

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

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<b>In the Matter of</b> )	
_____ )	
<b>Digital Performance Right in Sound</b> )	<b>Docket No. 2009-1</b>
<b>Recordings and Ephemeral Recordings</b> )	<b>CRB Webcasting III</b>
_____ )	

**COLLEGE BROADCASTERS INC.'S REPLY TO IBS'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Discovery Schedule dated March 3, 2010, College Broadcasters, Inc. ("CBI") hereby respectfully submits this Reply to Intercollegiate Broadcasting System's ("IBS") Proposed Findings of Fact and Conclusions of Law.

The CBI-SoundExchange Settlement ("Settlement") meets the standard for adoption by the Board as statutory terms and rates for NEWs. CBI has standing to submit it as a basis for statutory terms and rates pursuant to 17 U.S.C. Section 801(b)(7)(A), and the Settlement itself provides a reasonable basis for those terms and rates. Taken as a whole, the Settlement minimizes costs to eligible webcasters by providing predictability, certainty, and ease of administration, while effectively compensating copyright owners.

**I. REPLY TO FINDINGS OF FACT**

**A. The CBI-SoundExchange Settlement, Taken as a Whole, Minimizes Costs To Eligible Webcasters While Effectively Compensating Copyright Owners And Is Mutually Agreeable To Both.**

1. The rates and terms for Noncommercial Educational Webcasters ("NEWs") proposed jointly by CBI and SoundExchange minimize costs to NEWs

because they include a minimum fee and an optional waiver of the Reports of Use requirement. Under that proposal, in exchange for a flat, budgetable proxy fee, minimum-fee NEWs can be assured that they will not incur recordkeeping costs as an additional expense beyond the minimum fee.<sup>1</sup>

2. The value proposition created by the reporting waiver is particularly important for the smallest webcasters, who are least able to afford the equipment and labor required to compile Reports of Use and least likely to reach the proposed ceiling for waiver eligibility of 55,000 Aggregate Tuning Hours ("ATH").

3. Out of 25 comments submitted to the Board regarding the Proposed CBI-SoundExchange Settlement ("Settlement"), eleven comments (submitted by educational webcasters) emphasized the importance of the reporting waiver. *See* Comments of Black, DiNome, Gilbert, Harman, Maben, Marek, Newton, Thuringer, Tyron, Willer, and Wasson (Apr. 22, 2010). No other aspect of the proposal was identified as important by commenters so frequently.

4. No party or commenter has objected to the establishment of a reporting waiver in the regulations.

5. The proposed proxy fee compensates SoundExchange for the expense of estimating the usage of particular sound recordings in lieu of receiving Reports of Use, allowing SoundExchange to distribute royalties to copyright owners efficiently and with reasonable accuracy.

**B. The CBI-SoundExchange Settlement, Taken as a Whole, Provides Predictability, Certainty, and Ease of Administration.**

6. The Settlement by CBI and SoundExchange provides for predictability as

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<sup>1</sup> The proxy fee is optional; webcasters can choose to file Reports of Use on a sample basis.

to future rates and terms. While similar terms are available for NEWs to adopt as part of the settlement reached between CBI and SoundExchange under the Webcaster Settlement Act of 2009, those terms expire at the end of 2015. If the CBI-SoundExchange Settlement is adopted by the Judges as a basis for statutory terms and rates pursuant to 17 U.S.C. Section 801(b)(7)(A), the same fee and reporting waiver will survive as available terms until new regulations are promulgated. This distinction provides certainty to NEWs as it minimizes, if not completely removes, the chance of suddenly incurring burdensome recordkeeping costs come 2016.

7. The Settlement also recognizes NEWs as a distinct category of webcaster. It is appropriate to establish this category in the regulations given the educational mission and limited resources of NEWs. The Board has already recognized the particular situation of "minimum fee broadcasters," which includes most NEWs. 74 Fed. Reg. 52418, 52421-22 (Oct. 13, 2009). This further shows that establishing NEWs as a distinct category is appropriate.

8. Two NEWs who submitted comments on the CBI-SoundExchange Settlement emphasized the importance to educational webcasters of predictability in rates and terms. *See* comments of Bill Keith, WDSP-FM (Apr. 22, 2010) ("The monetary amount was reasonable . . . this is especially important for smaller educational stations that need a reasonable and consistent charge so that they can maintain their small operations."); *see also* comments of Jamie Gilbert, WKNC-FM (Apr. 22, 2010) (without consistent, predictable rates and terms "a station will be unable to risk financing an operation that could be shut down at any time if future negotiations leave terms drastically altered").

**C. There Is No Dispute As To Rates and Terms for NEWs Using Over 15,914 ATH Per Month.**

9. IBS's Amplification of Restated Rate Proposal, Part IV, includes a \$500 minimum fee for NEWs performing over 15,914 ATH per month. This fee is the same as that included in the CBI-SoundExchange Settlement as to those webcasters.

10. IBS's rate proposal includes a reporting waiver. Although IBS's specific proposal for a reporting waiver with no proxy fee in some circumstances has been rejected by the Board, there is no dispute among the parties or commenters in this proceeding that a reporting waiver is appropriate for NEWs who pay no more than the minimum fee. *Id.*; *see also* SoundExchange Proposed Conclusions of Law ¶ 517.

11. CBI, IBS, and SoundExchange all support establishing NEWs as a distinct category of webcasters in the regulations implementing the Section 112 and 114 statutory licenses.

**II. REPLY TO CONCLUSIONS OF LAW**

**A. CBI Has Standing to Submit Its Settlement As A Basis For Statutory Terms and Rates.**

1. CBI and SoundExchange are participants in this proceeding pursuant to 17 U.S.C. Section 803(b)(2).

2. CBI and SoundExchange reached an agreement concerning terms and rates, and subsequently petitioned the Board to adopt that agreement as statutory terms and rates for NEWs pursuant to Section 801(b)(7)(A).

3. Section 801(b)(7)(A) expressly provides for settlements between parties to be adopted as statutory terms and rates.

4. Moreover, Section 114(f)(5)(C) provides that settlements between parties may be admissible as evidence or otherwise taken into account in future proceedings involving the setting of royalty rates and terms, and of notice and recordkeeping requirements when the parties' settlement agreement "expressly authorize[s] the submission of the agreement in a proceeding under this subsection," such as the instant royalty rate proceeding.

5. There are no other prerequisites apart from those described in Paragraphs 1-4 for an entity such as CBI to have standing to petition the Board for adoption of its Settlement as statutory terms and rates.

6. Therefore, CBI has standing to petition the Board for adoption of its Settlement as statutory terms and rates.

7. IBS states in Paragraphs 14-17 of its Proposed Conclusions of Law that CBI does not have standing to petition the Board under Section 801(b)(7)(A) because CBI has entered an agreement with SoundExchange. This is contrary to the plain wording of Section 801(b)(7)(A), which permits the Board "[t]o adopt as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding . . . ."

8. Also, contrary to IBS's assertion in Paragraph 17 of its Proposed Conclusions of Law, CBI's settlement with SoundExchange alone does not satisfy all of CBI's rights in this proceeding. CBI has the right to request that its Settlement be established as statutory rates and terms in order to establish a precedent for future

rulemakings and provide for greater certainty in any interim period after the expiration of the settlement on December 31, 2015.

**B. The CBI-SoundExchange Settlement Meets the Standard for Adoption by the Board as Statutory Terms and Rates for NEWs.**

1. The Copyright Act provides two criteria for declining to adopt a settlement agreement under Section 801(b)(7)(A): that a party objects to the agreement, and that "the agreement does not provide a reasonable basis for setting statutory terms or rates." An objection alone is not sufficient reason to decline adoption of a settlement agreement. This is true even when a resulting regulation would be applicable to the party objecting. *See* H.R. Rep. No. 108-408, at 24 (2003).

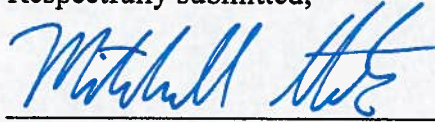
2. The CBI-SoundExchange Settlement is a voluntary agreement between a representative of NEWs and a representative of copyright owners. The settlement is based in part on the history of rates and terms for noncommercial webcasters set by the Board and in negotiation, taking into account, royalty rates, the prohibitive cost to educational webcasters of preparing Reports of Use, and the cost to SoundExchange of administering licenses to NEWs. *See* SoundExchange Proposed Conclusions of Law ¶ 501 ("This rate structure was obviously influenced by the Webcasting II decision."). The resulting Settlement is a reasonable accommodation of these various concerns.

3. No NEW will be prejudiced by the adoption of the CBI-SoundExchange Settlement. Should the Board accept IBS's assertion that NEWs performing 15,914 ATH per month or less constitute a "different type[]" of users under Section 114(f)(2)(A), the Board may adopt IBS's proposal in addition to CBI's proposal, without conflict or ambiguity. However, IBS's assertion does not negate the reasonableness of the CBI-SoundExchange Settlement as to NEWs in general.

4. Therefore, and for the reasons stated in CBI's Proposed Findings of Fact and Conclusions of Law, the CBI-SoundExchange agreement is a reasonable basis for statutory terms and rates, and meets all criteria for adoption as such.

Date: September 27, 2010

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Mitchell L. Stoltz, do hereby certify that copies of the foregoing filing were sent via email and first class mail this 27th day of September, 2010 to the following:

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/s/ Mitchell L. Stoltz

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Mitchell L. Stoltz



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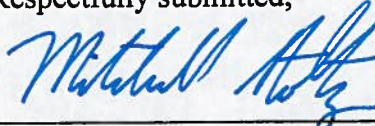
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**NOTICE OF APPEARANCE OF AYMERIC F. DUMAS-EYMARD AND  
DEMONSTRATION OF COMPLIANCE WITH 37 C.F.R. § 350.2**

I, Mitchell L. Stoltz, am counsel of record in this proceeding for College Broadcasters, Inc., ("CBI"). By this notice, I advise the Board that Aymeric F. Dumas-Eymard of this firm will also be appearing on behalf of CBI in this proceeding. As required by 37 C.F.R. § 350.2, I affirm that Mr. Dumas-Eymard is a member in good standing of the bar of the State of New York.

September 27, 2010

Respectfully submitted,



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