Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, DC 20559

In the Matter of	)	
	)	
Music Licensing Study: Notice and Request for Public Comment	)	Docket No. 2014-03
	)	

COMMENTS OF
EDUCATIONAL MEDIA FOUNDATION

Educational Media Foundation ("EMF"), by its attorneys, hereby submits its comments in the above-referenced proceeding. EMF is a not for profit religious corporation qualified under Section 501(c)(3) of the Internal Revenue Code. EMF was organized to operate noncommercial religious and educational radio stations as a means to spread the Gospel of Jesus Christ. Perhaps its most prominent role is as one of the largest noncommercial broadcasters in the country, holding licenses for more than 300 full-power noncommercial educational broadcast radio stations providing contemporary Christian music and educational and informational programming through its K-LOVE and Air1 formatted stations to millions of listeners across the country.

In addition, EMF is one of the country's largest webcasters. In the February Webcast Metrics ratings for webcasters produced by Triton Digital, EMF was ranked as the seventh largest webcaster in the country, ranking ahead of many commercial broadcasters and media

companies, averaging over 20,000 average listeners.[1] As a result, EMF has a significant interest in this proceeding and in highlighting ways in which the current music royalty structures do not address the needs of nonprofit organizations. EMF would like, also, to offer some suggestions for reform of the current structures to better recognize the differences between commercial and noncommercial entities.

Initially, it must be recognized that, like most nonprofit entities affected by the music royalty structure, EMF is not just a broadcaster seeking to reach its audience with entertainment and information. Instead, as a nonprofit, it has a much broader mission to educate the public about core beliefs and to encourage them to service to their church, community, family and friends. In doing so, it does far more than provide music programming. For instance, EMF actively partners with other groups to directly aid those in need. For example, K-LOVE and its listeners helped to establish the K-LOVE Hope Center in Detroit, an outreach ministering to the physical and spiritual needs of the area through addiction recovery services, 24 hour childcare, a feeding center for hungry children, a battered women and children shelter and a church on site. EMF recently began the K-LOVE Crisis Response Training, to provide free Critical Incident Stress Management ("CISM") training to governmental units and first responders across the country to help insure that there will be a network of first responders within the community that can skillfully handle the human impact of a disaster. (CISM is an intervention protocol developed specifically for dealing with traumatic events. It is a formal, highly structured and professionally recognized process for helping those involved in a critical incident to share their

[1] According to the Webcast Metrics ratings, EMF averages over 22,000 active sessions, 6 AM to Midnight, Monday-Sunday, just behind NPR's Member Stations, and ahead of the streaming done by companies such as ESPN, Entercom, Univision and Townsquare Media. See http://www.tritondigital.com/Media/Default/rankers/feb-ranker-2014.pdf (last visited May 10, 2014).

experiences, vent emotions, learn about stress reactions and symptoms and be given referral for further help if required. First developed for use with military combat veterans and then civilian first responders (police, fire, ambulance, emergency workers and disaster rescuers), it has now been adapted and used virtually everywhere there is a need to address traumatic impact in people's lives. EMF has helped to establish this program in cities across the country.)[2]

EMF also supports numerous worldwide charities including Feed My Starving Children, Angel Tree, Compassion International, World Vision, Hunger for Hope and Habitat for Humanity.[3] Even at its center of broadcast operations, there are six full-time pastors ready to respond to any need of members of its listening audience, offering services ranging from suicide prevention to providing advice and counsel on many other spiritual and secular matters. Hundreds of lives have been saved nationwide through EMF's suicide intervention efforts.

This recitation of ministry accomplishments is not intended to promote EMF. Rather, it is offered only to show that the goals of the company are far different than those of commercial companies whose principal mission is to earn a profit for its shareholders/owners. Certainly, EMF would in no way minimize the important role that commercial broadcasters play in promoting public safety, serving the information needs of the communities they serve, and otherwise operating in the public interest. Nevertheless, the goal of commercial companies is still to earn a profit. And that is fundamentally different than that of ***all*** nonprofit entities. Whether the nonprofit entity is one organized around religious principles and ministry, or one associated with an educational institution, or one like NPR with a broader mission "to work in partnership with Member Stations to create a more informed public — one challenged and

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[2] See, http://www.klove.com/ministry/crisisresponse/ (last visited, May 10, 2014).

[3] See, http://www.klove.com/ministry/organizations.aspx and http://www.kloveair1foundation.com/partnerships.aspx (both last visited May 10, 2014) for some of the charitable partnerships with which EMF is associated.

invigorated by a deeper understanding and appreciation of events, ideas and cultures," the goal of a nonprofit entity is not a profit-driven one. In enforcing the copyright laws, the government must recognize that copyright users have many different structures and goals, and make sure that the laws function in a way that best promotes all of those functions and goals, including those of nonprofit entities.

The constitutional underpinning of all copyright law is "to promote the progress of the sciences and useful arts" – essentially to facilitate the spread of knowledge and information. While this necessarily requires that the enforcement of copyright laws insure that creators have the incentive to create, it also requires that users be able to rely on those works in a way that knowledge and information is distributed to the public, and that the public good is served overall. In striking the balance between promoting the creation of content and the useful dissemination of that content, the government must weigh how the content is to be used and the benefits that flow from such uses, as well as the benefits to the creators. In that calculus, EMF submits that commercial and noncommercial entities must be treated differently.

While EMF commends the Copyright Office's efforts to assess the effectiveness of current methods for licensing sound recordings and musical works, it notes that many of the issues teed up for inquiry are not framed in a way that would apply to nonprofit entities. Unfortunately, this is indicative of much of the licensing framework. As discussed in detail below, EMF submits that the current royalty rate setting process for noncommercial broadcasters and webcasters fails to ensure that the interests of noncommercial entities are adequately considered and addressed. To insure that these interests are adequately addressed, EMF suggests in these comments that a separate proceeding should be instituted to establish webcaster royalties for noncommercial entities, and a new modified version of the traditional "801(b) standard"

should replace the current "willing buyer/willing seller" standard. The present standard is clearly intended to apply to an analysis of commercial transactions, not those typical of nonprofit entities. In addition, EMF suggests that in light of modern realities of the digital world, Section 118 of the Copyright Act[4] should be expanded to include public performances of a musical composition via webcast or by other online and digital music performances by the service providers covered by that section of the law.

Nonprofit entities such as EMF, which use music as part of their nonprofit mission, need to be able to enter into licenses for the use of such music in a manner that is efficient and cost-effective. EMF supports the collective licensing process, and urges that the Copyright Office continue to promote licensing policies that ensure that music licensing is an easy and transparent process. Nonprofit entities, in particular, do not have the resources necessary to spend significant amounts of time negotiating with multiple rightsholders for permission to use copyrighted works. Thus, it is important that there be clearinghouses where all of the rights necessary to use music can be obtained, and that these clearinghouses set royalties that recognize the differences between for-profit and nonprofit entities.

I. Section 112/114 Royalties

a. Background

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act[5] ("DPRA"), granting copyright owners of sound recordings a limited performance right to make or authorize the performance of their works "by means of a digital audio transmission."[6] In so doing, it also created a compulsory blanket license for "noninteractive subscription

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[4] 17 U.S.C. § 118.

[5] Public Law 104-39, 109 Stat. 336 (1995).

[6] 17 U.S.C. § 106(6).

transmissions."[7] The Digital Millennium Copyright Act ("DMCA")[8] subsequently expanded the statutory license regime to include certain noninteractive, nonsubscription digital transmissions typically referred to as webcasting.[9]

Statutory webcasting rates are set through either voluntary negotiations or hearings before the Copyright Royalty Board ("CRB"). Theoretically, interested services can negotiate rates and terms with SoundExchange, the nonprofit organization that collects royalties on behalf of sound recording copyright owners, and submit them to the CRB for adoption. Agreements adopted by the CRB are available for opt-in by similarly situated parties. In practice, voluntarily negotiated rates submitted to the CRB for approval prior to any hearing have rarely happened in the webcasting world.

Instead, webcasting royalties have been set by CRB proceedings held once every five years. When setting rates, the CRB considers what a "willing buyer" and "willing seller" would agree to as royalty rates in a marketplace, and bases its decision on economic, competitive and programming information presented by the parties, including –

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.[10]

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[7] 17 U.S.C. § 114.

[8] Public Law 105-304, 112 Stat. 2860 (1998).

[9] Section 112 also establishes a statutory license for ephemeral reproductions made by webcasters; these licenses are usually paid in a bundle with the Section 114 rights to a public performance. 17 U.S.C. § 112.

[10] 17 U.S.C. § 114(f)(2)(B).

During these proceedings, parties submit case exhibits – written testimony setting out the parties' proposals as to what the royalties should be, and justifying those proposals through written testimony of factual and expert witnesses advancing business and economic justifications for their conclusions as to what a "willing buyer" and a "willing seller" would agree to as royalty rates in a marketplace transaction. Then there is a full trial-type hearing, following extensive discovery, leading to a final decision. While the statute limits the time to be spent in this litigation, these proceedings are still very time consuming and expensive proceedings.

These decisions are all focused on determining what a "willing buyer" and "willing seller" would agree to in a hypothetical marketplace. The "willing buyer/willing seller" standard has been interpreted as trying to establish the rates that would be entered into by two parties with equal market power in a marketplace transaction. The formulation of this standard thus inevitably looks at commercial transactions between rightsholders or their representatives and commercial services. Royalty rates for noncommercial services have, at best, been an afterthought, being set as some percentage of the commercial rates established after the application of the "willing buyer/willing seller" standard.

In fact, noncommercial rates are usually not established until after the entire CRB proceeding has been completed. In both *Web I* and *Web II*,[11] the rates were set by decisions of the governing body (the Copyright Arbitration Royalty Panel in *Web I* and the CRB in *Web II*). Many webcasters felt that the rates set in the proceedings were unreasonable, protesting to Congress and the Courts. As a result of post-decision negotiations in the shadow of these

[11] These are the informal names often used for the first and second rate-setting proceedings instituted pursuant to Section 114 of the Copyright Act. *See Digital Performance of Sound Recordings and Ephemeral Recordings,* Determination of Reasonable Rates and Terms, 67 Fed. Reg. 45240 (July 8, 2002) ("*Web I*") and *Digital Performance of Sound Recordings and Ephemeral Recordings,* Final Determination for Rates and Terms, 72 Fed. Reg. 24084 (May 1, 2007) *("Web II").*

protests, the Small Webcaster Settlement Act of 2002[12] and the Webcaster Settlement Acts of 2008 and 2009[13] were adopted. It was under these statutory "fixes" that the noncommercial royalties under which most noncommercial webcasters operate were established. It was only after many nonprofits had expended considerable legal and financial capital and significant time in litigating a full proceeding, and endured substantial uncertainty engendered by the initial decisions on these royalties, that the prevailing rates were established pursuant to these legislative fixes.[14]

While, as set forth above, the statute governing the webcasting proceedings provides for pre-litigation settlements establishing royalties for all similarly situated parties, that rarely happens, as parties are concerned about the precedential effect of any negotiated rates on the upcoming proceeding. The failure to settle is a more acute concern for nonprofit entities. While it might be assumed that rightsholders would be willing to settle with these entities prior to CRB litigation, if for no other reason than to lessen the issues in the upcoming proceeding by eliminating parties that have little overall economic impact on the total royalties collected, that has not been the case. Whether it is because of the fear that even noncommercial royalties will be used as a precedent to set commercial royalties in an upcoming proceeding, or simply because SoundExchange and other rightsholders simply have bigger fish to fry during the negotiation

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[12] Pub. L. No. 107-321, 116 Stat. 2780 (Dec. 4, 2002).

[13] Pub. L. No. 110-435, 122 Stat. 4974 (Oct. 16, 2008); Pub. L. No. 111-36, 123 Stat. 1926 (Jun. 30, 2009).

[14] The noncommercial rates in *Web III* were, for the most part, set by the post-*Web II* negotiations. *Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Determination of Rates and Terms, 76 Fed. Reg. 13026 (Mar. 9, 2011) ("*Web III*"). It is interesting to note that the party which fully litigated the *Web III* decision, leading to a decision which ultimately declared that the CRB had been unconstitutionally established, was an organization representing nonprofit entities.

periods, such entities are rarely able to negotiate a pre-litigation settlement – forcing their participation in the CRB litigation process.[15]

b. The Rate-Setting Framework Works Against Nonprofits

1. Participation in Proceedings Is Costly, With Little Gain to Nonprofits

Given the description set forth above, it is clear that the rate-setting framework does not work for nonprofits. Nonprofits must participate or risk that they might be disadvantaged in the proceeding. Yet, the proceedings largely center on disputes involving the commercial entities and have little, if anything, to do with the noncommercial entities. Unfortunately, their participation in this proceeding which is, for them, largely irrelevant, comes at great expense of both time and money. While nonprofits could, in theory, instead engage in private settlement negotiations with SoundExchange, SoundExchange has little incentive to do so, as (1) it does not want to create any potential precedent that could be used in the litigation by commercial users, and (2) there is little to no additional cost to having the nonprofits stay in the proceeding, as SoundExchange has to litigate on the commercial side anyway.

2. The "Willing Buyer/Willing Seller" Standard Applied In Webcasting Royalty Proceedings Does Not Work For Noncommercial Webcasters

The "willing buyer/willing seller" standard should not be applied to noncommercial entities. While this standard may make some sense in the commercial context (though certainly many commercial webcasters will dispute the degree to which it makes sense even in the commercial context), as far back as the *Web I* proceeding, determining "willing buyer/willing seller" fees for noncommercial entities has been recognized as problematic, as that application

[15] The one exception was again *Web III*, where certain noncommercial groups had negotiated settlements under the Webcaster Settlement Acts to amend the rates set by the CRB in *Web II*. These settlements were both retrospective and prospective, covering the time periods governed by both *Web II* and *Web III*.

"presents an extraordinary challenge."[16] There, the Copyright Arbitration Royalty Panel (CRB's predecessor) noted that, "while commercial broadcasters can pass along some portion of their costs to their advertisers," programming costs incurred by noncommercial broadcasters were "not automatically accommodated through market forces."[17] Indeed, noncommercial broadcasters are inherently different from their commercial counterparts: they are nonprofit organizations; their mission is not to maximize profits but to provide educational, cultural, religious and social programming in furtherance of their stated missions; and they derive their funding not from ad revenue but from listener donations, corporate underwriting, private grants, and foundation or university funding.[18] In short, noncommercial broadcasters cannot just raise advertising rates to accommodate an increase in licensing costs. It is little wonder that the various rate-setting panels have struggled over the years to find the appropriate benchmark as a starting point in setting rates for noncommercial webcasters. Applying a "willing buyer/willing seller" standard to nonprofits who are not driven by traditional marketplace factors is like trying to fit a square peg in a round hole.

3. There Should Be A Separate Rate-Setting Proceeding for Noncommercial Entities

The current ratemaking proceeding (known as *Web IV*) kicked off in January 2014.[19] Already, the difficulty in setting noncommercial rates in the context of this proceeding is becoming clear. For instance, many of the questions raised by the CRB in its *Web IV*

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[16] Report of the Copyright Royalty Arbitration Panel, Docket No. 2000-9 (Feb. 2002), at 88.

[17] *Id.* at 89.

[18] *See, e.g., Web II*, 72 Fed. Reg. at 24098.

[19] *Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)*, Notice announcing commencement of proceedings with request for Petitions to Participate, 79 Fed. Reg. 412 (Jan. 3, 2014) ("*Web IV Commencement Notice*").

Commencement Notice, and in its revised *Web III*[20] decision following the remand of the case after the Court of Appeals decision[21] on the constitutionality of the CRB, indicate their interest in exploring a "percentage of revenue" royalty framework instead of a "per performance" model. How would or could a percentage of revenue model work for nonprofit entities? There are obviously a number of factors that are unique to noncommercial broadcasters when considering a revenue-based model. What is a fair percentage of revenue, where the primary source of revenue available to commercial broadcasters (from advertising) is not available to nonprofits? What weight should be given to the fact that such revenue is derived from listener donations, grants or underwriters which may be prompted more by the support the underlying mission of the noncommercial webcaster than by any music contained in the programming it provides? Consideration also needs to be given to the fact that it is nearly impossible for noncommercial broadcasters that also stream their programming to be able to accurately determine which donations (or what percentage of any given donation) are received for their over-the-air listening, their digital listening, or a combination of the two. Commercial broadcasters can easily determine which advertising revenue was earned from advertising that was sold for their different platforms, but there is no feasible way for noncommercial broadcasters to make this determination for donations. As a result, a revenue-based model for noncommercial broadcasters would likely result in fees being paid by the broadcaster for completely unrelated programming or services. Moreover, there are over 25 participants who have indicated an interest in participating in the *Web IV* proceeding. With such a large group of litigants, the limited time available for trial, and the limited discovery allowed for each "side" in the proceeding, will there

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[20] *Determination after Remand of Rates and Terms For Royalty Years 2011-2015*, Docket No. 2009-1 CRB Webcasting III (Jan. 9, 2014).

[21] *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012).

really be time to explore noncommercial issues? EMF is concerned that the unique issues of nonprofit entities will not be properly considered as long as commercial and noncommercial entities continue to be lumped into a single proceeding.

There is a simple solution to the inherent difficulties in trying to establish rates for both commercial and noncommercial entities in a single proceeding – and that is to create a separate proceeding altogether for noncommercial webcasters. This would be consistent with past practice of a separate musical composition public performance royalty proceeding for noncommercial broadcasters under Section 118 of the Copyright Act.

EMF suggests that the CRB commence a separate proceeding for noncommercial entities, commencing immediately after the commercial rates are set. Given the financial limitations of noncommercial entities, the process for conducting the proceeding should be streamlined to the extent possible. For instance, there may have been relevant evidence on the overall state of the streaming marketplace adduced in the commercial proceeding. Parties should have some rights to designate that evidence into the record in the noncommercial case, subject to appropriate due process safeguards.

By holding this case after the commercial proceeding, the commercial rates will have been already established and, to the extent that the CRB or the parties continue to set noncommercial rates as a percentage of the commercial rates, those rates will have already been set and will be known to all. Without the overhang of an immediately upcoming commercial proceeding, and where both the rightsholders and the services have an equal burden that would be imposed by a separate noncommercial trial, EMF believes that the likelihood of a settlement of noncommercial rates prior to trial is high. In the Section 118 proceedings, there have been pre-trial settlements in every proceeding for almost two decades. Even if the case does go to

trial, the trial would be focused on purely noncommercial interests and therefore would likely be much shorter, saving participants time and money.

Moreover, in such a proceeding, the "willing buyer/willing seller" standard should not be employed. Instead, a standard more akin to the Section 801(b) standard, [22] assessing public interest factors instead of a pure commercial transactional analysis, should be employed. This standard (which is currently used for determining rates for satellite radio and digital cable radio) looks at a number of factors in assessing royalty rates. Those factors are:

- To maximize the availability of creative works to the public.
- To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

As is evident, these factors not only look at the economic value of the use of the work, but also assess the public interest in the distribution of artistic and literary works and the impact that the royalty will have on the industry that has to pay it. As such, it appears to be more aligned with the mission of the noncommercial webcasters, who are not primarily focused on maximizing revenue but whose purpose is to transmit programming that is consistent with their social, cultural or religious missions. EMF notes, however, that even this standard is adopted in a commercial context (e.g. the reference to providing the user a "fair return" on the use of the copyrighted material). So, even this standard should be reviewed for the appropriateness of its application to noncommercial entities, with the second factor in this analysis premised on setting

[22] 17 U.S.C. § 801(b).

a royalty that allows the noncommercial entity to fulfill its noncommercial mission while allowing a fair return (judged in a nonprofit setting) to the copyright owner.

By adopting a unique standard applicable to noncommercial royalties, another problem is solved, in that the rates will no longer be precedential on the commercial rates. Any negotiated rates agreed to in a noncommercial proceeding can easily be distinguished from the rates to be adopted in any subsequent commercial proceeding by the differing standard – again furthering the potential for successful settlement negotiations.

II. Section 118 Proceedings

Currently, the statutory license available to noncommercial broadcasters under Section 118 of the Copyright Act for the public performance of musical compositions only covers noncommercial broadcasting. This section of the Act was adopted in 1976, long before the Internet. It covers musical compositions and other copyrights necessary for public broadcasting. When adopted, there was no performance right in a sound recording in the United States, and no Internet or other digital transmissions that are now so important to noncommercial broadcasters. Thus, its application is limited to the needs of over-the-air broadcasters.

Clearly, Section 118 needs to be updated so that the royalties adopted in that proceeding are expanded to include webcasting and other digital performances made by noncommercial broadcasters. Currently, a noncommercial broadcaster that transmits a program via both broadcast and webcast is subject to two different rates for the public performance of the same musical composition. In the royalty setting context, after concluding a Section 118 negotiation, the same noncommercial broadcaster may then have to turn around and conduct another negotiation, without the oversight of the CRB, to negotiate public performance rights for digital uses of music made by the broadcaster. This extra wrinkle in an already-convoluted royalty

regime is confusing and unnecessary. Thus, the Section 118 proceedings should be expanded to include all public performance rights needed by the noncommercial broadcaster – whether such uses are contained in their over-the-air broadcast or on any of their digital platforms.

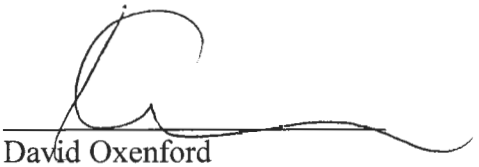
Moreover, for the reasons set forth above in the discussion of the sound recording royalties, the standard to be applied in the Section 118 proceeding should also be one that recognizes that the motivations behind the use of music by nonprofit entities is not the same as for commercial operators. Thus, a modified version of the Section 801(b) standard should be applied in deciding any Section 118 proceeding that goes to trial.

III. Conclusion

To be most effective, music licensing must be easy and fair. The current environment poses many issues for everyone in the industry. From the perspective of a nonprofit company, having a collective licensing society that offers one-stop shopping is the most cost-effective way to insure that the system continues to operate smoothly. But, in setting up any collective, care must be taken to ensure that licensing is done in an open and fair manner for all parties. In setting up that oversight, consideration must be given to the needs of all users, commercial and noncommercial. EMF appreciates the opportunity to participate in this proceeding to offer the suggestions set out herein to ensure that the unique needs of, and valuable services provided by, nonprofit companies are fairly represented and given the recognition and attention they deserve.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

By: 
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