

**UNITED STATES COPYRIGHT ROYALTY JUDGES**

<b>In the Matter of :</b>	}	
<b>Adjustment of Rates and Terms for Digital</b>	}	<b>Docket No. 2005-1 DTRA</b>
<b>Performance Right in Sound Recordings and</b>	}	<b>Webcasting II</b>
<b>Ephemeral Recordings</b>	}	

**AMENDMENT TO DETERMINATION PURSUANT TO REMAND ORDER**

On May 1, 2007, the Copyright Royalty Judges (“Judges”) published in the Federal Register their determination of royalty rates and terms under the statutory licenses under Sections 112(e) and 114 of the Copyright Act, title 17 of the United States Code, for the period 2006 through 2010 for the digital public performance of sound recordings by means of eligible nonsubscription transmission or a transmission by a new subscription service. 72 FR 24084. In *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 574 F.3d 748 (D.C. Cir. 2009), the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) affirmed the Judges’ determination in the main but remanded to the Judges the matter of setting the minimum fee to be paid by both Commercial Webcasters and Noncommercial Webcasters under Sections 112(e) and 114 of the Copyright Act. *Id.* at 762, 767. No rules or procedures applied to a proceeding that is remanded, and the Judges adopted an Interim Final Rule to govern. 37 C.F.R. § 351.15. Pursuant to this Rule, Intercollegiate Broadcasting System, Inc. (“IBS”) and SoundExchange, Inc. (“SoundExchange”) presented proposals for the

conduct and schedule of the remand proceeding, including settlement negotiations, written direct statements with proposed rates, discovery and an evidentiary hearing. By order dated October 23, 2009, the Judges established a period commencing November 2, 2009, and concluding on December 2, 2009, for the parties to negotiate and submit a settlement of the minimum fee issue that is the subject of the remand. Absent settlement, the parties were directed to file written direct statements by January 11, 2010.

On December 2, 2009, SoundExchange, Inc. and the Digital Media Association (“DiMA”) submitted a settlement regarding the statutory minimum fee to be paid by Commercial Webcasters. Subsequently, the Judges published for comment the proposed change in the rule necessary to implement that settlement pursuant to the order of remand from the D.C. Circuit. 74 FR 68214 (December 23, 2009). The Judges received one comment from IBS. The Final Rule for the minimum fee to be paid by Commercial Webcasters was published. 75 FR 6097 (February 8, 2010).

Following the filing of Written Direct Statements by IBS and SoundExchange, on January 20, 2010, the Judges established the discovery schedule on the remaining issue of the minimum fee for Noncommercial Webcasters. Following discovery, the hearing was held May 18, 2010. SoundExchange presented the testimony of W. Tucker McCrady, associate counsel, digital legal affairs, Warner Music Group (“WMG”), and Barrie Kessler, chief operating officer, SoundExchange. It also offered Webcaster Settlement Acts of 2008 and 2009 agreements between SoundExchange and College Broadcasters, Inc. (“CBI”) for noncommercial educational webcasters, National Association of Broadcasters (“NAB”) for broadcasters, Sirius XM Radio, Inc. (“Sirius XM”) for satellite services and DiMA for commercial webcasters. 5/18/10 Tr. at 13 (McCrady). IBS

presented the testimony of Frederick J. Kass, Jr., John E. Murphy and Benjamin Shaiken. 5/18/10 Tr. at 62 and 67 (Kass). The testimony of Mr. Kass was that IBS supported a different rate proposal than the one filed. When this different rate proposal was not timely filed, the Judges ordered that it be filed by June 1, 2010. 5/18/10 Tr. at 98 (Kass). The IBS' Restated Rate Proposal was filed June 1, 2010.

Mr. McCrady testified that WMG enters voluntary licenses for commercial webcasters. A negotiated license for the full catalogue must generate at least payments of \$25,000. 5/18/10 Tr. at 25 (McCrady). The lowest commercial minimum fee is 20% of revenue. A smaller revenue stream would not justify the time and resources WMG would need to devote to evaluating, negotiating, implementing and monitoring an agreement. 5/18/10 Tr. at 20 (McCrady). Noncommercial Webcasters use the statutory license, because they do not generate enough revenue to WMG to support negotiating a license. SX Remand Trial Ex. 1 at 6 (McCrady).

The CBI agreement has the rates and terms for noncommercial educational webcasters, the same group that IBS represents in this proceeding. 5/18/10 Tr. at 71 (Kass). It has a minimum fee of \$500 per year per station or channel and a usage rate of \$500 per channel for streaming a noncommercial educational service up to 159,400 aggregate tuning hours ("ATH"). 5/18/10 Tr. at 14 (McCrady). The SoundExchange proposed minimum fee is \$500 per station or channel. 5/18/10 Tr. at 14 (McCrady). The proposed minimum fee is fully recoupable against royalty fees owed and this feature reduces transaction costs for both parties. 5/18/10 Tr. at 21, 22 (McCrady). IBS says the average annual revenue of its member stations is \$9,000. 5/18/10 Tr. at 20 (McCrady) and 5/18/10 Tr. at 71 (Kass). So, the proposed fee is 6% of revenue, a large discount for

Noncommercial Webcasters off the negotiated license agreements for commercial webcasters. 5/18/10 Tr. at 20 (McCrary). All users of sound recordings should be licensed and pay something. It is an important educational message for students to learn the value of recorded music and to pay for it. 5/18/10 Tr. at 23 (McCrary). From the first webcasting proceeding, the standard minimum fee for statutory licenses has been \$500, on the theory that the minimum fee should be sufficient to cover at least the costs of administering the license. SX Remand Trial Ex. 1 at 7 (McCrary).

Ms. Kessler testified about administering the royalties paid under the statutory license. Of the approximately 730 webcasting services paying royalties in 2009, 363 are noncommercial. The noncommercial royalties are less than 1% of the total webcasting royalties paid for 2009. 5/18/10 Tr. at 34 (Kessler). Of the noncommercial services, 305 paid only the minimum fee of \$500, and the remaining 58 paid more for exceeding the ATH cap or streaming multiple channels or stations. These payments are pursuant to the royalty minimum fee that is the subject of this remand proceeding, 5/18/10 Tr. at 42 (Kessler), and they demonstrate that noncommercial services are able and willing to pay the minimum fee. 5/18/10 Tr. at 33 (Kessler). SoundExchange does not regularly track the administrative costs on a licensee, station or channel basis. Such costs vary widely based on the quality of the data provided by the service. For this proceeding, SoundExchange estimated its administrative costs. The average per channel or station cost for webcasters for 2008 is \$803. 5/18/10 Tr. at 36 (Kessler). The cost of administering the statutory license is greater than the revenue from noncommercial webcasters. 5/18/10 Tr. at 34 (Kessler). The CBI agreement for noncommercial educational webcasters, together with the NAB agreement, the Sirius XM agreement and

the DiMA agreement all provide a similar minimum fee of \$500, as SoundExchange proposes in this proceeding. All of these agreements were filed under the Webcaster Settlement Acts of 2008 and 2009, which permit agreements on the royalty rates under the statutory licenses. 5/18/10 Tr. at 13 (McCrary).

On June 1, 2010, IBS filed the restated rate proposal that Mr. Kass had supported in his testimony. The general principle of the proposal is that small noncommercial webcasters should pay only for the performances of music subject to the statutory license that they actually webcast. This principle is the same as the Judges used in the Final Determination to support the per performance metric for royalty rates, being more directly tied to the nature of the right being licensed. *See Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 574 F.3d 748, 760-61 (D.C. Cir. 2009). But contrary to this principle, the proposal then provides for a flat royalty rate and an exemption from recordkeeping and reporting requirements. Both the flat rate and the exemptions are inconsistent with a per performance royalty, which is based on the number of performances times the rate for each performance. The proposal was for the royalty rates to be paid by Noncommercial Webcasters (set by 37 C.F.R. § 380.3(a)(2)(i)) and not for the minimum fee, which is the subject of this remand proceeding. The proposed rate is \$20 to \$50 per annum, based on the number of aggregate tuning hours. The proposal did not include a minimum fee. 5/18/10 Tr. at 76, 83-85 (Kass). Mr. Kass said no minimum fee should be paid. He said this discount is justified, because the small noncommercial educational webcasters are teaching students. IBS Remand Trial Ex. 1 at 2. The CBI agreement is available for use by IBS members and some of those members

have joined the CBI agreement. 5/18/10 Tr. at 104, 105 (Kass). It proposes the \$500 minimum fee per channel or station. 5/18/10 Tr. at 14 (McCrary).

### **Noncommercial Minimum Fee**

The Final Determination discussed in Section IV.C.2 that most Noncommercial Webcasters qualified for a distinct segment of the marketplace that justified royalties lower than those paid by Commercial Webcasters. However, the Judges found that:

the bare minimum that such services should have to pay is the administrative cost of administering the license. There is no evidence in the record to suggest that the submarket in which a Noncommercial Webcaster may reside would yield a different administrative cost for SoundExchange as compared to the administrative costs associated with Commercial Webcasters and SoundExchange, notably, makes no distinction between webcasters with respect to the \$500 minimum fee. *Webcaster I* affirmed the notion that all webcasters – all Noncommercial Webcasters as well as all Commercial Webcasters- should pay the same minimum fee for the same license. 67 FR 45259 (July 8, 2002). We also find no basis in the record for distinguishing between Commercial Webcasters and Noncommercial Webcasters with respect to the administrative cost of administering the license. Therefore, we determine that a minimum fee of an annual non-refundable, but recoupable \$500 minimum per channel or station payable in advance is reasonable over the term of this license. (72 FR 24084,24099 (May 1, 2007))(footnotes omitted).

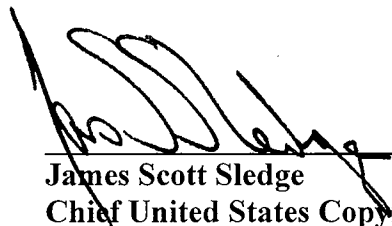
Ms. Kessler testified that the rough estimate of the average administrative cost for 2008 to SoundExchange per station or channel for webcasters is \$803. All of the agreements filed pursuant to the Webcaster Settlement Acts of 2008 and 2009 have similar minimum fees as the proposed rate of \$500 per station or channel. One includes the agreement for noncommercial educational webcasters (the CBI agreement), the same type of services as IBS, which seeks to pay no minimum fee. As found in the above quote from the Final Determination, a zero minimum fee is not supported by the evidence. IBS also asserts that administrative costs should be proportionately tied to the number of performances on a channel in a given year, but fails to establish any credible nexus. On the contrary, there

are certain basic processes that must be utilized in administering the use of sound recordings by any commercial or noncommercial webcaster of any size. Not surprisingly, at lesser levels of sound recording usage, the establishment and conduct of such administrative processes cannot simply be dispensed with. Indeed, smaller users may even result in larger proportionate administrative processing time than larger users. SoundExchange Remand Trial Ex. 1 at 3-4 (Kessler) at 3-4. See also *Order*, 72 FR 24084, 24096 FN37 (May 1, 2007).

The evidence presented in the remand proceeding supports a minimum fee of at least the same fee as adopted in the Final Determination. SoundExchange has now presented evidence on administrative costs that exceed this minimum. The agreements entered pursuant to the Webcaster Settlement Acts of 2008 and 2009 support that the industry accepts this minimum fee, which has substantially been in place since the first webcasting proceeding. IBS' position seeks to pay no minimum fee and indeed seeks to pay no or an extremely small royalty for use of copyrighted content. The Judges adopt the same minimum fee for Noncommercial Webcasters as stated in the Final Determination of an annual non-refundable, but recoupable \$500 minimum per annum per channel or station payable in advance. 37 C.F.R. § 380.3(b)(2).

**SO ORDERED.**

**June 30, 2010**

  
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**James Scott Sledge**  
**Chief United States Copyright Royalty Judge**



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**William J. Roberts, Jr.**  
**United States Copyright Royalty Judge**



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**Stanley C. Wisniewski**  
**United States Copyright Royalty Judge**