

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC

_____)
In the Matter of)
)
Digital Performance in Sound Recordings) Docket No. 2009-1 CRB
and Ephemeral Recordings) Webcasting III
)
_____)

College Broadcasters, Inc.'s
Proposed Findings of Fact and Conclusions of Law

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Table of Contents

Introduction and Overview 1

Proposed Findings of Fact 2

I. CBI and SoundExchange reached a settlement for rates and terms for NEWS and submitted it to the CRB for adoption as the statutory rates and terms for 2011 through 2015..... 2

 A. CBI and SoundExchange are participants in Webcasting III..... 2

 B. CBI and SoundExchange reached this settlement as provided for under the Webcaster Settlement Act of 2009. 2

 C. CBI and SoundExchange jointly moved for the CRB to adopt the settlement as the statutory rates and terms for NEWS..... 3

 D. The CRB has the authority to adopt settlements as the basis for statutory rates and terms pursuant to 17 U.S.C. § 801(b)(7)..... 3

Proposed Conclusions of Law 3

I. This settlement meets the criteria for adoption by the CRB as the statutory rates and terms pursuant to 17 U.S.C. § 801(b)(7)..... 3

 A. Pursuant to 17 U.S.C. § 801(b)(7)(A)(i) the parties affected have had ample chance to comment. 4

 B. Taken in its entirety this settlement supports a finding by the CRB that it represents a reasonable basis for rates and terms as required by 17 U.S.C. § 801(b)(7)(A)(ii)..... 4

II. This Settlement as a whole represents a reasonable basis for the statutory rates and terms for NEWS. 5

 A. Adoption of this settlement in its entirety as the statutory rates and terms would benefit both services and copyright holders by reducing confusion and costs for both. 5

 B. The Settlement itself reflects a what a marketplace transaction between a willing buyer and willing seller would be. 6

 C. No party would be prejudiced by this settlement..... 6

III. The CRB should adopt this settlement as a whole as the statutory rates and terms for NEWS because Congress intended settlements to become the basis for them. 7

Introduction and Overview

Pursuant to 17 U.S.C. § 801(b)(7) College Broadcasters, Inc. ("CBI") and SoundExchange have submitted their settlement for rates and terms for Noncommercial Educational Webcasters ¹("NEWs") to the Copyright Royalty Board ("CRB") for adoption as the statutory rates and terms for 2011 through 2015. CBI and SoundExchange are participants in Webcasting III, with CBI representing webcasting services who qualify as NEWs and SoundExchange representing copyright holders and artists. They reached their settlement ("Settlement") as provided for under the Webcaster Settlement Act of 2009. CBI and SoundExchange then jointly moved for the CRB to adopt the terms of the Settlement as the statutory rates and terms for NEWs.

Pursuant to 17 U.S.C. § 801(b)(7) the CRB is authorized to adopt settlements as the basis for statutory terms and rates if, after affected participants have had a chance to comment on a proposed settlement, the record shows that it would provide a reasonable basis for the statutory rates and terms. This proposed Settlement meets both criteria.

Additionally, adoption of this Settlement in its entirety as the statutory rates and terms would benefit both services and copyright holders by reducing confusion and costs for everyone. The Settlement itself reflects a what a marketplace transaction between a willing buyer and willing seller would be, and no party would be prejudiced by it.

Therefore the CRB should adopt this Settlement as the statutory rates and terms for NEWs for the period of 2011 through 2015. Congress intended settlements to become the basis of statutory rates and terms so long as they met the relevant statutory standard, which this Settlement does.

¹ As defined in the proposed rates and terms. See footnote 2, *infra*.

Proposed Findings of Fact

I. CBI and SoundExchange reached a settlement for rates and terms for NEWs and submitted it to the CRB for adoption as the statutory rates and terms for 2011 through 2015.

A. CBI and SoundExchange are participants in Webcasting III.

1. CBI is a national nonprofit association, the members of which include college, university and high school radio and television stations and other electronic media organizations. Most of CBI's members make Internet transmissions subject to licensing under sections 112(e) and 114. Most of these stations fit the statutory definition of Noncommercial Educational Webcaster as outlined in the proposed regulation.²

2. SoundExchange is the organization representing sound recording copyright owners and performers that has been designated by the CRB to receive and distribute royalties under Sections 112(e) and 114 on behalf of all copyright owners and performers and to enter into settlements under the Webcaster Settlement Act of 2009.³

B. CBI and SoundExchange reached this settlement as provided for under the Webcaster Settlement Act of 2009.

3. Under the authorization granted in the Webcaster Settlement Act of 2009, Pub. L. No. 111-36 (to be codified at 17 U.S.C. 5 114(f)(5)), SoundExchange and CBI reached an agreement for the reproduction and performance of sound recordings under Sections 112(e) and 114 of the Copyright Act concerning royalty rates and terms for eligible

² "Noncommercial Educational Webcaster means Noncommercial Webcaster (as defined in 17 U.S.C. § 114(f)(5)(E)(i)) that (1) Has obtained a compulsory license under 17 U.S.C. § 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (2) Complies with all applicable provisions of Sections 112(e) and 114 and all applicable regulations; (3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary school, college, university or other post-secondary degree-granting educational institution; and (4) Is not a 'public broadcasting entity' (as defined in 17 U.S.C. § 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396." Subpart C, § 380.21, 75 Fed. Reg. 62, 16383 (emphasis original).

³ Webcaster Settlement Act of 2009, Pub. L. No. 111-36 (to be codified at 17 U.S.C. 5 114(f)(5)).

nonsubscription transmissions made by noncommercial educational webcasters over the Internet during the period 2011 through 2015.

4. This agreement was published in the Federal Register⁴ pursuant to 17 U.S.C. § 114(f)(5)(B), at which point it became binding on all copyright owners and performers, in lieu of any future determination by the Copyright Royalty Judges, and available, as an option, to any NEWs meeting the eligibility conditions set forth in it.⁵

C. CBI and SoundExchange jointly moved for the CRB to adopt the Settlement as the statutory rates and terms for NEWs.

5. On August 13, 2009, CBI and SoundExchange submitted a "Joint Motion to Adopt Partial Settlement" ("Joint Motion") for the instant proceeding. The Joint Motion includes proposed rates and terms under Sections 112(e) and 114 of the Copyright Act for NEWs that are identical to the rates and terms in agreed upon by CBI and SoundExchange in their Settlement under the authority of the Webcaster Settlement Act of 2009.⁶

D. The CRB has the authority to adopt settlements as the basis for statutory rates and terms pursuant to 17 U.S.C. § 801(b)(7).

6. The Copyright Royalty Judges have the authority, under 17 U.S.C. § 801(b)(7)(A) to adopt an agreement reached among some or all the participants as "a basis for statutory terms and rates."

Proposed Conclusions of Law

I. This Settlement meets the criteria for adoption by the CRB as the statutory rates and terms pursuant to 17 U.S.C. § 801(b)(7).

⁴ 74 Fed. Reg. 40, 616 (Aug. 12, 2009).

⁵ 17 U.S.C. § 114(f)(5)(B).

⁶ CBI and SoundExchange renewed their motion February 23, 1010. See Joint Settlement Conference Report.

A. Pursuant to 17 U.S.C. § 801(b)(7)(A)(i) the parties affected have had ample chance to comment.

1. On April 1, 2010 the CRB caused the terms proposed by the CBI and SoundExchange Joint Settlement to be published in the Federal Register and solicited comments on them.⁷ Twenty-five substantive comments were received, all but one in favor.⁸

2. Additionally the CRB held a hearing on objections to the Settlement on May 5, 2010, offering another forum for all interested parties to make their views known. These opportunities for comment satisfy the Copyright Royalty Judges' responsibilities under 17 U.S.C. § 801(b)(7)(A)(i).⁹

B. Taken in its entirety this Settlement supports a finding by the CRB that it represents a reasonable basis for rates and terms as required by 17 U.S.C. § 801(b)(7)(A)(ii).

3. In instances when participants in the relevant proceeding object to the CRB's adoption of the agreement, pursuant to 17 U.S.C. § 801(b)(7)(A)(ii) the CRB may decline to adopt the settlement if, bearing in mind the objective of encouraging settlement, based on the record before them¹⁰, the agreement does not provide a reasonable basis for setting

⁷ 75 Fed. Reg. 62, 16377 (April 1, 2010).

⁸ See <http://www.loc.gov/crb/proceedings/2009-1/index.html>.

⁹ "[T]he Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section [17 U.S.C. §] 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates..." 17 U.S.C. § 801(b)(7)(A)(i).

¹⁰ "Because settlement agreements can be offered at any time before final disposition of a proceeding, the extent of the record before the CRJs may vary widely depending on the timing of the settlement agreement. Bearing in mind the objective of encouraging settlement, the CRJs are to use their best judgment as to whether the record before them indicates the proposed agreement is not likely to meet the relevant statutory standard." H.R. Rep. No. 108-408, at 24 (2003).

the statutory rates and terms.¹¹ There is nothing in the record to suggest that these proposed rates and terms are not reasonable.¹²

II. This Settlement as a whole represents a reasonable basis for the statutory rates and terms for NEWs.

A. Adoption of this Settlement in its entirety as the statutory rates and terms would benefit both services and copyright holders by reducing confusion and costs for both.

4. The Settlement includes three parts: a flat fee (up to the "cap" for non-commercial entities established in Webcasting II), a "listener"-based fee above the cap, and service-appropriate recordkeeping requirements. Taken as a whole, the Settlement advances the interests of both NEWs and rights holders by removing many of the barriers NEWs face in meeting regulatory requirements concerning recordkeeping and reporting. In allowing them to use service-appropriate reporting options SoundExchange has agreed to gather data more efficiently, and in a way less prohibitively expensive to both NEWs and copyright holders, allowing for reduced overhead eating into royalties and enabling speedier distributions.

5. Adoption of the Settlement would also reduce confusion by bringing into alignment the statutory rates and terms and the Webcaster Settlement Act rates and terms¹³ for NEWs for the period of 2011-2015.

¹¹ 17 U.S.C. § 801(b)(7)(ii). "When an objection has been registered pursuant to clause (i), clause (ii) gives the CRJs discretionary power to decline to adopt the proposed agreement *if* they find, based on the record before them, that the agreement is not likely to meet the relevant statutory standard." H.R. Rep. No. 108-408, at 24 (2003) (emphasis added).

¹² In its objection participant IBS raised two concerns: (1) that if the CRB adopted the proposed terms at the time CBI and SoundExchange jointly moved for the CRB to do so it would have lead to confusion as to which rates and terms would apply between the time they were implemented and the end of 2010; and (2) that it was unclear whether college and high school stations carrying commercial announcements would be eligible as NEWs to use these proposed terms. See Comment of IBS, April 22, 2010. Regarding point (1) there is no confusion; the proposed rates would apply for the 2011-2015 period that this proceeding covers. Regarding point (2), college and high school stations carrying commercial announcements would indeed be covered. The criteria for eligibility as a NEW is that they are educational and non-profit. See footnote 2, *supra*.

B. The Settlement itself reflects a what a marketplace transaction between a willing buyer and willing seller would be.

6. Because CBI, a recognized representative of many NEWs, represents willing buyers, and SoundExchange, representing copyright holders, represents willing sellers, the accord itself is a reasonable facsimile of what a willing buyer and seller would agree to. Additionally, because both parties specifically agreed that the Settlement should be regarded as precedent of what a marketplace transaction should be, as per statute,¹⁴ the CRB need not take any further evidence to try to divine what a willing buyer and willing seller might agree to when the agreement itself serves as an actual example of what they *did* agree to.¹⁵

C. No party would be prejudiced by this Settlement.

7. As proposed, the regulatory language does not prevent copyright owners and NEWs from entering into private agreements in lieu of the statutory license.¹⁶ Furthermore, no NEW is obligated to use the proposed rates and terms for NEWs if it

¹³ 74 Fed. Reg. 40614 (Aug. 12, 2009).

¹⁴ "Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in Section 801(b). *This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.*" 17 U.S.C. § 114(f)(5)(C) (emphasis added).

¹⁵ "By facilitating and encouraging settlement agreements for determining royalty rates and establishing distribution of royalties, this section reduces the need to conduct full-fledged rate-setting and distribution proceedings." H.R. Rep. No. 108-408, at 24 (2003).

¹⁶ See Subpart C, Section 380.20(c). "Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmissions within the scope of such agreements." 75 Fed. Reg. 62, 16383 (April 1, 2010).

qualifies for other rates and terms it would prefer to use. While the regulatory language as proposed by SoundExchange for the statutory license excludes NEWs from eligibility from other rates and terms,¹⁷ should the CRB not adopt the exclusion as proposed, SoundExchange and CBI have agreed it is fair that a NEW could then be able to make use of any other statutory language that it may be eligible for if it preferred.¹⁸

III. The CRB should adopt this Settlement as a whole as the statutory rates and terms for NEWS because Congress intended settlements to become the basis for them.

8. In creating the Copyright Royalty Board and amending Chapter 8 to govern its proceedings to establish statutory rates and terms Congress emphasized the importance of settlements in several instances in drafting the statute.¹⁹ One such instance is in the establishment of a mandatory settlement period.²⁰ Another instance is in establishing a mechanism for settlements to become the basis of the statutory rates and terms.²¹

9. Congress similarly encouraged settlements in establishing the various settlement acts of 2008 and 2009, including the one under which the instant CBI-SoundExchange

¹⁷ Second Revised Proposed Rates and Terms of SoundExchange, Inc., July 23, 2010.

¹⁸ See Subpart C, Section 380.20(b). "[I]f a Noncommercial Educational Webcaster is also eligible for any other rates and terms for its Eligible Transmissions during the period January 1, 2011, through December 31, 2015, it may, by written notice to the Collective in a form to be provided by the Collective, elect to be subject to such other rates and terms rather than the rates and terms specified in this subpart." 75 Fed. Reg. 62, 16383 (April 1, 2010).


¹⁹ "The Committee expects CRJs to act in a manner which ensures that the timetable for proceedings as set forth in this bill as amended are adhered to, *while helping to facilitate the ultimate goal of conflict resolution between parties.*" H.R. Rep. No. 108-408, at 34 (2003) (emphasis added).

²⁰ 17 U.S.C. § 803(b)(3). "In granting CRJs the necessary authority to adopt as binding on all participants settlement agreements proposed by some or all of the participants in rate-setting or distribution proceedings, the Committee intends that the bill will facilitate and encourage settlement agreements for determining royalty rates and establishing distribution of royalties throughout the entire process under Chapter 8. The Committee believes that by creating formalized time periods for encouraging settlement under the direction of the CRJs, parties will necessarily focus their attention on the goal of achieving a settlement." H.R. Rep. No. 108-408, at 33 (2003).

²¹ 17 U.S.C. § 801(b)(7). "Subsection 801(b)(7) gives the CRJs the necessary authority to adopt as binding on all participants settlement agreements proposed by some or all of the participants in ratesetting or distribution proceedings." H.R. Rep. No. 108-408, at 24 (2003).

settlement was forged.²² Those acts allow parties to accede that their settlements reflect, for courts such as this, the rates and terms to which a willing buyer and willing seller would agree in the marketplace.²³ In this case CBI and SoundExchange did agree that the rates and terms negotiated in their Settlement should be precedential.²⁴

10. Given that Congress encouraged settlements generally, that CBI and SoundExchange did reach such a settlement, and that the those parties were in agreement that the Settlement be precedential, it would contravene Congress's intent to ignore the accord of the parties and not adopt as the statutory rates and terms what CBI and SoundExchange, a willing buyer and seller, agree is fair and reasonable.



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²² See Webcaster Settlement Act of 2009, Pub. L. No. 111-36.

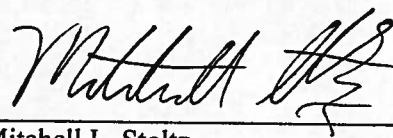
²³ "This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection." 17 U.S.C. § 114(f)(5)(C).

²⁴ See Joint Motion.

CERTIFICATE OF SERVICE

I, Mitchell L. Stoltz, do hereby certify that copies of the foregoing filing were sent via email and first class mail this 10th day of September, 2010 to the following:

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