Before the
COPYRIGHT ROYALTY BOARD
Library of Congress
Washington, D.C. 20559

In re	)	
Notice of Proposed Rulemaking	)	RM 2008-7
NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	)	

SUPPLEMENTAL COMMENTS of INTERCOLLEGIATE BROADCASTING SYSTEM

These supplemental comments are filed on behalf of the over one thousand members of the Intercollegiate Broadcasting Systems, Inc. (IBS), the nation's first and largest association of academically affiliated broadcasters and webcasters. IBS was incorporated as a non-profit corporation in Rhode Island in 1940. IBS has filed comments in prior rulemakings and was a party to the webcasting royalty hearing before the Board (Dkt. 2005-1 CRB DTRA) ("Webcasting II"), submitted after oral argument before the U.S. Court of Appeals for the D.C. Circuit, Dkt. 07-1123, on March 19, 2009, and in RM 2008-7 in response to the Board's NPRM, published in 73 Federal Register, No. 250, 79727 (December 20, 2008). These supplemental comments in RM 2008-7 are filed in response to the board's notice of inquiry in Dkt. 2008-7, published in 74 Fed. Reg., No. 66, 15902 (April 8, 2009). In the course of the webcasting hearing IBS presented oral testimony and documentary evidence as to the distinctive characteristics of the non-profit webcasting operations staffed by college and high school students. These operations, at an estimated 1500 domestic academic institutions, are very local and diverse in nature and bear little resemblance to larger commercial and non-commercial operations and programming to which the existing and proposed rules are addressed. *A fortiori* the public high school webcasters.

The Judges will recall that in Webcasting II the Board received testimony as to the peculiar burdens on small webcasters with these characteristics of applying recordkeeping and reporting requirements more suitable for larger operations with paid staffs. Their listenership to music subject to licensing under Sections 112 and 114 of the Copyright Act is relatively limited: the academic witnesses were agreed that the number of instantaneous listeners to non-varsity-sports programming was only about five.

By order of September 8, 2006, the Board received testimony and exhibits offered in rebuttal to the testimony of Ms. Barrie Kessler, SoundEx's chief operating officer, on record-keeper and reporting requirements and penalties, etc., in Webcaster II for incorporation in the collateral rulemaking proceeding. *See* Determination and Order in Webcaster II, 72 Fed. Reg., No. 83, 24084, 24109-10 (May 1, 2007). This rebuttal information is available to the Board for rulemaking purposes from its record in Webcasting II, pursuant to its evidentiary ruling in Determination and Order in Webcaster II, 72 Fed. Reg., No. 83, 24084, 24109-10 (May 1, 2007). In aid thereof, IBS filed herein a motion to incorporate by reference the foregoing testimony on January 29, 2009.

Since that date SoundEx and CPB *et al.* have signed a licensing agreement, notice of which was published in 74 Federal Register, No. 40, at 9293, March 3, 2009, Appendix A at 9293, of which the Board must necessarily take official notice. While it may be true that each party thereto may have covenanted not to rely on it collaterally or introduce it into evidence, under the precedent in Webcaster II, IBS, not being a party to the agreement or even the negotiations which led up to it, may introduce it for present purposes.

I. IN PRESCRIBING RULES THE BOARD IS OBLIGED TO ADVANCE THE SMALL BUSINESS POLICY ADOPTED BY THE CONGRESS.

The Board, when adopting rules and requirements in this rulemaking proceeding, is obliged to advance the small business policy adopted by Congress.[1] Whether or not the Board -- since its reconstitution under the provision of the 2004 amendments to the Copyright Act -- is an "agency" within the meaning of APA, Section 551(1),[2] or is an agency of another sort required by "any other law to publish general notice of proposed rulemaking

[1] In the Regulatory Flexibility Act of 1980, P.L. 9-354, as amended by the Small Business Regulatory Enforcement Act of 19965, P.L. 104-121, codified at 5 U.S.C., chapter 6 (herein "RFA").

[2] *E.g.,* RFA Sections 603(a), 604(a).

for any proposed rule,"[3] 5 U.S.C. §§ 603(a), 604(b), it is subject to the requirements to provide a regulatory flexibility analyses conforming to the RFA.

Whether or not the Copyright Royalty Judges are subject to the specific terms of the RFA, as sworn officers of the United States they are still to be guided by the policies of the United States, as laid down by Congress. In Section 2(a) of the 1980 Act, 5 U.S.C. § 601 note, Congress found to be called for *inter alia* (6) an end to "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent" and (7) the adoption of "alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes … [to] minimize the significant economic impact of rules of small businesses, small organizations, and small governmental jurisdictions, and (8) for agencies in proposing and adopting Federal regulations to "examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules."

In Section 2(b) Congress declared that its purpose was "to establish as a principle of regulatory issuance that agencies shall endeavor … to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdiction subject to regulation. SBA and OMB specially recognized "that small entities … often face[d] a disproportionate share of the Federal regulatory burden compared with their larger counterparts."[4] To implement this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for the actions to assure that such proposals are given serious consideration. *See also* 5 U.S.C. § 604(a)(5).

The legislative history of the 1980 Act expresses the intent that government agencies should "not give a narrow reading" to the Act. 126 Cong. Rec. 510, 940 (Aug. 6, 1980).

The Federal government has now had nearly thirty years of experience under that policy. The SBA, as the responsible administering agency, has published[5] "A Guide for Government Agencies – How to Comply with the Regulatory Flexibility Act" (May, 2003), incorporating much of that experience under the Act.

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[3] In Webcaster I IBS argued that the predecessor CARP was an agency within the meaning of the APA, and that was the harder case.

[4] Memorandum of Understanding between SBA and OMB, printed as Appendix D in the SBA's Guide.

[5] The SBA has reorganized it website since IBS' Motion for Issuance of an Initial Regulatory Analysis was filed on January 29, 2009, and SBA advises that the handbook is now at http://www.sba.gov/advo/laws/law_lib.html.

Achieving Congress' purposes. IBS applauds the NOI as a significant start toward implementing Congress' purpose.

Among other things, however, the IRA requires the agency noticing proposed rules and requirements –

- to identify homogenous groups of economically comparable small "entities"[6] within segments of the industry, where any such group would be disproportionately *and* substantially or significantly impacted adversely by the rule. Guide at 14, 17, 21. Such a group is "more than just a few … small entities." Guide at 11, 19-20. The Guide, however, makes it plain that it is not enough, however, for the agency to lump disparate segments of the industry into a single group for this purpose. *Id.* at 15. A rule providing for equal treatment to all segments of the industry is not consistent with the purpose of the Act, if the impact on a substantial number of small entities is disproportionate, *i.e.,* one size does not necessarily fit all.
- to not give a narrow reading to what constitutes a "significant economic impact" … a determination of significant economic impact is not limited to easily quantifiable costs. (Guide at 19, *citing* 126 Cong. Rec. S 10,940-42 (August 6, 1980). The agency's regulatory flexibility analysis should describe the cumulative recordkeeping and reporting burden and the affected classes of small entities. Guide at 32-34, 37-38.
- to identify, collect, and evaluate alternative proposals for approaches that have a more proportional impact and would yield a more efficient result. Guide at 2, 35-37, 51. The agency should calculate the disproportionate impact on each group of small entities. Guide at 51. The agency should "detail for the public record" why each of the other significant alternatives was rejected." Guide at 51.
- In calculating disproportionate burdens, the agency should recognize that the volume of revenues over which each entity can spread compliance costs must be taken into account. Guide at 1.

[6] As pointed out in IBS' motion, the term "entities" encompasses not only "small businesses," but also "small organizations," including non-profits, and "small governmental jurisdictions." Section 601(3)-(5). The SBA's Guide, in discussing "small organizations" at 12 points to "a sound definition of a small organizations" in the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.

II. THE BOARD SHOULD EXEMPT SMALL, EDUCATIONALLY AFFILIATED WEBCASTERS FROM ANY CENSUS REPORTING REQUIREMENT.

There is little additional data that IBS could add to the rather massive record of testimony, exhibits, and comments beyond that the Board has already accumulated in Webcaster II, RM 2008-7, RM 2005-2, *et al.*, with respect to the costs and benefits of census recording and reporting by small, non-profit, educationally affiliated webcasters. Any additional detail would be cumulative or within the exclusive possession of SoundEx, which to date has not been quantitatively forthcoming. Under the rules of evidence, the Board is entitled to presume that such withheld data would be unfavorable to SoundEx's case. *See* FRE 301.

1. Census-reporting should be rejected for small non-commercial, educationally affiliated, webcasters. It would simply not be cost-effective, *i.e.,* the payout to the performers would less than the SoundEx's processing costs, and these stations' compulsory royalty payments would be eaten up by their royalty payments to SoundEx. The minimum payments in dollars from these stations would not support SoundEx's costs in terms of collecting and booking the usage. To IBS' information, SoundEx has never allocated payments from small, non-commercial, academically affiliated webcasters for this reason.

These webcasters' royalty payments would be *de minimis* in SoundEx's total scheme. IBS is informed that SoundEx's webcast royalty collections in 2008 totaled about $ 100 million, of which the total non-commercial royalties were about $ 200,000 in 2008. The exact figures, of course, are kept by SoundEx. Thus, the educational ATHs represent about 0.2 percent of SoundEx's total royalty revenue. The testimony in Webcaster II from the educational institutions with which the small college webcasters were affiliated average about five simultaneous listeners per webcaster, except for varsity play-by-play, which was greater. The number of simultaneous listeners per high school webcaster is bound to be no greater than that. Percentagewise, the audience figures from these small webcasters would be overwhelmed by the vast quantities of ATH from larger commercial and educational webcasters.

SoundExchange argues that anything less than full census recordkeeping and reporting would deprive small artists of payment. SoundEx fails even to allege that the amounts of which such individual artists would be deprived by an average ATH of five

would be more than pennies per small artist. These artists would, as the expression goes, never be able to tell the difference from a galloping horse. Moreover, this subclass of artists values public exposure of their music more highly than a few pennies in royalties. Even SoundEx's own witness from the musician's union testified to this in Webcaster II on cross-examination. In this regard the audience for small, educationally affiliated webcasters is a prime submarket for artists recording "new" musical genres. The statutory beneficiaries for which SoundEx is purporting to collect royalties would rather have the highly beneficial public exposure than pennies.

2. Full-census recordkeeping and reporting is beyond the present technical capacity of many smaller educationally affiliated webcasters and beyond the present financial ability of even more smaller educationally affiliated webcasters.

It is understandable that, for example, the average high school webcasting operation lacks the human and technical resources to do automated programming, recordkeeping, and reporting. Most of these operations are extra-curricular, *i.e.,* they run on volunteers whose numbers of hours per school day may be limited by such exogenous factors as busing schedules and homework. To devote their precious hours to an elaborate recordkeeping and reporting process would divert them and taxpayer funds from such schools' primary educational purpose. The position of campus-based collegiate extra-curricular activities, though perhaps less obvious, is comparable.

Full-census recordkeeping and reporting is not economically efficient, because the expenditure of small webcasters' resources to achieve that, even if possible, would be disproportionate to the royalties to be distributed by SoundEx based on such data from their respective webcasting operations. The public interest would be prejudiced by diverting scarce resources to full-census recordkeeping and reporting. The Board should not put itself in the position of imposing a requirement that cannot be complied with.

3. Finally many of the smaller stations, which utilize institutionally maintained servers or unsophisticated desktop computers for distributing their webcasts, simply do not have access to usage data that full-census reporting requires. Mr. Griffith, SoundEx's technical witness, testified on cross-examination that institutional IT staffs have been known to be unforthcoming toward such student activities.

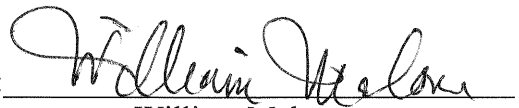
Conclusion

WHEREFORE, IBS urges the Board to not impose technologically or financially impractical conditions in recordkeeping and recording that would force changes in, or curtailment or abandonment of, the nature and purposes of the small, non-commercial, academically affiliated webcasters' programming and operations. The Board should implement the Congress' policy for protection of small entities, giving all due weight to avoidance of disproportionate impact to the small, educational affiliated webcasters and to avoid economic inefficiencies.

Moreover, in adopting recordkeeping and reporting rules, the Board should discharge its responsibility for, and exercise its capability to, resolve the conflicts within the groups of SoundEx beneficiaries, such as the small artist-beneficiaries, as well as between SoundEx and the small, non-commercial webcasters within the statutory purposes of the Act, and it should do so within the over-arching principles of cost-effectiveness and proportionality. Full-census reporting is in neither the small entities nor the small artists' self-interest, and the Board should tailor its recordkeeping and reporting requirements accordingly.

Respectfully submitted,

INTERCOLLEGIATE BRODCASTING SYSTEM, INC.

by: 

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