

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
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Music Licensing Study: Notice and)
Request for Public Comment)
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)

Docket No. 2014-03

COMMENTS OF THE NATIONAL RELIGIOUS BROADCASTERS
NONCOMMERCIAL MUSIC LICENSE COMMITTEE

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INTRODUCTION AND SUMMARY

The National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”) – the noncommercial arm of the National Religious Broadcasters Music License Committee (“NRBMLC”) – appreciates the opportunity to respond to the Copyright Office’s Notice of Inquiry (“NOI”) regarding the effectiveness of existing music licensing mechanisms. 79 Fed. Reg. 14,739 (Mar. 17, 2014). The NRBNMLC submits these comments to propose that the Copyright Office recommend that Congress:

- expand section 118 to encompass digital transmissions of musical works in addition to broadcast transmissions and modify the rate-setting standard to reflect policy-based standard in section 801(b)(1);
- legislate a fixed annual \$500 fee for streaming by noncommercial broadcasters under sections 112 and 114 to up to 300 average listeners and modify the rate-setting standard to reflect the section 801(b)(1) policy-based standard; and
- exempt noncommercial broadcasters from music use reporting requirements under section 114 if their annual fee does not exceed the minimum fee and impose on other noncommercial broadcasters requirements that are no more stringent than those under section 118.

The NRBNMLC is a committee that represents the interests of religious and other mixed-format noncommercial radio stations in music licensing matters. It was formed in 2002 as the noncommercial arm of the NRBMLC, which, in turn, is a standing committee of the National Religious Broadcasters.

The NRBNMLC represents a variety of noncommercial radio stations, ranging from small single-station operators to larger multi-station organizations. All NRBNMLC stations, however, share certain characteristics. First, they are non-profit organizations and must advance a religious, educational, charitable or other non-profit goal. Second, they are prohibited from selling advertising in accordance with their licenses from the Federal Communications Commission (“FCC”) and thus must rely on other sources of funding, such as listener donations

and underwriting. Third, like commercial radio stations, NRBNMLC stations focus principally on their over-the-air broadcasting activities rather than on more ancillary activities like Internet streaming.

The NRBNMLC has been at the forefront of a number of music licensing matters affecting noncommercial broadcasters over the past several years. For example, for the past two five-year license terms covering the period 2008-2017, it has taken the lead in negotiating the rates and terms under the statutory license set forth in 17 U.S.C. § 118 for the public performance of musical works by noncommercial broadcasters that are neither affiliated with National Public Radio (“NPR”) nor licensed to a college or university. *See* 37 C.F.R. § 381.6. Before there was a noncommercial committee, the then-predominantly commercial NRBMLC itself took the lead in such negotiations in the four prior five-year license terms covering the period 1988-2007. *See infra* p. 14 n.9.

In addition, the NRBNMLC actively participated in the Copyright Royalty Board (“CRB”) proceeding to set rates and terms for the digital performance of sound recordings and the making of associated ephemeral recordings under the statutory licenses set forth in 17 U.S.C. §§ 112 and 114 for the period 2006-2010 (“*Web II*”). When Congress enacted the Webcaster Settlement Acts of 2008 and 2009 (“WSAs”), the NRBNMLC took the lead in negotiating noncommercial rates and terms under sections 112 and 114 for 2006-2015 that are applicable to broadcasters not affiliated with a college or university or with NPR that were more favorable than those set by the CRB for 2006-2010. The NRBMLC itself (before the NRBNMLC was created) played a similar leading role in negotiating noncommercial rates for these statutory licenses under the Small Webcaster Settlement Act (“SWSA”) for the term October 28, 1998

through 2004¹ that were more favorable than those determined by the Copyright Arbitration Royalty Panel (“CARP”) and adopted by the Library of Congress in the first webcasting proceeding (“*Web I*”). It also has been negotiating a license with SESAC for the digital performance of musical works by the stations it represents. The NRBNMLC thus has been a significant player in numerous music licensing issues affecting noncommercial broadcasters and has a vital interest in those issues.

The NRBNMLC is aware that the related NRBMLC – which has, since the late 1980s, been very active in music licensing proceedings and negotiations – is separately filing comments addressing music licensing issues affecting commercial and noncommercial broadcasters alike. The NRBNMLC joins in those comments and incorporates them by reference into these comments. Given its focus on noncommercial broadcasters, however, it writes separately to comment on three additional music licensing issues of unique importance to noncommercial broadcasters.

The comments are structured into four sections, as follows. First, the NRBNMLC discusses why noncommercial broadcasters are different from commercial licensees – including their more limited resources and reliance on donations to operate – and consistently have been recognized as such by Congress, prior CARPs, and the CRB. Given these differences and the express congressional finding that “encouragement and support of noncommercial broadcasting is in the public interest,” H.R. Rep. No. 94-1476, at 117 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5732, noncommercial broadcasters should be given special consideration with respect to all of the music licenses that they need to fulfill their missions.

¹ These SWSA rates were later extended by Congress through 2005. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 6(b)(3), 118 Stat. 2341, 2370 (2004).

Second, the NRBNMLC comments on the continued need for the section 118 statutory license and urges the Copyright Office to seek expansion of that license to cover noncommercial streaming of musical works by noncommercial broadcasters so that those noncommercial broadcasters may seek and obtain rates for performing musical works over the air and over the Internet in a single proceeding (NOI Question 5). It also proposes that Congress adopt the rate-setting standard found in 17 U.S.C. § 801(b)(1) for proceedings under section 118, including modifications of that standard proposed in the comments submitted by the National Association of Broadcasters (“NAB”) in response to the NOI, to ensure more effectively that the rates paid under section 118 are affordable and fair and better take into account the unique circumstances of noncommercial broadcasters.

Third, the NRBNMLC addresses the effectiveness of the section 114 license as it applies to noncommercial broadcasters (NOI Questions 8 and 9). It observes that the CRB rate-setting proceedings are extraordinarily expensive, imposing a particularly heavy burden on noncommercial entities, which are least able to absorb these significant costs given their mission-oriented focus and dependence on the largess of others for donations. It proposes that Congress legislate a \$500 flat fee applicable to all noncommercial broadcasters for streaming levels up to 300 or fewer average concurrent listeners, with fees for noncommercial streaming that exceeds that level to continue to be set through voluntary negotiations or, as a last resort, in a rate-setting proceeding.

Finally, the NRBNMLC comments on the particular importance to noncommercial broadcasters of having reasonable recordkeeping requirements apply to the statutory licenses under sections 112 and 114 given noncommercial broadcasters’ limited resources, methods of obtaining funding, streaming listenership, and reporting capabilities (NOI Questions 8-9). Given

these limitations, the NRBNMLC urges the Copyright Office to support a legislative exemption from recordkeeping for noncommercial broadcasters whose annual fee liability does not exceed the minimum fee (currently \$500). For such broadcasters, the costs of complying with the recordkeeping requirements approach or exceed the entire amount of royalties to be distributed, which is not reasonable. The NRBNMLC also proposes that the recordkeeping requirements applicable to noncommercial broadcasters with liability in excess of the minimum fee be no more stringent than they are for noncommercial broadcasters under 17 U.S.C. § 118, where, at most, broadcasters are required to keep records for only one week per year. *See* 37 C.F.R. § 381.6(f). At a minimum, noncommercial broadcasters should not have to submit reports of use for more than two weeks per calendar quarter – a level under which many noncommercial broadcasters operate presently under the noncommercial WSA agreement. *See* Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 40,614, 40,627 (Aug. 12, 2009).

I. EXISTING MUSIC LICENSING MECHANISMS PROPERLY RECOGNIZE THE FUNDAMENTAL DIFFERENCES BETWEEN NONCOMMERCIAL BROADCASTERS AND COMMERCIAL ENTITIES BUT SHOULD BE ADJUSTED TO ACCOUNT FOR THESE DIFFERENCES MORE EFFECTIVELY.

Noncommercial broadcasters are different from commercial licensees in their expressly non-profit religious and educational missions, the constraints placed upon their operations, their financial situation, and their sources of funding. While Congress, CARPs, and the CRB have uniformly recognized these differences in establishing music licensing mechanisms and rates applicable to these broadcasters, some of these mechanisms should be modified, as discussed below, to take account of these differences more effectively.

A. NONCOMMERCIAL BROADCASTERS DIFFER FROM FOR-PROFIT ENTITIES.

1. Noncommercial Broadcasters Have a Different, Non-Profit Mission from For-Profit Commercial Licensees.

Noncommercial licensees are non-profit organizations. As such, they are required by the IRS to be “organized and operated exclusively for” non-profit purposes – such as “religious, charitable, ... or educational purposes” – rather than for financial gain. *See* 26 U.S.C. § 501(c)(3) (emphasis added). Significantly, and unlike commercial licensees, “no part of the net earnings of” a 501(c)(3) noncommercial licensee may “inure[] to the benefit of any private shareholder or individual.” *Id.* In other words, noncommercial licensees focus on providing a particular public service to their audience and community, not on maximizing financial gain.

In contrast to commercial broadcasters and webcasters, the mandate of noncommercial broadcasters is to produce a culturally, educationally, religiously, or socially enhanced product, a goal that frequently conflicts with revenue maximization. By designing programming that is desirable not so much for its universal appeal as for its inherent value, noncommercial broadcasters operate outside of the traditional incentives that determine the programming choices of many of their commercial counterparts. Fee-setting mechanisms for noncommercial broadcasters should function with an eye to these characteristics.

2. Noncommercial Broadcasters Must Comply with FCC Regulations Not Applicable to Commercial Entities.

Noncommercial broadcasters represented by the NRBNMLC meet the definition of a “public broadcasting entity,” which is defined as “a noncommercial educational broadcast station as defined in section 397 of [United States Code] title 47.” 37 C.F.R. § 253.2. That section, in turn, defines noncommercial educational broadcast stations as radio stations that are licensed by the FCC to operate as noncommercial educational radio stations, and are owned and operated by

public agencies, municipalities, or nonprofit entities. 47 U.S.C. § 397(6). Such nonprofit entities must operate “exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” 26 U.S.C. § 501(c)(3).

The FCC has strict regulations governing noncommercial radio stations. *See, e.g.*, 47 C.F.R. §§ 73.501-73.599. Perhaps most notably, noncommercial radio stations must “furnish a nonprofit and noncommercial broadcast service” and are not permitted to sell advertisements to be aired on their broadcast. *See* 47 C.F.R. § 73.503(d). While they are permitted to acknowledge contributions, *id.*, such “acknowledgements should be made for identification purposes only and should not promote the contributor’s products, services, or company.” *See* Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting, Public Notice, No. 36590 (FCC Apr. 11, 1986). For example, the FCC has found that noncommercial broadcasters cannot make “[a]nnouncements containing price information,” “[a]nnouncements containing a call to action,” such as “Stop by our showroom to see a model,” or “[a]nnouncements containing an inducement to buy, sell, rent, or lease” – they are all forbidden. *Id.* Moreover, “[t]he scheduling of any announcements and acknowledgements may not interrupt regular programming.” 47 C.F.R. § 73.503(d).

These noncommercial broadcast operations are further constrained by their educational mission. *See* 47 C.F.R. § 73.503(a) (outlining FCC licensing requirements for noncommercial broadcasters); 26 U.S.C. § 501(c)(3). An elaborate maze of regulation governs how noncommercial stations can fund their programming. *See* 47 C.F.R. § 73.4163 (referencing several FCC reports published in the Federal Register for guidance regarding the required noncommercial nature of public broadcasting).

3. Noncommercial Broadcasters Have Different Sources of Funding Than Commercial Licensees.

Because noncommercial radio stations cannot sell advertisements to generate revenue, they must turn to other sources for funding to make ends meet. Funding can come from listener donations, corporate underwriting, or sponsorships, from programming providers who pay the station to air their content, or from university funds.² Often, noncommercial stations must engage in substantial fundraising efforts just to meet their annual budgets.

The funding of noncommercial licensees cannot be compared with the funding of commercial licensees. Commercial webcasters and simulcasters generate revenues primarily by selling advertisements; the advertisers pay for the opportunity to reach an audience with their message. Noncommercial entities, however, cannot depend on the mass appeal of their programming to raise funds but rather must rely on more intangible factors such as support for the noncommercial station's mission, desire to be affiliated with the message of a particular noncommercial station, or simple charity.

B. CONGRESS CONSISTENTLY AND REPEATEDLY HAS MADE CLEAR THAT NONCOMMERCIAL BROADCASTERS ARE TO BE GIVEN FAVORED STATUS.

1. The Public Broadcasting Act

Congress has a long history of providing special treatment to noncommercial stations. As far back as 1967, Congress enacted the Public Broadcasting Act, legislation specifically intended to benefit and encourage noncommercial broadcasters. See 47 U.S.C. § 390 (stating that the objectives of the legislation were, among other things, "to extend delivery of public telecommunications services to as many citizens of the United States as possible by the most

² Moreover, while NPR-affiliated stations rely on government funding to support their operations, the religious stations represented by the NRBNMLC do not have that funding source available to them.

efficient and economical means, including the use of broadcast and nonbroadcast technologies,” and to “strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public”).

2. The Section 118 License

Congress again recognized the special status of noncommercial broadcasters by creating the statutory license under 17 U.S.C. § 118 covering, *inter alia*, the performance of musical works by noncommercial broadcasters. *See* 17 U.S.C. § 118; 37 C.F.R. §§ 381.1-381.11. In connection with this license, the House Judiciary Committee specifically stated that:

The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967, that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas.

H.R. Rep. No. 94-1476, at 117, 1976 U.S.C.C.A.N. at 5732. In other words, specifically in the context of copyright licensing, Congress chose to confer a particular benefit on noncommercial broadcasters due to their special challenges and non-profit missions. It did so by granting a statutory license where noncommercial broadcasting rates payable to all copyright owners could be determined in a single proceeding and the “limited financial resources” of noncommercial broadcasters’ could be properly accounted for by the rate-setter (currently the CRB). Congress thus ensured that noncommercial broadcasters would be able to continue to provide socially desirable programming that includes musical works as part of that programming.

3. The Small Webcaster Settlement Act

Congress continued its special treatment of noncommercial entities in 2002, when it enacted the SWSA in response to the outcry from smaller noncommercial webcasters who could

not afford to pay the rates set by the Library of Congress in *Web I*. Small Webcaster Settlement Act of 2002, Pub. L. 107-321, 116 Stat. 2780 (2002). That legislation created a mechanism by which noncommercial licensees could obtain a lower sound recording royalty rate than what the Library of Congress had set. Notably, Congress enacted this legislation even though the Library of Congress already had given noncommercial entities a rate that was approximately one-third of the commercial rate that the Library had set. *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings: Final Rule and Order, 67 Fed. Reg. 45,240, 45,273 (July 8, 2002) (setting rate of \$0.0007 per performance for commercial licensees and \$0.0002 per performance for noncommercial licensees plus an additional 8.8% of the performance royalty for ephemeral recordings for both types of licensees).

C. CARPS AND THE COPYRIGHT ROYALTY JUDGES SIMILARLY HAVE ALWAYS SET A DIFFERENT RATE FOR NONCOMMERCIAL ENTITIES THAN FOR COMMERCIAL ONES.

CARPs and the CRB, like Congress, similarly have followed a consistent pattern of recognizing that noncommercial broadcasters are different from commercial broadcasters and have set separate – and lower – rates in recognition of those differences.

1. The Section 118 CARP Proceeding

In the only CARP proceeding held to determine musical works performance rates under section 118 for certain noncommercial broadcasters (namely, those affiliated with National Public Radio), the CARP expressly rejected the efforts of ASCAP and BMI to equate public broadcasting fees with commercial fees. Repeatedly, the CARP made clear its view that “commercial license rates can not appropriately be used as a benchmark to determine Public Broadcasters’ rates.” Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA, at 30 (July 22, 1998); *see also id.* at 20, 23-24. The CARP observed that:

significant differences remain which render the commercial benchmark suspect – particularly with respect to the manner in which broadcasters raise revenues. Commercial broadcasters generate their revenues through the sale of advertising while Public Broadcasters derive their income through a variety of sources including corporate underwriting, Congressional appropriations and viewer contributions. Though corporate underwriting may superficially resemble advertising (particularly as underwriting regulations are relaxed), the relevant economics are quite different. In the commercial context, audience share and advertising revenues are directly proportional and also tend to rise as programming costs rise – increased costs are passed through to the advertiser. No comparable mechanism exists for Public Broadcasters. Increased programming costs are not automatically accommodated through market forces. Contributions from government, business, and viewers remain voluntary. For these reasons, commercial rates almost certainly overstate fair market value to Public Broadcasters

Id. at 24-25 (citations omitted).

2. *Web I*

Rate-setting bodies determining royalties for the digital performance of sound recordings similarly have been uniform in setting noncommercial rates significantly lower than commercial rates for that right.³ In *Web I*, covering the period from October 28, 1998 through 2002, the CARP specifically found that “[a]pplying the same commercial broadcaster rate to noncommercial entities affronts common sense.” Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9 CARP DTRA 1& 2, at 89 (Feb. 20, 2002). The CARP set noncommercial performance rates for simulcasting that were less than one-third of the simulcasting rates set for commercial broadcasters, and the Library of Congress then adopted those rates. *See id.* App. A; Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings: Final Rule and Order, 67 Fed.

³In emphasizing the differences between noncommercial broadcasters and commercial entities and the importance of accounting for those differences in applicable music licensing mechanisms, the NRBMLC does not in any way intend to suggest that the rates set for commercial broadcasters under sections 112 and 114 are reasonable or reflect those that would be set in a competitive market. Rather, as the NRBMLC NOI comments make clear, the rate-setting scheme for those licenses is broken as to commercial licensees as well and needs to be repaired in accordance with the NRBMLC’s proposals.

Reg. 45,240, 45,273 (July 8, 2002) (setting rate of \$0.0007 per performance for commercial licensees and \$0.0002 per performance for noncommercial licensees).⁴

Notably, there was still an outcry among noncommercial webcasters that the rates were too high, so Congress enacted the SWSA. As noted, that legislation enabled noncommercial religious broadcasters to negotiate an agreement with the recording industry for the period October 28, 1998 through 2004 under which they paid a fixed annual fee increasing from \$200 for October 28, 1998 through 1999 to \$500 for 2004 to stream to 200 average listeners (146,000 aggregate tuning hours (“ATH”)/month).⁵ Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 68 Fed. Reg. 35,008, 35,010 (June 11, 2003). Usage fees applied to listening over this threshold. *Id.*⁶

3. *Web II*

In the second litigated webcasting proceeding covering 2006-2010 (“*Web II*”), the Copyright Royalty Judges (“CRJs”) followed the lead of the CARP and Library of Congress in also setting a different rate for noncommercial broadcasters than for commercial ones. While the CRJs required commercial broadcasters and other entities to pay streaming usage fees increasing from \$0.0008 per performance in 2006 to \$0.0019 per performance in 2010, which are charged against all performances, noncommercial entities, including broadcasters, were permitted to stream to 218 average listeners (159,140 ATH/month)⁷ for a flat annual fee of \$500 before the

⁴ These rates were then essentially carried forward for 2003-2005. See Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule, 69 Fed. Reg. 5,693, 5,697, 5,702 (Feb. 6, 2004); Copyright Royalty and Distribution Reform Act of 2004, § 6(b)(3), 118 Stat. at 2370.

⁵ 146,000 ATH/month = 200 average listeners * 24 hours/day * 365 days/year / 12 months/year.

⁶ Congress extended these rates through 2005. See Copyright Royalty and Distribution Reform Act of 2004, § 6(b)(3), 118 Stat. at 2370.

⁷ 159,140 ATH/month = 218 average listeners * 24 hours/day * 365 days/year / 12 months/year.

commercial usage rates kicked in. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,111 (May 1, 2007).

As was true following *Web I*, noncommercial religious broadcasters were able to negotiate a separate agreement for 2006-2015 under new special legislation – the 2009 WSA – that similarly charged a \$500 fixed annual fee for webcasting to 218 average listeners, but with significantly more favorable usage fees than those set by the CRJs. *See* Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 40,614, 40,626 (Aug. 12, 2009). Noncommercial religious broadcasters did not participate in the third webcasting proceeding for the 2011-2015 license period, as their WSA agreement already covered that license term and precluded such participation. *Id.* at 40,627.

* * *

As can be seen from the above history, existing music licensing mechanisms are already somewhat effective in realizing Congress’s goal of encouraging and supporting noncommercial broadcasting as in the public interest. Nonetheless, the NRBNMLC believes that these mechanisms can do better. It therefore proposes improvements to three specific music licensing mechanisms that would enhance noncommercial broadcasters’ ability to communicate their programming to the public without being saddled with unreasonable fees or administrative burdens. These areas concern: (1) the section 118 statutory license; (2) the statutory licenses under sections 112 and 114; and (3) the recordkeeping requirements associated with the section 114 license.⁸

⁸ The NRBNMLC strongly supports the continued exemption of all radio broadcasters – commercial and noncommercial alike – from any sound recording performance right applicable to over-the-air broadcasts for the reasons articulated by the NRBNMLC in its separate NOI comments.

II. THE SECTION 118 STATUTORY LICENSE HAS BEEN CRITICAL IN ENABLING NONCOMMERCIAL BROADCASTERS TO TRANSMIT MUSICAL WORKS OVER THE AIR; IT SHOULD BE EXPANDED TO ENCOMPASS THE DIGITAL TRANSMISSION OF THESE WORKS (NOI QUESTION 5).

As previously discussed in *supra* Part I.B.2, Congress safeguarded noncommercial broadcasters' ability to include musical works in their over-the-air programming through the statutory license provided in 17 U.S.C. § 118 in the 1976 Copyright Act. That license was enacted to give noncommercial broadcasters "special treatment" in recognition of, *inter alia*, "the special nature of [their] programming" and their "limited financial resources." H.R. Rep. No. 94-1476, at 117, 1976 U.S.C.C.A.N. at 5732. For noncommercial religious broadcasters such as those represented by the NRBNMLC, that license has served its purpose well. For the last several license terms, religious broadcasters (through the NRBNMLC or the NRBMLC before there was a noncommercial committee) have been able to agree upon rates and terms with ASCAP, BMI, and SESAC without the need for a rate-setting proceeding.⁹ The section 118 license thus has been an important music licensing mechanism by which to take into account the unique circumstances of noncommercial broadcasters.

There is no reason, however, that this license should be confined to over-the-air transmissions. Rather, the NRBNMLC proposes that the license be expanded to encompass the digital transmission of musical works by noncommercial broadcasters as well, including Internet simulcasting of the same programming already covered by the section 118 over-the-air license. Currently, noncommercial broadcasters are required to negotiate with ASCAP, BMI, and SESAC

⁹ See, e.g., 1987 Adjustment of the Public Broadcasting Royalty Rates and Terms: Notice of Proposed Rulemaking, 52 Fed. Reg. 44,610 (Nov. 20, 1987); 1992 Adjustment of the Public Broadcasting Royalty Rates and Terms: Notice of Proposed Rulemaking, 57 Fed. Reg. 55,494 (Nov. 25, 1992); In the Matter of Noncommercial Educational Broadcasting Compulsory License: Notice of Proposed Rulemaking, 62 Fed. Reg. 63,502 (Dec. 1, 1997); Noncommercial Educational Broadcasting Compulsory License: Notice of Proposed Rulemaking, 67 Fed. Reg. 66,090 (Oct. 30, 2002); Noncommercial Educational Broadcasting Statutory License: Notice of Proposed Rulemaking, 72 Fed. Reg. 19,138 (Apr. 17, 2007); Determination of Reasonable Rates and Terms for Noncommercial Broadcasting: Proposed Rule, 77 Fed. Reg. 24,662 (Apr. 25, 2012).

separately for such licenses. While noncommercial broadcasters currently may seek the assistance of a rate court if they are unable to agree to license fees with ASCAP and BMI, no similar rate court mechanism exists with respect to SESAC. In other words, under a worst-case scenario, noncommercial broadcasters conceivably could be forced into a CRB proceeding and two rate court proceedings and required to agree to unreasonable fee demands from SESAC, with no external means of obtaining reasonable fees from that entity – just to set license fees for all public performances of musical works by noncommercial broadcasters. Such a system is neither efficient nor cost-effective.

Folding digital transmissions of musical works into the existing section 118 license applicable to broadcast transmissions would greatly enhance efficiencies and reduce costs in setting license fees for those transmissions. First, it would encourage parties to negotiate fees for digital and over-the-air transmissions in the same set of negotiations. Second, if the parties are unable to agree on any musical work performance fees, the rates could be set in a single CRB proceeding instead of a CRB proceeding and two separate rate court proceedings, with no external mechanism at all in place to constrain SESAC from demanding excessive fees. Third, it would assure that noncommercial broadcasters actually would be able to transmit the musical works in SESAC's repertory by removing SESAC's ability to refuse to license its works at all. Such an expanded and streamlined section 118 license makes particular sense with respect to noncommercial simulcast transmissions, which are simply retransmissions over the Internet or cellular networks of the same over-the-air programming already covered by section 118. In that instance, the only material licensing issue raised by the digital transmission of over-the-air programming is the number of additional listeners to that programming.

In advancing this proposal, the NRBNMLC does not wish to disrupt current licensing practices between college broadcasters and performance rights organizations (“PROs”), which have been working well. Under those practices, licensing of digital transmissions of musical works by college broadcasters typically has been folded into overall college licenses covering a wide variety of musical performances occurring on college campuses. The NRBNMLC anticipates that the PROs and colleges will be able to continue those practices under an expanded section 118 and requests that its requested modification to section 118 be implemented in a way that recognizes the validity of such voluntary agreements.

The NRBNMLC further proposes that Congress adopt the rate-setting standard found in 17 U.S.C. § 801(b) for section 118 proceedings, including the modifications of that standard proposed in the NOI comments submitted by NAB. A standard that explicitly takes fairness of the rates into consideration will:

- more appropriately ensure that the rates paid under section 118 are affordable and fair;
- better account for the unique circumstances of noncommercial broadcasters that led Congress to enact the statutory license in the first place – *i.e.*, their limited finances and their socially beneficial programming; and
- more effectively ensure that Congress’s goal of encouraging and supporting noncommercial broadcasting is realized.

See H.R. Rep. No. 94-1476, at 117, 1976 U.S.C.C.A.N. at 5732.

III. GIVEN THE CONSISTENT NONCOMMERCIAL HISTORY FOR THE STATUTORY LICENSES UNDER SECTIONS 112 AND 114, CONGRESS SHOULD LEGISLATE A FIXED ANNUAL FEE OF \$500 FOR THE FIRST 300 AVERAGE LISTENERS FOR THESE LICENSES (NOI QUESTIONS 8-9).

The statutory licenses under sections 112 and 114 have been somewhat effective in according noncommercial licensees lower rates than commercial licensees, but their effectiveness could be improved. The section 114 statutory license specifically mandates that the

rates and terms set by the CRJs “shall distinguish among the different types of eligible nonsubscription transmission services then in operation.” 17 U.S.C. § 114(f)(2)(B). In practice, this has consistently translated into different – lower – rates for noncommercial licensees than the rates applicable to commercial licensees, as described in *supra* Part I.C.

While noncommercial broadcasters have always been able to obtain lower rates than commercial licensees in the webcasting rate-setting proceedings, participating in those proceedings and related settlement negotiations to obtain such rates has imposed significant costs and burdens on them. This is unfortunate, as noncommercial entities are far less able to bear those costs than commercial licensees given their dependence on listener donations and sponsorships and their inability to sell advertisements to raise money. Historically, SoundExchange has been reluctant to agree to noncommercial rates and terms until commercial rates have been established, perhaps out of concern that any resulting noncommercial rates would affect the level at which commercial rates are set.

To alleviate the costs and burdens of participation in these proceedings for noncommercial broadcasters, the NRBNMLC proposes that the Copyright Office support legislation that sets a fixed annual fee for all noncommercial broadcasters for the statutory licenses under sections 112 and 114 of no more than \$500 for up to 300 average listeners (219,000 monthly ATH), with the rate for additional listenership above this threshold continuing to be set through negotiation or in CRB rate-setting proceedings. From the creation of these statutory licenses to the present, noncommercial religious broadcasters represented by the NRBNMLC consistently have paid a fixed annual fee of no more than \$500 for a certain level of listenership. From October 28, 1998 through 2005, that level was 200 average listeners, and from 2006-2015, that level increased somewhat to 218 average listeners. The NRBNMLC

proposes that Congress simply legislate the continuation of this consistent pattern, with a somewhat higher level of listenership to account for growth over the past ten years.

Adopting such a proposal has several benefits for all parties involved. Most notably, it would make the rate-setting proceedings under sections 112 and 114 vastly more efficient, as it would remove the entities with the least economic significance to SoundExchange and its members from the ambit of those proceedings. This would enable the CRJs and the remaining parties to focus on the entities who are of far greater economic significance to SoundExchange and the copyright owners. It also would enable SoundExchange and its members to save the time and money involved in negotiating or litigating rates for the smallest entities engaging in the least streaming activity. Further, it would spare the vast majority of noncommercial entities from bearing these very significant costs and burdens as well, which is particularly appropriate given that these entities are the ones that are least able to bear these expenses.

The proposal would help larger noncommercial entities as well. By narrowing the scope of license negotiations and rate-setting proceedings vis-à-vis noncommercial broadcasters, it would (a) increase the likelihood of a settlement and concomitantly decrease the likelihood that a rate-setting proceeding will be necessary and (b) decrease the cost of a rate-setting proceeding vis-à-vis noncommercial broadcasters if such a proceeding does turn out to be necessary.

The NRBNMLC also proposes that the rate-setting standard applicable to proceedings under sections 112 and 114 be modified from a willing-buyer-willing-seller standard to the standard set forth in 17 U.S.C. § 801(b)(1), as modified by NAB in its comments in this NOI, for the reasons stated in those comments and in the NRBMLC's comments. While the NRBNMLC supports application of this modified standard for all licensees, the need for a standard that takes into account fairness and other policy considerations is particularly acute for noncommercial

broadcasters, which have far less ability to raise additional funds to cover licensing costs given the unique restrictions applicable to them.

The NRBNMLC observes that it would not be appropriate to apply the commercial usage rates set in the third webcasting proceeding covering 2011-2015 (“*Web III*”) to noncommercial broadcasters by legislation, as those rates are not remotely representative of what a noncommercial webcaster would negotiate in a competitive marketplace. The noncommercial entity that negotiated and urged adoption of those rates was Collegiate Broadcasters, Inc. (“CBI”). But the vast majority, if not all, of the stations represented by CBI will likely never be required to pay these usage rates, as their streaming listenership falls far below the threshold of 218 average listeners that must be triggered before the usage rates kick in. Indeed, in *Web II*, the CBI representative who negotiated these rates testified that his station’s listenership was only 8.6 average listeners (based on computer connections) – less than 5% of the listenership permitted by the \$500 flat fee before usage rates kick in. *See* Ex. 1 (Transcript of Record at 137-38, *Web II*, Docket No. 2005-1 CRB DTRA (Aug. 2, 2006) (Test. of Will Robedee)). The only other witness presented by CBI, Joel Willer, testified that his listenership was even smaller – only 2.9 average listeners – *i.e.*, less than 2% of the threshold. *Id.* at 289-90 (Test. of Joel R. Willer). Therefore, it would not have mattered to CBI how high the usage fees were, as the negotiator’s station and other CBI stations were so far below the listenership threshold that they would not need to pay them. In a competitive market, usage rates for noncommercial licensees actually would be far lower than those set for commercial webcasters if they were negotiated by noncommercial licensees that actually could be forced to pay them.

IV. SMALL NONCOMMERCIAL BROADCASTERS SHOULD BE EXEMPT FROM MUSIC USE REPORTING UNDER SECTION 114; NO NONCOMMERCIAL BROADCASTER SHOULD BE REQUIRED TO COMPLY WITH REPORTING REQUIREMENTS MORE ONEROUS THAN THOSE APPLICABLE TO SECTION 118 (NOI QUESTIONS 8-9).

Finally, the NRBNMLC requests that the Copyright Office support legislative relief from the notice and recordkeeping requirements applicable to noncommercial broadcasters. These requirements have consistently been a significant concern for noncommercial broadcasters, which are some of the entities least equipped to comply with the requirements due to their more limited resources and staffing and less sophisticated technology, and they have repeatedly and consistently sought and obtained relief from them. In the noncommercial SWSA agreement, for example, noncommercial broadcasters were permitted to pay a proxy fee of \$50 in 2003 and \$25 in 2004 in lieu of reporting music use. *See* 68 Fed. Reg. at 35,010-11. That exemption was carried forward in 2005. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 6(b)(3), 118 Stat. 2341, 2370. Under the noncommercial non-college non-NPR WSA agreement covering the 2006-2015 period, small noncommercial broadcasters with listenership at or below 44,000 ATH/year are similarly exempt in exchange for a payment of an annual \$100 proxy fee. 74 Fed. Reg. at 40,626-27. Noncommercial broadcasters who stream to no more than 218 average listeners are required to submit reports for only two weeks per calendar quarter instead of on a census basis. *See id.* at 40,627. This agreement, however, expires at the end of 2015.

It makes no sense to require noncommercial broadcasters whose streaming audiences are below the current threshold of 218 average listeners and are paying the \$500 fixed annual fee to have to do any reporting at all. The burden in requiring such reporting is particularly heavy for noncommercial broadcasters, which typically have less sophisticated reporting technology – usually their legacy broadcasting systems – and far more limited staffing and financial resources

to handle such reporting requirements than do commercial entities. At the same time, the amount of money to be distributed is modest – certainly below \$500 per year once SoundExchange deducts its administrative and other expenses from the royalty. In other words, the significant costs and burdens imposed on noncommercial broadcasters from requiring such reporting far outweighs any negligible benefit and cannot be the “reasonable” type of notice of use of sound recordings that Congress required licensees to provide. *See* 17 U.S.C. § 114(f)(4)(A).

It is particularly telling that ASCAP, BMI, and SESAC have been able to distribute royalties received from noncommercial broadcasters for years based on, at most, reports of use for only one week per year in the section 118 context. *See* 37 C.F.R. § 381.6(f) (“A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC each shall not in any one calendar year request more than 10 stations to furnish such reports.”). If ASCAP, BMI, and SESAC are able to distribute noncommercial royalties to their members based on far more limited reporting, surely SoundExchange should be able to do the same. Therefore, the NRBNMLC proposes that noncommercial broadcasters whose fee liability does not exceed the annual minimum fee – currently set at \$500 – be legislatively exempted from any reporting requirements. It further proposes that noncommercial broadcasters that exceed this threshold be required to report on a sample basis of one week per year, consistent with the section 118 reporting requirements. Such sample reporting is a reasonable way to inform copyright owners of the sound recordings being performed by noncommercial broadcasters, which have relatively narrow playlists, play the vast majority of recordings on their active playlist at least once per week, and often have very slow turnover of their playlists, with a song

remaining on it “for at least six months and often longer than a year.” See Ex. 2 (Rebuttal Test. of Eric Johnson, CDR Radio Network, *Web II*, Docket No. 2005-1 CRB DTRA, ¶ 20 (Sept. 29, 2006)). Under such circumstances, one-week sample reports would pick up the vast majority of music played. *Id.* At a minimum, noncommercial broadcasters should not have to submit reports of use for more than two weeks per calendar quarter – a reporting level at which many noncommercial broadcasters operate presently under the noncommercial WSA agreement. See 74 Fed. Reg. at 40,627.

CONCLUSION

The NRBNMLC appreciates the opportunity to submit comments on the efficiency of current music licensing mechanisms and suggestions for proposed changes. As the Copyright Office prepares its report to Congress, the NRBNMLC respectfully urges it to incorporate proposals in that report – including those propounded by the NRBNMLC – that more effectively recognize the unique circumstances of noncommercial broadcasters, just as Congress itself did when it first enacted the Public Broadcasting Act in 1967.

Respectfully submitted,

/s/

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*Counsel for the National Religious Broadcasters
Noncommercial Music License Committee*

Dated: May 23, 2014

EXHIBIT 1

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

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In the Matter of:

The Digital Performance Right in Sound Recordings and Ephemeral Recordings		Docket No. 2005-1 CRB DTRA
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(Webcasting Rate Adjustment
Proceeding)
-----+

Volume 32

Room LM-414
Library of Congress
First and Independence
Avenue, S.E.
Washington, D.C. 20540

Wednesday,
August 2, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

APPEARANCES:

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I-N-D-E-X

WITNESS DIRECT CROSS REDIRECT RECROSS

DAVID RAHN

Pro Se	12		110	
By Mr. Astle		55		
By Mr. Freedman		62		

WILLIAM ROBEDEE

By Mr. Greenstein	114		243	
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By Mr. Smith		172		
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JOEL R. WILLER

By Mr. Anderson	268		363	
By Mr. Smith		320		372

E-X-H-I-B-I-T-S

EXHIBIT NO. DESCRIPTION IDEN RECD

SoundExchange Exhibits:

117	SBR Expenses and Revenue, 2003-2005		66	70
118	Custom Channels FAQ from www.customchannels.com		75	88
119	2005 ASCAP-SBR Agreement		92	95
120	CBI Membership Forms		192	
121	Willer Testimony before the House of Representatives		321	359

1 MR. RAHN: Okay, thank you, Your
2 Honor.

3 CHIEF JUDGE SLEDGE: All right, Mr.
4 Greenstein.

5 MR. SETH GREENSTEIN: Thank you,
6 Your Honor.

7 Collegiate Broadcasters,
8 Incorporated, would like to call as its first
9 witness Mr. William Robedee.

10 WHEREUPON,

11 WILLIAM ROBEDEE
12 was called as a witness by Counsel for the
13 Collegiate Broadcasters and, having been first
14 duly sworn, assumed the witness stand, was
15 examined and testified as follows:

16 CHIEF JUDGE SLEDGE: Thank you,
17 sir. Please be seated.

18 DIRECT EXAMINATION

19 BY MR. GREENSTEIN:

20 Q Good morning. Mr. Robedee, would
21 you please state your full name and spell your
22 last name for the record?

1 A William C. Robedee, R-O-B-E-D-E-E.

2 Q By whom are you employed?

3 A William Marsh Rice University.

4 Q In what capacity?

5 A General Manager for KTRU FM.

6 Q You are here testifying on behalf
7 of Collegiate Broadcasters, Inc., CBI?

8 A Correct.

9 MR. SETH GREENSTEIN: Your Honor,
10 before we begin, would the Board like to have
11 copies --

12 CHIEF JUDGE SLEDGE: You've already
13 begun. So you can't do it before we begin.

14 (Laughter.)

15 MR. SETH GREENSTEIN: Thank you,
16 Your Honor. In the midst of the testimony
17 then, would the Board like to have a copy of
18 Mr. Robedee's written testimony?

19 CHIEF JUDGE SLEDGE: Yes.

20 BY MR. GREENSTEIN:

21 Q Mr. Robedee, what is CBI?

22 A CBI is an association of college

1 another stream that we are hosting for the
2 athletic department on campus. So that when
3 they don't broadcast some of their events on
4 KTRU, they have another outlet for those
5 events. So we have another stream that is an
6 athletic stream, but when it is not being used
7 by athletics, we also put the KTRU programming
8 on there, so it is not an empty stream.

9 But, I'm sorry, to answer your
10 question, with the exception of the athletics,
11 it is a simulcast.

12 Q What is the general level of
13 listenership to the webcasts for KTRU?

14 A Well, we computed the average for
15 2004 as 8.6 on average connections or
16 listeners. There is some variance in the term
17 there, but you can say that, on average, in
18 2004 8.6 connections you would find throughout
19 the day on a month -- over a month, at any
20 given time, you would find 8.6 on average.

21 You would find that, looking at the
22 programming that was done, that that is

1 actually a little bit high when you are
2 looking at the issue of the statutory license
3 and the royalties because a lot of the
4 programming that we do that garners the
5 highest amount of listenership are the
6 athletic events.

7 For example, in 2005, the Rice
8 baseball team was in the College World Series.
9 They were again this year, but this is the
10 observation that I have written down. We
11 looked at the servers during that event, and
12 we saw that there were 4,000 connections to
13 that stream at that time.

14 When we take a look at anything
15 that we have seen on the music programming
16 side, I haven't seen anything approaching 100
17 simultaneous connections.

18 But to answer your question, 8.6 is
19 the average, with the highest draw by far the
20 athletic events.

21 Q What about for the FM operation?
22 What is the level of listenership for your FM

1 duly sworn, assumed the witness stand, was
2 examined and testified as follows:

3 CHIEF JUDGE SLEDGE: Thank you,
4 sir. Please be seated. And before you are
5 seated, we'll recess 10 minutes.

6 (Laughter.)

7 (Whereupon, the foregoing matter
8 went off the record at 3:37 p.m. and went back
9 on the record at 3:50 p.m.)

10 CHIEF JUDGE SLEDGE: Thank you.
11 We'll come to order.

12 Yes, sir?

13 MR. ANDERSON: I'm here for the
14 testimony of Professor Willer. May I proceed?

15 CHIEF JUDGE SLEDGE: All right.
16 Tell me your name again.

17 MR. ANDERSON: Todd Anderson from
18 Constantine Cannon, representing CBI.

19 CHIEF JUDGE SLEDGE: Thank you.
20 Please proceed.

21 MR. ANDERSON: Thank you.

22 DIRECT EXAMINATION

1 BY MR. ANDERSON:

2 Q Professor Willer, would you please
3 state your full name for the record?

4 A My name is Joel R. Willer.

5 Q Where are you currently employed?

6 A I am currently employed as an
7 Assistant Professor of Mass Communications in
8 the Department of Communication at the
9 University of Louisiana at Monroe.

10 Q And you sometimes refer to the
11 University of Louisiana-Monroe as ULM?

12 A Yes.

13 Q I would like to refer to it as ULM,
14 if you don't mind.

15 What are your responsibilities at
16 ULM?

17 A I am an Assistant Professor, so I
18 teach within the academic department of Mass
19 Communications. I am also the faculty
20 supervisor of student-operated radio station
21 KXUL.

22 Q How long have you been a professor

1 so what I would hear over the webcast is
2 identical to what I would hear --

3 A Exactly.

4 Q -- on the radio station?

5 A Yes. There are no differences
6 between the webcasts and our over-the-air
7 programming.

8 Q Is it possible for educational
9 stations like KXUL to measure the listenership
10 of their webcasts?

11 A No.

12 Q Is it possible to measure anything
13 that is a proxy for or related to the
14 listenership?

15 A What we can measure is the number
16 of client computers that are connected to our
17 streams that may or may not represent
18 listenership. In many cases, I think there is
19 very strong indications that connections are
20 not equal to listenership.

21 Q But you can measure connections?

22 A We can measure connections.

1 Q Do you use software to do that?

2 A We do.

3 Q And who created this software?

4 A I did.

5 Q For your station, for KXUL, when
6 you use this software, what does it show in
7 terms of number of connections?

8 A For the preparation of my testimony
9 for this, I analyzed our records for the
10 calendar year 2004, which was the most recent
11 complete calendar year that I had data
12 available to me. The average aggregate tuning
13 hours across the entire calendar year showed
14 an average of 2.94 listeners.

15 Q So what does that mean to a
16 layperson?

17 A It means, at an average time, we
18 would have fewer than three listeners.

19 Q To your webcast?

20 A Throughout the course of the day,
21 throughout the entire year.

22 Q How does that compare to commercial

EXHIBIT 2

In the Matter of)
)
)

Docket No. 2005-1 CRB DTRA

)
)
Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
_____)

REBUTTAL TESTIMONY OF ERIC JOHNSON, CDR RADIO NETWORK

1. My name is Eric Johnson. I submitted direct testimony in this proceeding on behalf of the National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”), and my background is described in that testimony. I am submitting this rebuttal statement in order to respond to a few points that were raised by SoundExchange during the direct phase of this proceeding.

I. CDR’S LISTENERSHIP LEVELS

2. In my direct statement, I referred to CDR’s online and over-the-air listenership levels as an example of the relative sizes of online audiences in comparison to over-the-air audiences for noncommercial religious radio stations. At the time I wrote my direct statement, I did not have precise numbers for either CDR’s online or over-the-air listenership, so I made reasonable estimates of those listenership levels based on the best information that I had. During my cross-examination, the validity of the estimates I presented was questioned. I now have obtained much more precise numbers for CDR’s listenership levels, and they demonstrate that my previous estimates of the sizes of CDR’s online and over-the-air audiences were reasonably accurate.

A. Over-the-Air Listenership

3. CDR has obtained Arbitron over-the-air listenership data through an organization called Radio Research Consortium (“RRC”). Arbitron is the well-recognized service that tracks broadcast radio listenership and assigns ratings to stations. RRC is a non-profit research

As shown by Table 3, WRVL averaged 5.4 concurrent listeners throughout these months, and the highest monthly average was 9.0 concurrent listeners – a far cry from the average of 100,000 posited by SoundExchange. Indeed, the highest number of users who ever tuned in simultaneously between December 1, 2005 and August 31, 2006 was 90. It is clear that Liberty University’s online simulcast listenership is actually substantially lower than CDR’s. WRVL has a long way to go before it averages 100,000 concurrent online listeners.

III. NOTICE AND RECORDKEEPING ISSUES

17. I understand that the Copyright Royalty Board has ruled that notice and recordkeeping terms for the statutory license will not be set in this proceeding. Nonetheless, I have been informed that SoundExchange has introduced as exhibits several of its past submissions regarding recordkeeping issues and has presented oral and written testimony specifically concerning sample versus census reporting, and that the Board has allowed that evidence to remain in the record to provide background information and to enhance its understanding of the license administration process. Because the Board has accepted recordkeeping evidence from SoundExchange into the record, and because the NRBNMLC strongly supports sample reporting and is vitally concerned about recordkeeping requirements, I outline briefly below a few key views of the NRBNMLC with respect to recordkeeping issues – particularly sample reporting. While I will not address in this statement each and every recordkeeping argument raised in SoundExchange’s exhibits and testimony, I believe that it is important to offer at least an abbreviated response on the sample reporting issue to provide a degree of balance to the record before the Board concerning the license administration process and the burdens imposed on noncommercial religious stations by notice and recordkeeping requirements.

18. Census reporting, as proposed by SoundExchange, would be completely inconsistent with every music use reporting requirement ever imposed upon noncommercial broadcasters, and indeed could very likely be the death knell of noncommercial simulcasting if adopted by the Board. The NRBNMLC strongly agrees with other noncommercial parties to this proceeding who have argued that, for noncommercial entities, recordkeeping requirements should be no more burdensome than those contained in the regulations applicable to the 17 U.S.C. § 118 statutory license, covering terrestrial broadcasting of musical works by noncommercial broadcasters. These regulations specify that stations not affiliated with National Public Radio – whether or not affiliated with a college or university – need only report a sample of one week per calendar year.⁹ The regulations further specify that ASCAP, BMI, and SESAC may only request such reports from up to 10 college stations and 5 non-college non-NPR stations per calendar year.¹⁰ Indeed, to my knowledge, never have noncommercial religious broadcasters been subject to recordkeeping requirements more onerous than these, either for reports of musical works or reports of sound recordings.

19. In CDR's case, BMI asks me to submit information for only three days per year, and the only elements requested by BMI to assist it in identifying the songs played are song title, artist, and composer. I do not recall ASCAP or SESAC ever having asked me to submit a music use report at all (perhaps due to the restrictions on the number of stations from whom musical works performing rights organizations can request reports). This level of recordkeeping has been in effect for years with respect to the musical work performing rights organizations; I do not understand why it would not work for SoundExchange as well.

⁹ See 37 C.F.R. §§ 253.5, 253.6.

¹⁰ See *id.*

20. While the NRBNMLC believes that sample reporting is appropriate for all webcasters and radio simulcasters, it is particularly appropriate for NRBNMLC stations such as CDR. CDR's playlist is rather narrow; in a given month, we probably play fewer than 1,000 different songs, nearly all of which are played at least once in any given week. What's more, with very few exceptions, once a song is added to CDR's playlist, it remains there for at least six months and often longer than a year. A sample of one week per year would therefore be sure to pick up the vast majority of music we played. Thus, for CDR, a sample would be a particularly accurate representation of the music played – even more than it would be for webcasters with much more diverse playlists.

21. Finally, as the Board is considering the license administration process in setting rates and payment terms, I strongly urge it to take into account the administrative burdens that would be imposed on noncommercial licensees by notice and recordkeeping requirements more burdensome than those set forth in 17 U.S.C. § 118. Recordkeeping requirements more burdensome than those applicable to noncommercial terrestrial broadcasting of musical works, such as those proposed by SoundExchange, could rapidly overwhelm our staff and even make us reconsider our decision to stream altogether. Such a requirement might force CDR to spend countless hours and dollars collecting and reporting data and revamping our tracking software and practices. I do not believe that we would be likely to come up with those necessary resources, particularly given our small online listenership. In fact, if noncommercial broadcasters were required to report each and every song played for each and every hour of programming transmitted throughout the year, after evaluating how this recordkeeping burden would affect our staffing and budgetary needs, CDR could face the real possibility of shutting down our streaming operations altogether, regardless of the royalty fee we would be required to pay.

