

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

\_\_\_\_\_) )  
In the Matter of ) )  
 ) )  
Notification of Agreement under the Small ) Docket No. \_\_\_\_\_  
Webcaster Settlement Act of 2002 ) )  
\_\_\_\_\_) )

**NOTIFICATION OF AGREEMENT UNDER THE SMALL  
WEBCASTER SETTLEMENT ACT OF 2002 AND REQUEST FOR  
PUBLICATION OF RATES AND TERMS IN THE FEDERAL REGISTER**

SoundExchange, the receiving agent designated by the Librarian of Congress for the collection of royalty payments made by eligible nonsubscription transmission services pursuant to Sections 112 and 114 of the Copyright Act, and a group of membership organizations whose members include Noncommercial Webcasters, including American Council on Education (“ACE”); Collegiate Broadcasters, Inc. (“CBI”); the Intercollegiate Broadcasting System, Inc. (“IBS”) jointly with Harvard Radio Broadcasting Co., Inc.; and the National Religious Broadcasters Music License Committee (“NRBMLC”) on behalf of their members and/or stations that operate or plan to operate noncommercial webcasting services (collectively the “Requesting Parties”), hereby notify the Copyright Office that they have reached an agreement for the reproduction and performance of sound recordings by Noncommercial Webcasters under the Section 112 and 114 statutory licenses, pursuant to the authority granted in the Small Webcaster Settlement Act of 2002 (the “SWSA”). The rates and terms comprising that agreement are set forth as Appendix A (the “Rates and Terms”).

The Requesting Parties respectfully request that the Office promptly publish the Rates and Terms in the *Federal Register* pursuant to the SWSA so that the agreement embodied in the Rates and Terms will be available as an option to any eligible Noncommercial Webcaster and will be binding on all copyright owners of sound recordings and other persons entitled to payment under Section 114. The Requesting Parties ask that noncommercial webcasters be required to make an election to accept the Rates and Terms and notify SoundExchange to that effect as set forth in the Rates and Terms.

**I. Background to the Negotiation of the Rates and Terms Under SWSA.**

**The Parties**

SoundExchange is an organization formed for the purpose of administering the Section 112 and 114 statutory licenses. Its members include companies that are affiliated with record labels accounting for over 90% of the sound recordings lawfully sold in the United States, and it is governed by a board comprised equally of representatives of copyright owners and performers.<sup>1</sup> In the July 8, 2002 order of the Librarian of Congress establishing rates and terms for certain digital performances and ephemeral reproductions of sound recordings, 67 Fed. Reg. 45240 (July 8, 2002) (the “Order”), SoundExchange was designated as receiving agent for the collection of royalty payments made by eligible nonsubscription transmission services pursuant to the statutory licenses in Sections 112 and 114 of the Copyright Act.

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<sup>1</sup> SoundExchange is currently an unincorporated division of the Recording Industry Association of America (“RIAA”). It is anticipated that SoundExchange will be spun off into a separately incorporated entity.

American Council on Education (“ACE”), the major coordinating body for all the nation’s higher education institutions, seeks to provide leadership and a unifying voice on key higher education issues and to influence public policy through advocacy, research, and program initiatives. ACE represents 2,000 public and private colleges and universities.

Collegiate Broadcasters, Inc. (“CBI”) represents students involved in radio, television, webcasting and other related media ventures; ensures a commitment to education and the student pursuit of excellence through active involvement in electronic media; promotes cooperative efforts between CBI and other national, regional, and state media organizations; and facilitates the discussion of issues related to student-operated electronic media and other community-oriented programs.

Intercollegiate Broadcasting System, Inc. (“IBS”) is a Rhode Island not-for-profit corporation with nearly seven hundred non-profit member stations throughout the United States, representing the bulk of the not-for-profit educationally affiliated radio stations/webcasters. Harvard Radio Broadcasting Co., Inc. is a Massachusetts eleemosynary corporation, licensee of Station WHRB (FM), Cambridge, Massachusetts.

The National Religious Broadcasters Music License Committee (“NRBMLC”) is a committee formed under the auspices of the National Religious Broadcasters to represent religious, classical and other mixed-talk and limited music formatted radio stations, both commercial and noncommercial, in music licensing matters. The primary goal of the NRBMLC is to assure that stations with formats that use less music than music-intensive stations pay licensing fees that are fairly related to the limited amount of music they use.

## **Enactment of the SWSA**

Certain Noncommercial Webcasters<sup>2</sup> who did not participate in the copyright arbitration royalty panel (“CARP”) proceeding leading to the Order expressed reservations to Congress about the fees for noncommercial webcasters set forth in the Order and asked for a framework to negotiate a different payment structure. Congress, through the leadership of Representative James Sensenbrenner, Chairman of the Committee on the Judiciary of the House of Representatives, strongly encouraged representatives of copyright owners of sound recordings and representatives of the Noncommercial Webcasters to engage in negotiations to resolve the dispute over noncommercial compulsory license fees by mutual agreement. Congress enacted a six-month moratorium on noncommercial webcaster royalty fee payments for royalties due from October 28, 1998 through May 31, 2003, in order to allow the parties time to reach an agreement. The SWSA was passed by Congress on November 15, 2002 and signed by the President on December 4, 2002.

## **Noncommercial Provisions of the SWSA**

Under Section 114(f)(5)(A) of the Copyright Act, as added by the SWSA, SoundExchange, as receiving agent, is authorized to enter into agreements for the reproduction and performance of sound recordings under Sections 112 and 114 by one or

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<sup>2</sup> For purposes of the SWSA, “Noncommercial Webcasters” are defined as webcasters that are exempt from taxation under Section 501 of the IRS code or have applied in good faith for such an exemption and have a commercially reasonable expectation that such exemption shall be granted, or a State or governmental entity webcasting for public purposes. 17 U.S.C. § 114(f)(5)(E)(i). The term “webcaster” is used to mean a person or entity that has obtained a compulsory license to make eligible nonsubscription transmissions pursuant to Section 112 or 114. 17 U.S.C. § 114(f)(5)(E)(iii). Thus, for purposes of the SWSA, noncommercial entities that stream over-the-air broadcast signals on the Internet are also considered webcasters.

more Noncommercial Webcasters during the period beginning on October 28, 1998, and ending on December 31, 2004. Once published in the *Federal Register* pursuant to Section 114(f)(5)(B), any such agreement will be binding on all copyright owners of sound recordings and other persons entitled to payment under Section 114, in lieu of the rates and terms provided in the Order or any other determination by a CARP or decision by the Librarian of Congress.

The SWSA provides that the payments to be made by Noncommercial Webcasters for the period from October 28, 1998 through May 31, 2003 are due on June 20, 2003. Any agreement with noncommercial webcasters may include other terms and conditions, including requirements by which copyright owners may receive notice of the use of their sound recordings and under which records of such use shall be kept and made available by noncommercial webcasters. 17 U.S.C. § 114(f)(5)(A). The Rates and Terms set forth in Appendix A conform to these requirements and contain such additional terms and conditions.

### **Agreements Reached Under SWSA Are Nonprecedential**

SWSA also requires the *Federal Register* notice to include a statement containing the substance of 17 U.S.C. § 114(f)(5)(C), which provides that neither the legislation nor any agreement like the Rates and Terms shall “be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving” royalty setting or notice and recordkeeping under Sections 112 and 114. The purpose of this provision is explained in Section 114(f)(5)(C) of the Copyright Act:

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 small 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).

17 U.S.C. § 114(f)(5)(C).<sup>3</sup>

## **II. The Requesting Parties Ask for the Publication and Availability of the Rates and Terms According to the Provisions of the SWSA.**

Since passage of the SWSA, the Requesting Parties have reached an agreement that the Rates and Terms set forth in Appendix A should be made available as an option to Noncommercial Webcasters meeting the eligibility conditions set forth therein, pursuant to the procedures provided in the SWSA. Under Section 114(f)(5)(B) of the Copyright Act, as added by the SWSA, the Office is to cause any such rates and terms to be published in the *Federal Register*. Accordingly, the Requesting Parties respectfully request that the Office promptly publish the Rates and Terms in the *Federal Register*.

The Requesting Parties do not believe that the Rates and Terms provide for or in any way approximate fair or reasonable royalty rates and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. Consistent with the provisions of Section 114(f)(5)(C), the Rates and Terms truly are a compromise motivated by extraordinary and unique circumstances and should not be given any precedential effect whatsoever.

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<sup>3</sup> In addition, Section 114(f)(5)(D) provides that nothing in the SWSA or agreements reached pursuant to its provisions shall be taken into account in the pending appeal of the Order before the United States Court of Appeals for the District of Columbia Circuit. 17 U.S.C. § 114(f)(5)(D).

**Conclusion**

Pursuant to the authority granted in the SWSA, the Requesting Parties respectfully ask that the Copyright Office publish the Rates and Terms in the *Federal Register* pursuant to Section 114(f)(5)(B) of the Copyright Act.

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