

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, DC

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

**Comments of KXUL Radio at the University of Louisiana at Monroe  
on Proposed Regulations Governing the Rates and Terms  
for the Digital Performances of Sound Recordings**

Student-operated radio station KXUL, licensed to the University of Louisiana at Monroe, files these Comments in response to the Copyright Royalty Judges' ("CRJs") April 1, 2010, publication of proposed regulations for the digital performances of sound recordings. KXUL specifically submits its support for the regulations proposed as "Subpart C – Noncommercial Educational Webcasters."

**Introduction.**

The University of Louisiana at Monroe is a regional four-year state-assisted public institution of higher education with a population of approximately 9,000 students as of the fall of 2009, is located in the northeastern portion of the state of Louisiana, and offers a broad array of academic and professional programs through the doctorate degree. KXUL, a noncommercial educational radio station, obtained its first broadcast license from the Federal Communications Commission in 1973. KXUL is staffed principally by student volunteers and is administered by the academic College of Arts and Sciences. Mass Communications students may receive

academic credit for their involvement with the radio station; however, students with a variety of majors participate in the operations of KXUL, and many student volunteers at the station do not have professional aspirations in radio or broadcasting.

Funding for the operation of KXUL is finite, and is derived exclusively from student activity fees levied by a popular vote of the ULM student body; KXUL receives no state funding, no direct financial support from the ULM general fund, and no federal funding from the Corporation for Public Broadcasting. By federal regulation, KXUL cannot air advertising on its over-the-air broadcasts. A very small number of student staff members receive part-time work-study wages at the present federal minimum of \$7.25 per hour. The majority of the KXUL staff is comprised of volunteers. The KXUL student staff presently numbers fewer than one dozen students in total. KXUL has no full-time employees.

KXUL launched its first Web site in 1996. The station began the digital non-subscription retransmission of its over-the-air programming via the Web on July 2, 1998, utilizing free audio streaming software. KXUL provides all of its own audio streaming and Web services, software and hardware. The amount of traffic KXUL can service with its Web audio streams is restricted because of the limited network bandwidth the radio station shares with the rest of the university campus.

#### **Discussion.**

KXUL supports the regulations now proposed for Noncommercial Educational Webcasters ("NEWs") because these rates and terms recognize this unique class of Webcasters and their particular use of sound recordings in a way much more appropriate than prior regulations and rate determinations. Any negotiation will represent compromises from both parties to the negotiation, and these proposed regulations appear to meet that expectation.

Because the parties to this particular negotiation represent asymmetric power, with SoundExchange possessing much greater comparative weight in the negotiations, NEWs are clearly limited in their ability to truly achieve rates and terms representing both the willing buyer and the willing seller in a competitive marketplace, as is contemplated in the applicable statute. Though perhaps still imperfect, these proposed regulations vastly improve upon the present regulations.

**NEWs as a distinct class of Webcasters.**

A vital aspect of these proposed regulations is that, as a product of negotiations between SoundExchange, representing artists and sound recording owners as sellers, and College Broadcasters, Inc. ("CBI"), representing certain Webcasters as buyers, the parties mutually agree that NEWs represent a distinct class of services, meriting rates and terms under the Section 112 and 114 statutory licenses differentiated from all other services.

The historical practice of sweeping dissimilar services under the same broad regulations has naturally resulted in rates and terms inappropriate for some. Because the existing regulations establishing rates and terms for the statutory licenses have been developed with the largest of services in mind, small noncommercial services such as the NEWs have been subjected to expectations wholly inappropriate for their nature and scale.

Addressing NEWs in a separate subpart of the regulations lays the foundation for properly recognizing these services as distinct from all others, both for the current rate-setting period and going forward.

**Reports of Use requirements specific to NEWs.**

By mutual agreement the parties negotiating these proposed regulations recognize that existing burdensome regulations specifying the requirements for statutory notices of use of sound

recordings are inappropriate for uses by at least some services. The resulting transactional costs for each the royalty recipients and the rate payers are out of proportion to the royalties paid by low-intensity users.

In setting the existing regulations for notices of use the CRJs declined to adopt proposals for data processing fees in lieu of more onerous reporting requirements – as are again proposed here under the regulations published for comment – stating that, “The data proxy fee alternative as proposed here represents a step backward in achieving better accuracy in reporting.”<sup>1</sup> Information previously provided the CRJs by SoundExchange reveals that a large number of *all* services have proven unable to satisfy the detailed requirements specified under the regulations;<sup>2</sup> therefore, the proposed data processing fee alternative should not be interpreted as “a step backward” in achieving reporting accuracy – because the existing standard has proven to be demonstrably unworkable – but the proposal should be seen as right-sizing regulations to match a particular class of service. This is not a backward step, because the goal established by the existing regulations has been unachievable, particularly for many NEWs. Willing a particular outcome, as have the existing reporting regulations, cannot make it so.

Here, the CRJs should especially note that the data proxy fee in lieu of detailed reporting requirements, under very specific conditions, has been embraced by SoundExchange and NEWs alike.

Because these regulations, including the reporting provisions, are jointly proposed by parties representing both sides of the transaction, it becomes evident that the reporting requirement is clearly a term a willing buyer and a willing seller each consider when entering

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<sup>1</sup> 74 F.R. 52418 (October 13, 2009).

<sup>2</sup> SoundExchange states that, “[A]pproximately 60% of licensees who have made payments for performances in the first quarter of 2008 have failed to provide a corresponding report of use.” *Docket No. RM2008-7, Comments of SoundExchange, Inc.* (May 26, 2009) at p. 15.

into a transaction in the marketplace. The historical practice of separating the setting of reporting requirements from rate setting has confounded this natural interrelationship. The existing regulations now set an artificially high floor for NEWs to overcome in negotiations and therefore those regulations have served to distort the working of a competitive marketplace. To surmount the effect of this distortion, NEWs have been forced to make even greater concessions for other terms in order to garner SoundExchange's concurrence; SoundExchange's asymmetric power was unnaturally magnified because reporting regulations were previously set apart from the setting of rates and other terms of the statutory license.

Nevertheless, the provisions under the proposed regulations detailing reporting requirements for certain NEWs are essential considerations for those services.

**Requirements for NEWs not electing the data proxy fee in lieu of providing reports of use.**

The proposed regulations establish at least two additional reporting-related provisions critical to NEWs:

First, the proposed regulations allow smaller NEWs not electing to pay the data proxy fee in lieu of providing reports of use to submit reports on a sample versus a census basis. Present regulations carve out a census reporting exemption for certain FCC-licensed simulcasters, but the current regulations, perhaps by oversight, fail to recognize that the majority of Web-only NEWs without an FCC license are operated just like licensed stations and face similar reporting challenges. The proposed regulations properly remove that disparity.

Second, the proposed regulations allow certain NEWs not electing to pay the data proxy fee in lieu of providing reports of use to pay usage fees and to submit reports based on Aggregate Tuning Hours ("ATH") versus Actual Total Performances ("ATP"). Prior record before the CRJs well documents the unnecessary negative consequences of requiring reporting ATP by

many NEWs.

**The minimum annual fee.**

The proposed regulations extend the same \$500 minimum annual fee adopted under previous statutory license rate determinations. KXUL recognizes that the most recent minimum annual fee precedent was vacated by the federal court as arbitrary and remains under separate remand.

KXUL believes, based on its assessment of the inherent value of the performances being licensed and on the volume of utilization by the typical NEW, a \$500 minimum annual fee for digital sound recording performances represents an above-market cost for this class of service.

Though the CRJs have consistently resisted comparisons between royalties paid for digital performances of sound recordings and for performances of underlying musical works, as a practical matter most NEWs, as buyers in the marketplace, as a rule make exactly such a comparison. In aggregate, the annual blanket fees noncommercial educational stations, as licensed broadcasters, pay to performance rights organizations under the Section 118 statutory license – minimum annual fee and total royalty obligation, combined – are presently slightly more than the \$500 minimum annual fee specified in the instant proposed regulations; however, the level of utilization for virtually all NEW simulcasters is but an extremely small fraction of their concomitant over-the-air broadcast audience. Therefore, a minimum annual fee for NEWs, subject to a truly competitive marketplace, certainly would be something less than \$500.

The negotiations leading to the regulations proposed in the instant notice took place in an imperfect marketplace. As discussed *supra*, SoundExchange possessed disproportionately higher power in the negotiations. Reporting regulations established outside of the rate setting context skewed the negotiating positions of the parties, in the favor of SoundExchange.

Once rung, a bell cannot be un-rung. Calculating the likelihood that the ongoing rate setting process is predisposed to reaffirm previous decisions, the above-market minimum annual fee becomes reluctantly acceptable only in the context of the other weighty considerations discussed in these comments.

**Usage fees.**

As a buyer in the marketplace, KXUL, like most NEWs, assesses the transaction of obtaining the digital sound recording performance license in the context of the only other performance license obtained by the station. The Section 118 statutory license for noncommercial educational stations, with a history much longer than for the Section 112 and 114 licenses, has always featured a blanket royalty fee covering any and all performances.

The CRJs were persuaded by previous theoretically-based testimony that NEWs' performances at some volume become competitive with commercial services. On that basis, the Web II rate setting decision enacted a usage fee above a specified audience threshold.

Buyer KXUL disagrees with that conclusion, based on three principal factors: 1) the SoundExchange economist's theoretical model completely ignored the strong precedent of the Section 118 license, and how that precedent would weigh on decisions by a willing buyer in the marketplace; 2) the long precedent of the Section 118 license, without audience thresholds, also debunks the relevance of a supposed point of competitive convergence by NEWs with commercial services; and 3) a discord is created when suggesting that NEWs become commercially competitive at very small audience sizes, yet Section 118 performances are not similarly competitive, no matter the audience size.

This history again interferes with the ability of any negotiations to approximate a competitive marketplace. SoundExchange is once more the beneficiary of the influence of the

artificial processes of the statutory license rate setting proceeding.

Apart from the propriety of *any* usage fee is the determination of the *amount* of any usage fee through the interplay of the willing buyer and willing seller in the conceptual competitive marketplace.

An overriding strategy for SoundExchange, no doubt, is to establish above-market usage fees for NEWs, to create rate precedent for other services in the ongoing Web III proceeding and for future rate determinations.

NEWs – disadvantaged in negotiating other key provisions, particularly the reporting elements discussed *supra*, and overpowered by a weightier opponent – have been positioned to begrudgingly accept above-market usage fees, hoping that few of the covered NEWs will become subject to the additional fees. No matter how few NEWs might be subject to such fees, above-market fees are still above what would be set in a competitive market.

Taken in isolation, KXUL contends that the usage fees in the proposed regulations are quite likely above-market; however, NEWs, recognizing their disadvantaged negotiating position, will swallow this bitter pill to obtain the other key provisions in the proposed regulations.

#### **Audience thresholds, going forward.**

The proposed regulations contain certain audience thresholds in multiple contexts: 1) to establish the supposed point where NEWs competitively converge with commercial services, and 2) to describe eligibility for several reporting options. Appropriate or not, such audience thresholds appear to be preordained under the rate setting process.

The audience thresholds proposed in these proposed regulations are all obviously derived from a best-guess figure in the prior Web II determination .

As the overall Webcasting audience grows over time, as is expected and likely, future rate setting proceedings should respond with corresponding increases in any and all audience thresholds. As the total Webcasting audience grows, the point at which NEWs supposedly compete will also logically rise. Should future audience thresholds remain unchanged – or, worse, should they be reduced – the growth of NEWs will be unfairly stunted.

**The proposed regulations represent one of several options for NEWs.**

The proposed regulations permit a Webcaster that objects to any of these terms to elect to be subject to any available rates and terms, for which the Webcaster qualifies, other than those in proposed Subpart C.<sup>3</sup>

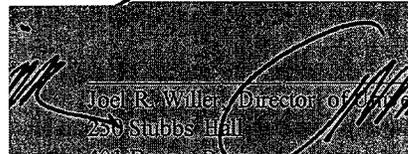
Should objectors to these proposed regulations arise, the CRJs should reject such objections. The availability of alternatives, at the Webcaster's sole option, ensures that no Webcaster can credibly claim to be adversely impacted by the adoption of these proposed regulations.

**Conclusion.**

For the reasons outlined above, radio station KXUL and the University of Louisiana at Monroe encourages the CRJs to adopt the proposed Subpart C, as published on April 1, 2010.

Respectfully Submitted,

University of Louisiana at Monroe



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<sup>3</sup>Proposed regulations at § 380.2(b).

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**Date:** Wed, Apr 21, 2010 11:10 PM  
**Subject:** Comments RE: 75 F.R. 16377, Docket No. 2009-1, CRB Webcasting III

Student-operated radio station KXUL, licensed to the University of Louisiana at Monroe, respectfully submits the attached Comments in response to the Copyright Royalty Judges' ("CRJs") April 1, 2010, publication of proposed regulations for the digital performances of sound recordings.

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