

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	)	
	)	

COMMENTS of INTERCOLLEGIATE BROADCASTING SYSTEM

These 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"), now set for oral argument before the U.S. Court of Appeals for the D.C. Circuit, Dkt. 07-1123, on March 19, 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.

In Webcasting II the Board received testimony as to the peculiar burdens on stations 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., for incorporation in the collateral rulemaking proceeding. See Determination and Order in Webcasting 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.

I. Definitions

To avoid computationally based errors, there needs to be, but is not, an accurate definition of a "listener":

- How, if at all, is someone who accesses the server for 1-to-5 seconds and is logged onto the server log during a three-minute digitally streamed music performance, to be counted?
- How, if at all, is a non-insomniac who is logged onto the server 168 hours a week to monitor signal performance electronically to be counted as a "listener"?
- Since the definition of a "listener" in the DMCA is limited to domestic listeners, is there an agreed-on list of IP addresses that are domestic listeners?

II. Extension of Census Reporting to Small, Educationally Affiliated Non-commercial Webcasters is Neither Practical -- Operationally or Financially -- Nor Would Such a Requirement for Them be Consistent with Law and Public Policy.

The NPRM's proposal to extend reporting¹ by small, non-commercial webcasters² to census reporting should be rejected or deferred for the following reasons, in summary:

- Detailed reporting is impractical for small, academically affiliated college and high school webcasters.
- There is no uniform database of recorded performances of digitally recorded music.

¹ NPRM, point V; proposed Section 370.4 (Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services).

² Section 114(f)(5)(E)(i) of the Copyright Act of 19746, as amended by P.L. 107-321, 116 Stat. 2781, 2784 (2002), 17 U.S.C. § 114(f)(5)(E), defines "non-commercial webcaster" in terms of (I) and (II), Section 501 of the Internal Revenue Code, and (III) operation by a government or subordinate unit. The provision in (III) would encompass any domestic governmental entity including, *inter alia*, public colleges and universities, academies, etc.. We understand this to be the definition used by the Board in its determination and order in Webcasting II.

- Under the law of large numbers, fuller reports by the small, non-commercial webcasters would not yield significantly more accurate or cost-effective payments to the statutory beneficiaries.

- Automated software erroneously and prejudicially reports as listening to the academically affiliated webcasters' streams, listeners to the disproportionately larger proportion of programming and aggregate listening devoted to non-digitally recorded-music.

In detail:

Reporting of use assumes – and, as a practical matter, requires -- digital automation, or a server system, for reporting the over-the-air, digitally streamed, audio signals. A prerequisite to automation of music reporting requires that the digital logging system have access, on a real-time basis, to the server logs of ALL servers, on campus/locally, and remote, using all CODECs (Real Audio, WIN AMP, WAV, etc.) involved with the digitally streamed signal(s). In some cases, this data is simply not available to campus webcasters. On cross-examination in Dkt. No. 2005-1, SoundEx's witness Griffith admitted that IT functions at some educational institutions are notoriously unresponsive to such requirements of student organizations.³

Until SoundExchange provides or authorizes a standard database of music, much less the music covered by artists, copyright holders registered with SoundExchange, automated reporting will be inefficient and not cost-effective. In addition, it will produce unacceptable error rates for the distinctive kinds, amounts, and media of music streamed by academically affiliated, non-commercial webcasters. Without such an accepted database of subject music, there is no standard of reportable music. Without a standard the error rate of data collection is unacceptably large.

A substantial proportion of noncommercial webcast streams are not music. They are sports, news, talk, lecture, and other forms of communication other than digital music streaming. Current automated reporting of use does not currently block out or eliminate listeners that are not listening to music. There is no logging or software standard for reporting use to SoundExchange that will yield accurate, usable data.

With smaller samples, data might be practically corrected by hand for errors, or transmission problems. When data is census, or continuous, data, the error rate grows exponentially and is uncorrectable, if at all, within the resources of a volunteer student staff with

³ WORD (5/3/06) Tr. 252-53.

high turnover, thereby making the data far less accurate or legally defensible than smaller samples of correct data. The eclectic music that is disproportionately streamed by the small, non-commercial webcasters is inherently subject to a higher rate of reporting errors, due to incomplete or absent data required for identification. Music from non-standard or amateur recording companies will be unidentifiable or mis-identified because not accompanied by data to enable identification. The adverse effect of census-reporting on these entities suffers from a lack proportionality. If the performance cannot be accurately identified, there will be no compensation to the artists, and the costs of their collective will be run-up without benefit to them.

This practicability has been recognized in book copyrights since the end of WW II, whereby all written items are copyrighted on creation, but only those items registered with the Copyright Office can reasonably expect to enjoy revenues from copyright protection. If the Board were to require a similar system of registration, creating a standard, accessible database of music, then the artists could reasonably expect to directly benefit from reporting-of-use of those copyright. Otherwise it's a non-cost-effective burden on the small, non-commercial, entities. Congress has proscribed legal requirements disproportionately burdensome on "small entities."⁴

The law of large numbers applies to reporting by small, academically affiliated webcasters; it would seem to apply with particular force in such cases as to the accuracy with which reports by noncommercial webcasters can be processed by the performers' collective. SoundExchange receives over 90 % of its annual revenue from less than three dozen webcasters, all commercial. The vast majority, if not all, of the largest SoundExchange revenue generators are large fully automated commercial webcasters. The large commercial webcasters are now, or can easily be, providing SoundExchange with reasonably accurate, continuous reporting of use of performance covering over ninety percent of the revenue arriving at SoundExchange. It is uneconomical, and unnecessary, to require noncommercial webcasters, who provide a very small percentage of SoundExchange's revenue, to contaminate the SoundExchange data processing system with garbage data, that is not legally defensible, or put the noncommercial webcaster at risk of legal noncompliance because of a mismatch of the regulatory requirements with the nature, size, and capabilities of their operations.

⁴ The public policy recognized in, and the rationale and procedures prescribed in the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C., ch. 6, are the subjects of the motion filed by IBS concurrently with these comments.

SoundEx makes distributions from the artists' common fund net of its operational overhead. Since it has made no showing that there are revenues from these small users in excess of the total overhead of the fund, in the distribution of which excess the small webcasters' usage figures might be of use, SoundEx has simply failed to show that there is any compelling need to impose a disproportionate recordkeeping and reporting burden on these small entities. The issue of fairness of distributions among artists is a red-herring in view of their conflicting interests. The red-herring is addressed at pages 6-8 *post*.

The issue for the Board is no more complicated than this, *viz.*, is recording and reporting this usage data a disproportionate burden on small webcasters and totally unnecessary to disperse accurately the non-overhead portion (being at least 90 %) of SoundExchange's royalty revenue? Clearly 90 % or more of that revenue comes from large commercial webcasters. The thirty-six or fewer automated entities are now providing accurate census data, or are willing to do so. Inserting the usage data from the very large number of smaller users will not increase accuracy on net. IBS submits that inserting data from small noncommercial webcasters will *actually decrease the aggregate net amount of royalty funds reaching artists* and other copyright holders. The data processing and collection costs, for SoundEx to process a significant amount of this corrupt, *de minimis* data will detract from the efficiency of the distribution process and from the net distributions to the intended statutory beneficiaries..

III. CRB's Requests for Further Information

A. Spreadsheets and other commercially available software

Almost without exception IBS' members are unaware of, and consequently not using, suitable commercially available software for reporting use under Sections 114 and 112.

Small college and high school webcasters within annual budgets of as little as \$ 900 per annum cannot realistically procure and use commercial software, even were it modified to accommodate the particular programming offered by such student-operated stations. We have entered a period of financial stringency in college budgets. According published reports, the market values of educational endowments have decreased twenty percent on the average in the last half of calendar 2008.

B. Report Delivery

Post-2005 technological developments and software improvements have not materially alleviated the obstacles previously identified by the small, academically affiliated non-commercial webcasters.

. The most-significant technological improvement becoming recently available is the Google-type searchable standard database. But it still falls short of what's needed to make automated recordkeeping and reporting practicable for the eclectic programming and volunteer staffing of the small, non-commercial academically affiliated webcasters.

What is still needed is a SoundExchange-provided, open public database of registered members/copyright holders, and their covered music works. Recent developments simply have not adequately addressed the currently insurmountable technical challenge for FCC-licensed or other analog radio stations that in their programming exercise their free speech rights to digitally stream audio content from analog recorded sources that totally lack the embedded metadata effectively required by CRB-prescribed requirements pertaining to the reporting of use. The CRB should not put itself in the position of erecting insurmountable obstacles to the small, educationally affiliated, non-commercial webcasters' choice of program material. The only work-around that IBS can envision would be for the government to supply open digital automation systems that embed the metadata on all works broadcast, and simulcast webcast, over the Internet.

Although the cost of audio automation systems has drastically decreased in the course of the years, these systems remain well-beyond the economic reach of most IBS-member student radio stations and webcasters, who report *average* annual budgets of \$ 9,000.

Another current technical problem, for the vast majority of student webcasters, is the fact that they use campus-based, institutional IT resources. Server logs, from diverse servers, mix supported campus activities, such as the school or college library, with the student radio station. Although technology is advancing to scan the utilized server logs to determine who listened to what copyright music work, technology still limits accurate computation of per listener, per song data at institutionally served member-station webcasters. This point is elaborated *ante* at 3.

Public Purpose and Fiduciary Duty

Stepping back from the trees to view the forest, it is vital that the process itself of webcasters' registering for a statutory license and exercising the rights thereunder not be impractically complicated, expensive, and administratively oppressive in relation to the small, student-staffed webcasters at colleges and high schools. From the standpoints of public policy and the underlying intent of the people's representatives, no obstacles should be put in the way of America's Sons and Daughters' participating in and learning of vital life skills that reside on and, as a practical matter, can be learned by digitally streaming audio over the Internet.

A state university president has recently remarked that, curricularly speaking, the new "international" emphasis is an "IT" emphasis. But in the modern world, both sound citizenship and economic facility is necessary to the future success of our democratic nation. Public policy demands no less.

In addition, notionally within SoundEx's artist-membership there are two prominent groups with non-aligned interests, to both of which SoundEx, as the designated, *de facto* exclusive common agent under Webcasting II, owes a fiduciary duty of loyalty under Section 114(e) of the Act. The so-called "Top-40" artists comprise the first and more wealthy group. The second group comprise the would-be-but-aren't-yet-Top-40 recording artists.

These two groups have conflicting primary objectives. The primary objective of the first group is to be compensated at market rate for what they've already recorded. The primary objective of the second group is to be compensated for future work, based on the investment in public recognition from the playing of what they've already recorded. Certainly the latter group should not be deprived of future opportunity by impractical and uneconomic impediments to the play of their music by the small, non-commercial webcasters, who are the primary streamers of such "new" music.

The operative purpose and intended practical effect of the Small Webcaster Settlement Act of 2002 and the more recent echoing Webcaster Settlement Act of 2008, 122 Stat. 4974 (Oct. 16, 2008), are to encourage SoundEx to use the judgment of a prudent person in negotiating an impartial and objectively balanced settlement with the users, without the constricting fear of unfounded lawsuits. The third-party beneficiary to any such agreement is the public, which has an interest in fostering new music and performers for the future.

IBS respectfully submits that the CRB is not only positioned, but has a positive duty, to enforce that impartial balance.

Clearly the overwhelming percentage (> 90 %) of the funds collected by SoundExchange that might actually be distributed to the beneficiaries are from the thirty-six of the largest, commercial webcasters, whose programming may be presumed to be more heavily dominated by the recorded performances of the “Top 40” group. Plays by the smaller webcasters may be presumed to be more heavily weighted toward the up-coming performing artists. The latter group’s present financial compensation is less important to them because of the smaller amounts attributable to a larger number of sharing artists. A defensible fiduciary judgment by SoundEx resolving the conflicting interests should be protected by the Board as being driven by the second group’s overriding interest in having their existing recordings played by smaller webcasters without obstacles,⁵ even at the cost of foregoing enforcement obstacles arising from a more precise distribution of the last ten percent, which revenue in absolute terms will grow with the removal of regulatory and economic obstacles to the playing of the second group’s recorded performances. In a practical sense, Congress has already given guidance to SoundEx and to the Board in its statements of purpose in Sections 114(f)(2)(B) and 801(b)(1) of the Act, viz., 17 U.S.C. §§ 114(f)(2)(B) (“whether use of the service ... may promote the sales of phonorecords....”) and 801(b)(1). (“contribution to the opening of new markets for creative expression and media for their communication”).

Looking to the technological future, the Board has already announced the next rate-setting proceeding in 74 Fed. Reg., No. 318 (January 5, 2009). As technology and data-capture techniques, such as figure printing of music works by automated listening systems are perfected, broader sampling and eventually other economically justified reporting of use can be phased in.

That reduced reporting of usage by webcasters in the non-commercial segment of the webcasting market is practical is demonstrated by the widely reported settlement agreement between SoundEx and the CPB-qualified stations. An official press release and Q & A sheet have been released, but we understand the agreement will be filed with the Board for publication under Section 114(f)(5) shortly. Equally obviously in the current market place is the agreement between SoundEx and noncommercial webcasters, like CPB-qualified, NPR, NFCB, etc., which

⁵ This weighing by performers themselves is repeatedly reflected in the record of Webcasting II, e.g., Bradley (5/9/06) Tr 234-35, Kass WDT at ¶ 12; Kass WORD (8/7/06) Tr at 26-31, 66-67; Papish WDT at ¶ 10; Papish WORD Tr (8/7/06) at 110-12.

was admitted into evidence in Webcasting II over objection, does not provide for individual non-commercial census reporting of use, or even anything close to that..

CRB would not be justified in mandating for the smaller non-commercial webcasters, like IBS's member student webcasters, a reporting system of usage, that far exceeds the agreed-on legal requirements of the much larger and better-financed non-commercial webcasters, viz., National Public Radio and the CPB-qualified stations.

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 has the responsibility and capability of resolving the conflicts within the groups of SoundEx beneficiaries and between SoundEx and the small, non-commercial webcasters within the statutory purposes of the Act, and should do so within the over-arching limits of cost-effectiveness and proportionality. The issuance of the required IRLFA and FRFA should prove helpful to the Board in its task..

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

by: _____

William Malone

James H. Hobson

Matthew K. Shettenhelm

MILLER & VAN EATON, PLLC

1155 Connecticut Avenue, Suite 1000

Washington, D.C. 20036-4302

(202) 785-0600

(202) 785-1234 (FAX)

Info2@millervaneaton.com

Its Attorneys

January 29, 2009

4122\03\00145161.DOC