total performances of digitally recorded music is less than 15,914 ATH per month or the equivalent.

A *very small noncommercial webcaster* is a noncommercial webcaster whose total performance of digitally recorded music is less than 6,365 ATH per month or the equivalent.

II. Royalty Rates for Noncommercial Webcasters

1. Tiering Minimum Fee [to recognize actual use of license]

a. Pursuant to 17 U.S.C. §§ 112(e)(3) and 114(f)(2)(A) and (B), all non-commercial webcasters that are not small noncommercial webcasters or very small noncommercial webcasters shall pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including a side channel maintained by the annual broadcasters that is a licensee).

b. Any small noncommercial webcaster whose actual use of the license does not exceed 15,914 ATH per month shall pay an annual nonrefundable minimum fee of $50.00 [10% of $500 (10% of $500 for 21 continuous listeners)] during any month, *i.e.,* 2,291,616 annual statutory performances.

c. Any very small noncommercial webcaster whose actual use of the license is not more than 6,365 ATH during any month, *i.e.,* 916,646 annual statutory performances, shall pay an annual nonrefundable minimum fee of $20.00 [4% of $500 for 8 continuous listeners];

d. Each of the annual minimum fees described in this paragraph shall constitute the minimum fees during under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B).

2. Per Performance Rates

[as proposed by SoundExchange]

IV. Tiering of Reports of Use by Small and Very Small Noncommercial Webcasters

a. Reporting of use, or recordkeeping. All noncommercial webcasters not part of a settlement that exceed 55,000 ATH per month, shall submit census reporting in accordance with CRB final order on reporting of use.

b. For noncommercial webcasters with more than 15,914 ATH per month but not exceeding 55,000 ATH per month in addition to their $500.00 annual fee may pay SoundExchange a fee of $100 annually as a proxy for not submitting reports of use.

c. For noncommercial webcasters with 15,914 ATH per month, or less, no reports of use are required.

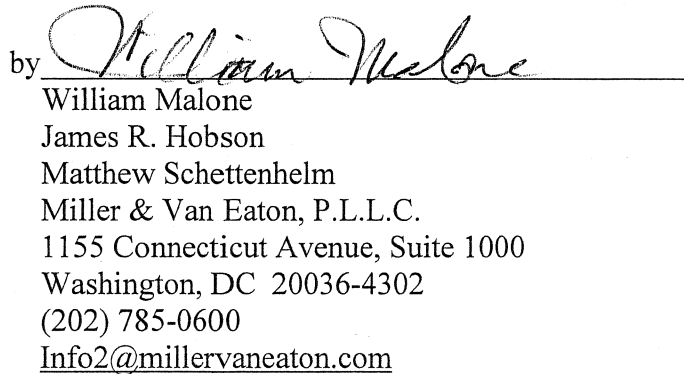
Unlike the record in Web II, where the court had found no cost justification, the IBS proposal reflects SoundEx's actual expenses that would be incurred in SoundEx's foreshortened processing of papers from small and very small non-commercial webcasters.

Prayer

For the foregoing reasons, IBS asks that the Judges adopt IBS' proposed findings of fact and conclusions of law.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, Inc.



by

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Its Attorneys

September 10, 2010

Attachment
IBS' Amplified Rate Proposal 8/28/10

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Before the
COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, DC 20540

In the Matter of	)	
	)	Docket No. 2009-1 CRB DTRA
Adjustment of Rates and Terms for Digital Performance Right in Sound Recordings and Ephemeral Recordings	)	Webcasting III

AMPLIFICATION of IBS' RESTATED RATE PROPOSAL

On May 21, 2010, IBS filed with the Judges its Restated Rate Proposal. On June 23 Sound Exchange filed with the Judges its Second Revised Rates and Terms. IBS now amplifies its Restated Rate Proposal to facilitate a more direct comparison in the differing format used by SoundExchange.[1]

I. Definition of New Terms

Definition: A *small, noncommercial webcaster* is a noncommercial webcaster whose total performances of digitally recorded music is less than 15,914 ATH per month or the equivalent.

A *very small noncommercial webcaster* is a noncommercial webcaster whose total performance of digitally recorded music is less than 6,365 ATH per month or the equivalent.

[1] Kyle Funn testified on behalf of SoundExchange after May 21, and SoundExchange has just noted two corrections to its June 23 filing. We have not attempted, however, to replicate SoundExchange's attachment, containing its proposal in the format of proposed regulations. Pursuant to Section 351.4(b)(3), IBS reserves the right to revise its proposal rates and terms at any time during the proceedings.

II. Royalty Rates for Noncommercial Webcasters

1. Tiering Minimum Fee [to recognize actual use of license]

a. Pursuant to 17 U.S.C. §§ 112(e)(3) and 114(f)(2)(A) and (B), all non-commercial webcasters that are not small noncommercial webcasters or very small noncommercial webcasters shall pay an annual, nonrefundable minimum fee of $ 500 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including a side channel maintained by the annual broadcasters that is a licensee).

b. Any small noncommercial webcaster whose actual use of the license does not exceed 15,914 ATH per month shall pay an annual nonrefundable minimum fee of $50.00 [10% of $ 500 (10% of $500 for 21 continuous listeners)] during any month, *i.e.,* 2,291,616 annual statutory performances.

c. Any very small noncommercial webcaster whose actual use of the license is not more than 6,365 ATH during any month, *i.e.,* 916,646 annual statutory performances, shall pay an annual nonrefundable minimum fee of $ 20.00 [4% of $500 for 8 continuous listeners];

d. Each of the annual minimum fees described in this paragraph shall constitute the minimum fees during under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B).

2. Per Performance Rates

[as proposed by SoundExchange]

III. Ephemeral Recordings

[as proposed by SoundExchange]

IV. Tiering of Reports of Use by Small and Very Small Noncommercial Webcasters

a. Reporting of use, or recordkeeping. All noncommercial webcasters not part of a settlement that exceed 55,000 ATH per month, shall submit census reporting in accordance with CRB final order on reporting of use.

b. For noncommercial webcasters with more than 15,914 ATH per month but not exceeding 55,000 ATH per month in addition to their $500.00 annual fee may pay SoundExchange a fee of $100 annually as a proxy for not submitting reports of use.

c. For noncommercial webcasters with 15,914 ATH per month, or less, no reports of use are required.

V. Collective payments for small and very small noncommercial webcasters

The collective [now SoundExchange] may elect to accept collective payments on behalf of small and very small noncommercial webcasters.

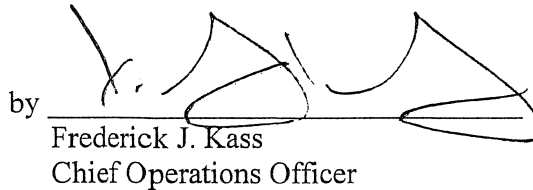
[IBS is prepared to offer to SoundExchange a proposal for a collective payment in essentially the following terms:

[IBS shall pay to SoundExchange in January 2011, and annually through 2015, a lump sum payment of $10,000.00 to cover the IBS members that are small noncommercial webcasters (not to exceed 15,914 ATH per month) that are not participating in any other SoundExchange agreement such as CPB/NPR/NFCB agreement. An example covered by the IBS payment of $10,000 would be 100 small ($50) and 250 very small/new ($20) webcasters. If the amount of IBS members participating exceeds $10,000.00 there will be a true up within 15 days of the end of the year.

[The purpose of the IBS payment is to eliminate the administrative burden to SoundExchange of small and very small noncommercial webcasters much the same as the Live365 aggregator payment in Web II.][2]

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, Inc.

by 
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July 28, 2010

Attachment

[2] *See* discussion as to the advantages of the agreement with Live365 in the written direct testimony of Kyle Funn, dated June 3, 2010, at page 4 (a copy of which is attached).

Attachment

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

In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2009-1 CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

KYLE FUNN

Manager, Licensing & Enforcement
SoundExchange, Inc.

June 2010

WRITTEN REBUTTAL TESTIMONY OF KYLE FUNN

Background and Qualifications

I am Manager, Licensing and Enforcement, at SoundExchange. I have worked at SoundExchange since May 2005. I have held my current position since early 2008. I previously served as Licensing and Enforcement Specialist at SoundExchange. My current job responsibilities include monitoring licensees' compliance with the regulations related to payment and reports of use, and communicating deficiencies to them. I act as a liaison between SoundExchange and licensees related to their compliance with statutory and regulatory requirements. In monitoring licensees' compliance, I work both with SoundExchange's finance department, which receives and processes royalty payments and statements of account from licensees, and its distribution services department, which receives and processes reports of use. In addition, I field questions from current and prospective licensees regarding general licensing, reporting and payment issues.

Discussion

I am submitting this rebuttal testimony to respond to Live365's proposal that it should receive a 20% aggregator discount from its proposed rates applicable to commercial webcasters. Live365 has proposed that "a streaming service that operates a network of at least one hundred (100) independently-operated 'aggregated webcasters'" should receive a 20% discount from the royalty rate set for commercial webcasting services. *See* Live365 Rate Proposal, Section I.B (Sept. 29, 2009). Live365 claims that it is entitled to this discount because of alleged "administrative savings" and other benefits it provides to copyright owners and SoundExchange. *See, e.g.*, Corrected and Amended Testimony of Mark R. Fratrik at 38-39.

In reality, however, Live365 has engaged in conduct that has created more work for SoundExchange, not less. As I understand the Court has already heard from other witnesses, after the Webcasting II decision, Live365 paid royalties at the incorrect royalty rate. In May 2008, we sent a letter to Live365 that notified Live365 that, among other things, it was failing to pay at the appropriate royalty rates. In April 2009 and August 2009, we contacted Live365 again because it still was not complying with the rates and terms set in the Webcasting II proceeding, and we repeated our demand that it pay in compliance with the regulations. Despite our repeated efforts, Live365 did not comply with the rates set in the Webcasting II proceeding until very recently.

Live365's decision not to pay royalties in compliance with the Webcasting II decision imposed a burden on SoundExchange. Over the course of approximately two years, SoundExchange had to spend time and money analyzing Live365's lack of compliance and repeatedly notifying Live365 about its failure to pay royalties at the correct rates. Moreover, because Live365 pays royalties to SoundExchange on behalf of thousands of webcasters, when Live365 was paying at the incorrect rates, it was causing thousands of webcasters to be out of compliance with the statutory license, even as those webcasters may have believed that they were compliant. And because Live365 has not provided SoundExchange with a list of the thousands of webcasters for whom it purports to pay SoundExchange, it can be more time-consuming for SoundExchange to determine whether a webcaster is complying with the statutory licenses.

Live365 also interfered with SoundExchange's collection and processing of information related to the webcasters for whom Live365 pays and reports to SoundExchange. In order to collect information in an efficient and uniform fashion from licensees, SoundExchange makes

template statement of account forms available on its web site. I am attaching the template 2009 statement of account for commercial webcasters as SoundExchange Rebuttal Exhibit 1 to my testimony. That template provides spaces for a webcaster to input the number of performances for each month, and then directs webcasters to multiply the number of performances by the applicable royalty rate for 2009 ($0.0018). The template statement of account form is designed to make it as easy as possible for webcasters to calculate the royalties they owe to SoundExchange. Most webcasters that pay SoundExchange use the template statement of account forms. Having the statement of account information in a standardized format makes it easier to review, and decreases the potential for errors due to human intervention and discretion. It is for this reason that SoundExchange is proposing in its revised rate proposal that webcasters be required to use the template statement of account form that SoundExchange makes available on its web site.[1]

If a webcaster does not use the standard statement of account form, it creates additional work for SoundExchange because the information that is submitted in a non-standard format cannot be processed as easily. Unfortunately, after the Webcasting II decision, Live365 did not use the correct statement of account template, and instead submitted statement of account forms that appear to have been doctored. For example, in December 2009, Live365 submitted the statement of account form that is attached hereto as SoundExchange Rebuttal Exhibit 2 (Restricted). The form that Live365 submitted appears designed to look like an official SoundExchange form, but it calculates royalties at incorrect royalty rates for the current rate period. It appears that Live365 took a statement of account form from the prior rate period and

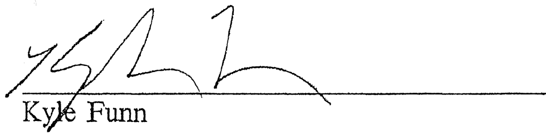
[1] In connection with statement of account forms, SoundExchange is also proposing that licensees should be allowed to submit electronic signatures instead of handwritten signatures. The purpose of this proposal is to make it easier for licensees to submit statements of account.

altered it so that it purports to be a 2009 form. As you can see from looking at this exhibit, the form claims to be a "Statement of Account for Commercial Webcasters Per Performance 2009," and includes the SoundExchange logo and other information that make it look like a form issued by SoundExchange for 2009. But on the first page of the form, in the section where a webcaster calculates the royalties due, the form instructs a webcaster to multiply its total performances by "$0.000762," and it instructs the webcaster to take a 4% deduction on the total number of reported performances. That, of course, is the Webcasting I rate and was not applicable in 2009. By submitting doctored Statement of Account forms, Live365 interfered with SoundExchange's efforts to administer the statutory licenses as efficiently as possible. This deliberate non-compliance creates additional work for SoundExchange and undermines the claim that Live365 should receive a discount.

Finally, I should also note that Live365 and other services with 100 or more stations or channels already obtain a benefit from SoundExchange that is not available to other services. Under the final regulations adopted by the CRJs for 2006 - 2010 (37 C.F.R. § 380.3(b)(1)), and under the Stipulation (May 14, 2010) submitted by Live365 and SoundExchange in Webcasting III for 2011 - 2015, the $500 per station or channel minimum fee is capped at $50,000. Thus, a service such as Live365 that aggregates thousands of stations already receives a substantial benefit because it is required to pay only $50,000 in minimum fees as opposed to, for example, the $2.5 million it would have to pay in minimum fees if it paid minimum fees for 5,000 stations or channels.

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

Date: 06/07/2010



Kyle Funn

Certificate of Service

I hereby certify that I have caused to be e-mailed this day copies of the foregoing Amplification of IBS' Restated Rate Proposal to the following persons. Hardcopies of the filing will be furnished to parties on request.

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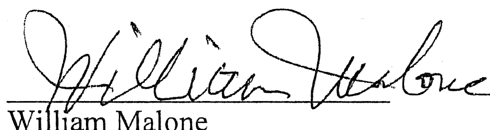

William Malone

Washington, DC

July 28, 2010

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Certificate of Service

I hereby certify that I have caused to be dispatched this day copies of the foregoing motion to the following persons by e-mail and Monday delivery.

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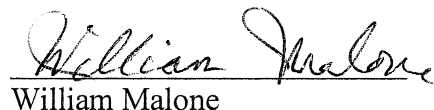
William Malone

Washington, DC

September 10, 2010

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