

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C. 20540

**RECEIVED**  
SEP 29 2009  
Copyright Royalty Board

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

**DIRECT CASE OF COLLEGE BROADCASTERS INC.**

Pursuant to 37 C.F.R. § 351.4 and the June 24, 2009 Order of the Copyright Royalty Board, College Broadcasters Inc. ("CBI") hereby submits its written Direct Case consisting of:

1. CBI's proposed rates and terms, embodied in Exhibit A to the Joint Motion of CBI and Sound Exchange to Adopt Proposed Partial Settlement, dated August 13, 2009.
2. Direct Written Testimony of Will Robedee.

In accordance with 37 C.F.R. § 350.4, an original, five paper copies, and one electronic copy are being submitted herewith.

Respectfully submitted,



9/28/09

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**Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

**RECEIVED**

AUG 13 2009

Copyright Royalty Board

In the Matter of:

Digital Performance in Sound Recordings  
and Ephemeral Recordings

Docket No. 2009-1  
CRB Webcasting III

**JOINT MOTION TO ADOPT PARTIAL SETTLEMENT**

SoundExchange, Inc. ("SoundExchange") and College Broadcasters, Inc. ("CBI") (collectively the "Parties") have reached a partial settlement of the above-captioned proceeding (the "Proceeding") for certain internet transmissions by college radio stations and other noncommercial educational webcasters. The Parties are pleased to submit the proposed regulatory language attached as Exhibit A (the "Settlement") for publication in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2). The Parties respectfully request that the Judges adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet, and related ephemeral recordings, as more specifically set forth in the Settlement.

**I. The Parties**

SoundExchange and CBI are both participants in this Proceeding.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of both sound recording copyright owners and performers. The Copyright Royalty Judges have designated SoundExchange as the collective to receive and distribute royalties under Sections 112(e) and 114 on behalf of all copyright owners and performers,

and SoundExchange currently maintains more than 35,000 artist accounts and more than 4,000 copyright owner accounts.

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. Many of CBI's radio station and other members make internet transmissions subject to licensing under Sections 112(e) and 114.

## **II. Nature of the Settlement**

Under the authorization granted in the Webcaster Settlement Act of 2009, Pub. L. No. 111-36 (to be codified at 17 U.S.C. § 114(f)(5)), SoundExchange was authorized to enter into agreements for the reproduction and performance of sound recordings under Sections 112(e) and 114 of the Copyright Act that, once published in the Federal Register, shall be binding on all copyright owners and performers, in lieu of any determination by the Copyright Royalty Judges, and available, as an option, to any webcaster meeting the eligibility conditions of such agreement. Pursuant to that Act, the Parties concluded an agreement concerning royalty rates and terms for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet during the period 2011-2015.

That agreement has been published in the *Federal Register* by the Copyright Office pursuant to 17 U.S.C. § 114(f)(5)(B). 74 Fed. Reg. 40,616 (Aug. 12, 2009). Under the Webcaster Settlement Act, the agreement is now "available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement." 17 U.S.C. § 114(f)(5)(B)

The entities eligible to elect to be covered by the agreement, as contemplated by the Webcaster Settlement Act, are, broadly speaking, noncommercial webcasters operated or sanctioned by, and staffed by students enrolled at, a college, university or other school and not qualified to receive funding from the Corporation for Public Broadcasting. (SoundExchange has a separate Webcaster Settlement Act agreement with the Corporation for Public Broadcasting.)

The Settlement implements the royalty rates and terms of the Parties' Webcaster Settlement Act agreement for the period 2011-2015, within the context of regulations based on the Copyright Royalty Judges' current webcasting regulations at 37 C.F.R. Part 380. Thus, the Settlement specifies statutory rates and terms for "Eligible Transmissions" by "Noncommercial Educational Webcasters" (as defined in proposed Sections 380.2(d) and (f) of Exhibit A). Adoption of the Settlement would bring into alignment the statutory rates and terms and Webcaster Settlement Act rates and terms for Noncommercial Educational Webcasters for the period 2011-2015.

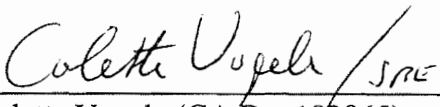
### **III. Adoption of the Settlement by the Copyright Royalty Judges**

Pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority "[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding." Such an agreement may serve as the basis of proposed regulations if other interested parties who "would be bound by the terms, rates or other determination" set by the agreement are afforded "an opportunity to comment on the agreement," *id.* § 801(b)(7)(A)(i), and provided that, in the event a participant in the proceeding who would be bound by the settlement raises an objection, the Judges conclude that the rates

and terms set forth in the settlement agreement “provide a reasonable basis for setting statutory terms or rates.” *Id.* § 801(b)(7)(A)(ii). Accordingly, the Parties respectfully request that the Judges publish the Settlement for notice and comment, and in due course adopt the Settlement in its entirety as the statutory rates and terms for Eligible Transmissions by Noncommercial Educational Webcasters for the period 2011-2015.

Respectfully submitted,

  
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August 13, 2009

## EXHIBIT A – PROPOSED REGULATIONS

### PART 380--RATES AND TERMS FOR NONCOMMERCIAL EDUCATIONAL WEBCASTERS MAKING CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS OF SOUND RECORDINGS

Sec.

380.1 General.

380.2 Definitions.

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380.6 Verification of royalty payments.

380.7 Verification of royalty distributions.

380.8 Unclaimed funds.

Authority: 17 U.S.C. §§ 112(e), 114(f), 804(b)(3).

**[Note: The section numbers used herein were employed for convenience of reference. The provisions hereof could be included in a separate subpart or otherwise be renumbered depending upon what other rates and terms also need to be included in Part 380 at the conclusion of the proceeding.]**

#### § 380.1 General.

(a) Scope. This Part 380 establishes rates and terms, including requirements for royalty payments, record keeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. § 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. § 112(e), during the period January 1, 2011, through December 31, 2015.

(b) Legal compliance. Noncommercial Educational Webcasters relying upon the statutory licenses set forth in 17 U.S.C. §§ 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this Part, and any other applicable regulations not inconsistent with the rates and terms set forth herein. However, if 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 Part 380. If a single educational institution has more than one station making Eligible Transmissions, each such station may determine individually whether it elects to be subject to this Part 380.

(c) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this Part, 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 Part to transmissions within the scope of such agreements.

### § 380.2 Definitions.

For purposes of this Part, the following definitions shall apply:

(a) ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. § 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

(b) Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 license period, the Collective is SoundExchange, Inc.

(c) Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this Part pursuant to the statutory licenses under 17 U.S.C. §§ 112(e) and 114(f).

(d) Eligible Transmission means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the internet.

(e) Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. § 114(f), and subject to the limitations specified in 17 U.S.C. § 112(e).

(f) Noncommercial Educational Webcaster means a Noncommercial Webcaster (as defined in 17 U.S.C. § 114(f)(5)(E)(i)) that (i) 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; (ii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) 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 degree-granting educational institution; and (iv) 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.

(g) Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Noncommercial Educational Webcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings, including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(h) Performers means the independent administrators identified in 17 U.S.C. §§ 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. § 114(g)(2)(D).

(i) Qualified Auditor is a Certified Public Accountant.

### **§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.**

(a) Minimum Fee. Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of \$500 (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this Part 380. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in Section 380.4(g)(1), shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective.

(b) Additional Usage Fees. If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (“Usage Fees”) for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

| <u>Year</u> | <u>Rate per Performance</u> |
|-------------|-----------------------------|
| 2011        | \$0.0017                    |
| 2012        | \$0.0020                    |
| 2013        | \$0.0022                    |
| 2014        | \$0.0023                    |
| 2015        | \$0.0025                    |



For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under § 380.4(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided above in this § 380.3(b) based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per-channel or -station basis.

(c) Ephemeral Royalty. The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this Part 380 is deemed to be included within the royalty payments set forth above and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting.

#### **§ 380.4 Terms for making payment of royalty fees and statements of account.**

(a) Payment to the Collective. A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.3 to the Collective.

(b) Designation of the Collective.

(1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Noncommercial Educational Webcasters due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. §§ 112(e) or 114(g).

(2) If SoundExchange, Inc., should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. §§ 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) Minimum Fee. Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. § 114 and/or 17 U.S.C. § 112(e) as of said date but begins doing so thereafter shall be due by the 45th

day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by the Collective, that the Noncommercial Educational Webcaster (i) qualifies as a Noncommercial Educational Webcaster for the relevant year, and (ii) did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay required any required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in § 380.4(g) it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) Usage Fees. In addition to its obligations pursuant to § 380.4(c), a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.3(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) Late Fees. A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) Statements of Account. Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

- (1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and, if the statement of account covers a single station only, the call letters or name of the station;
- (2) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this Part 380;
- (3) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution.
- (5) The printed or typewritten name of the person signing the statement of account;
- (6) The date of signature;
- (7) The title or official position held by the person signing the statement of account;

- (8) A certification of the capacity of the person signing; and
- (9) A statement to the following effect:

I, the undersigned officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) Reporting by Noncommercial Educational Webcasters in General.

(1) Reporting Waiver. In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for purposes of this Part 380 only, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of \$100 in lieu of providing reports of use for the calendar year pursuant to the regulations at § 370.3. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this § 380.4(g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in § 380.4(c) for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

(2) Sample-Basis Reports. A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at § 370.3 as they existed on January 1, 2009, except that, notwithstanding § 370.3(c)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) Census-Basis Reports. If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this § 380.4(g)(3): (i) the Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual

channel or station for more than one calendar month in the immediately preceding calendar year; (ii) the Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or (iii) the Noncommercial Educational Webcaster otherwise does not elect to be subject to §§ 380.4(g)(1) or (2). A Noncommercial Educational Webcaster required to report pursuant to this § 380.4(g)(3) shall provide reports of use to the Collective quarterly on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by § 370.3 as of January 1, 2009), except that, notwithstanding § 370.3(c)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with this § 380.4(g)(3). For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this § 380.4(g)(3) for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under this § 380.4(g)(3) shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(h) Distribution of Royalties.

(1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in § 370.3 and this Part, except that in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to § 380.4(g)(1), the Collective shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) Server Logs. Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this Part. To the extent that a third-party web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

(j) Representation of Compliance and Non-Waiver. By providing Statements of Account and payments pursuant to this Part 380, a person or entity represents and warrants that it qualifies as a Noncommercial Educational Webcaster and is eligible for the reporting option set forth in § 380.4(g) that it elects for the relevant year. The Collective's acceptance of an election, payment or reporting does not give or imply any acknowledgment that a transmitting entity qualifies as a Noncommercial Educational Webcaster or for a particular reporting option or is in compliance with the requirements of the statutory licenses under 17 U.S.C. §§ 112(e) and 114 (including this Part 380), and shall not be used as evidence that it so qualifies or is in compliance. The Collective and Copyright Owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements.

### **§ 380.5 Confidential information.**

(a) Definition. For purposes of this Part, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster submitting the statement.

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster's statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. §§ 112(e) and 114(f) by the Noncommercial Educational Webcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. §§ 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

### **§ 380.6 Verification of royalty payments.**

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Educational Webcaster.

(b) Frequency of Verification. The Collective may conduct a single audit of a Noncommercial Educational Webcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of Intent to Audit. The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Noncommercial Educational Webcaster, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Noncommercial Educational Webcaster to be audited. Any such audit shall be conducted by an independent Qualified Auditor identified in the notice and shall be binding on all parties.

(d) Acquisition and Retention of Report. The Noncommercial Educational Webcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable Verification Procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Noncommercial Educational Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Noncommercial Educational Webcaster reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the Verification Procedure. The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Noncommercial Educational Webcaster shall, in addition

to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

**§ 380.7 Verification of royalty distributions.**

(a) General. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of Verification. A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of Intent to Audit. A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) Acquisition and Retention of Report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable Verification Procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the Verification Procedure. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

**§ 380.8 Unclaimed funds.**

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this Part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. § 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.



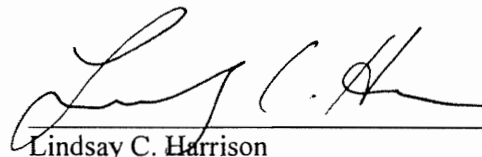
## CERTIFICATE OF SERVICE

I, Lindsay C. Harrison, do hereby certify that copies of the foregoing Joint Motion to Adopt Partial Settlement were sent via overnight mail this 13th day of August, 2009 to the following:

|  |  |
|--|--|
| <p>William Malone<br/>James Hobson<br/>Matthew K. Schettenhelm<br/>MILLER &amp; VAN EATON, PLLC<br/>1155 Connecticut Avenue, NW, Suite 1000<br/>Washington, DC 20036-4306<br/>wmalone@millervaneaton.com<br/>mschettenhelm@millervaneaton.com<br/><i>Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co. Inc.</i></p> | <p>A. Wray Fitch III<br/>Kenneth E. Liu<br/>GAMMON &amp; GRANGE, P.C.<br/>8280 Greensboro Drive, 7th Floor<br/>McLean, VA 22102<br/>Fax: 703/761-5023<br/>awf@gg-law.com<br/>kel@gg-law.com<br/><i>Counsel for NCE Radio Coalition</i></p> |
| <p>David D. Oxenford<br/>DAVIS WRIGHT TREMAINE LLP<br/>1919 K Street, N.W., Suite 200<br/>Washington, DC 20006<br/>Fax: 202/973-4499<br/>davidoxenford@dwt.com<br/><i>Counsel for AccuRadio, LLC, Digitally Imported Inc., ioWorldMedia, Inc., and Radio Paradise, Inc</i></p>   | <p>Stuart Nolan<br/>WOOD, MAINES &amp; NOLAN, P.C.<br/>4121 Wilson Boulevard, Suite 101<br/>Arlington, VA 22203<br/>Nolan@LegalCompass.com<br/><i>Counsel for Catholic Radio Association (CRA)</i></p>                                     |
| <p>David A. Zapolsky<br/>AMAZON.COM, INC.<br/>1200 12th Avenue South<br/>Seattle, WA 98144<br/>davidz@amazon.com</p>   | <p>Stephen Gajdosik<br/>WOOD, MAINES &amp; NOLAN, P.C.<br/>121 Broad Street<br/>Charleston, SC 29401<br/>Fax: 509/479-1186<br/>sgajdosik@bellsouth.net<br/><i>Counsel for Catholic Radio Association (CRA)</i></p>                         |
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|  |  |
|--|--|
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| <p>David W. Rahn<br/> 7464 Arapahoe Rd., Suite B4<br/> Boulder, CO 80303<br/> dave@customchannels.com</p>  | <p>Bryan Payne<br/> SPACIAL AUDIO SOLUTIONS, LLC<br/> 200 E 6th Street, Suite 204<br/> Austin, Texas 78701<br/> Fax: 512/519-4370<br/> bryan@spacialaudio.com</p>  |
| <p>William B. Colitre<br/> ROYALTY LOGIC, LLC<br/> 21122 Erwin Street<br/> Woodland Hills, CA 91367<br/> Bcolitre@RoyaltyLogic.com<br/> Fax: 818/558-3484<br/> <i>Counsel for Royalty Logic, LLC</i></p>   | <p>Suzanne Head<br/> NATIONAL ASSOCIATION OF BROADCASTERS<br/> 1771 N Street NW<br/> Washington, DC 20036<br/> shead@nab.org</p>   |
| <p>Bruce Joseph<br/> Karyn Ablin<br/> Matthew Astel<br/> WILEY REIN LLP<br/> 1776 K Street, NW<br/> Washington, DC 20006<br/> Fax: 202/719-7049<br/> bjoseph@wileyrein.com<br/> kablin@wileyrein.com<br/> mastle@wileyrein.com<br/> <i>Counsel for Sirius XM Radio Inc.; Counsel for National Religious Broadcasters MusicLicense Committee; Counsel for National Religious Broadcasters Noncommercial Music License Committee</i></p> | <p>Ara Hovanesian<br/> HOVANESIAN &amp; HOVANESIAN<br/> 301 E. Colorado Blvd., Ste. 514<br/> Pasadena, CA 91101-1919<br/> Fax: 626/795-8900<br/> hovanesian@earthlink.net<br/> <i>Counsel for Access2ip; Counsel for LIVE365, Inc.</i></p> |

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|--|--|
| <p>Lee Knife<br/> General Counsel<br/> DIGITAL MEDIA ASSOCIATION<br/> 1029 Vermont Ave., Suite 850<br/> Washington, DC 20005<br/> lknife@digimedia.org</p>   | <p>George Cheeks<br/> MTV NETWORKS<br/> 1515 Broadway<br/> New York, NY 10036<br/> Fax: 212/846-1849<br/> George.Cheeks@mtvstaff.com<br/> <i>Counsel for MTV Networks Viacom</i></p>                         |
| <p>Bennett Lincoff<br/> LAW OFFICE OF BENNETT LINCOFF<br/> 140 Riverside Drive, 7-N<br/> New York, NY 10024<br/> bennettlincoff@gmail.com<br/> <i>Counsel for mSpot, Inc.</i></p>  | <p>Brandon Casci<br/> LOUDCITY LLC<br/> 411A Highland Avenue #371<br/> Somerville, MA 02144<br/> brandon@loudcity.net</p>  |
| <p>David J. Taylor<br/> RIGHT SIZE LAW PLLC<br/> 621 Street SE<br/> Washington, DC 20003<br/> david.taylor@rightsize.com<br/> <i>Counsel for National Public Radio, Inc., its member stations, and all Corporation for Public Broadcasting -qualified radio stations</i></p> | <p>Ian C. Ballon<br/> Wendy M. Mantell<br/> GREENBERG TRAUERIG, LLP<br/> 2450 Colorado Avenue<br/> Suite 400E<br/> Santa Monica, CA 90404<br/> Fax: (310) 586-7800<br/> <i>Counsel for Slacker, Inc.</i></p> |
| <p>Kevin Saul, Associate General Counsel<br/> Matt Railo, Director, iTunes Legal<br/> APPLE<br/> 1 Infinite Loop, MS 3-ITS<br/> Cupertino, CA<br/> Fax: (408) 974-9105<br/> ksaul@apple.com<br/> mrailo@apple.com</p>  |  |



Lindsay C. Harrison

**Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C. 20540**

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

**DIRECT TESTIMONY OF WILL ROBEDEE**  
(On Behalf of College Broadcasters, Inc.)

1. My name is Will Robedee. I am currently employed by William Marsh Rice University (“Rice”) as the General Manager of KTRU-FM, a position I have held since July of 1998. I also serve as the staff adviser for RTV-5, a campus cable television station. Prior to this position, I was employed by the State University of New York as the Director of the Campus Media Center at the New Paltz campus. All together, I have over 27 years of employed and volunteer experience working in and with college radio and television stations which are primarily staffed by students, as a student staff member, a student manager, a hired consultant, and as an employee of educational institutions.

2. I currently serve as the Immediate Past President of College Broadcasters, Inc.<sup>1</sup> (“CBI”), a 501(c)(3) corporation. I came into this position after being duly elected by the membership of CBI to the board and completing terms in office as the Chair and Vice Chair<sup>2</sup>. Prior to being elected to the CBI board in 2001, I volunteered my time in order to create and maintain its website and to develop various

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<sup>1</sup> 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. Many of CBI's radio station and other members make internet transmissions subject to licensing under Sections 112(e) and 114.

<sup>2</sup> CBI recently renamed these titles to be President and Vice President, respectively, thus the incongruity in titles.

marketing and membership materials. The CBI website was directly developed based on my personal experience of developing and maintaining “College Broadcaster”, a web site which I developed to aid college radio stations, independent of any organization. Most recently, I have been hired as the first Executive Director of CBI, with the official commencement of duties to begin later this year.

3. In my various roles at CBI, I actively worked with primarily student staffed college radio and television stations by providing information through phone consultations, developing and contributing to publications, e-mail list correspondence, website maintenance and content development, convention planning and panel participation.

4. I have authored articles about college radio for College Broadcaster, the Journal of College Radio and College Media.

5. I have been a delegate and frequent speaker at the national conventions of the National Association of College Broadcasters (“NACB”), Intercollegiate Broadcasting System (“IBS”), College Media Advisers (“CMA”) and CBI.

6. I have led CBI’s efforts to obtain reasonable rates and terms concerning webcasting since 2002. CBI’s participation in webcasting issues, on behalf of its members, has been extensive and are a matter of record. Most recently CBI has submitted comments in the recordkeeping proceeding (Docket No. RM 2008–7), negotiated a settlement for Noncommercial Educational Webcasters (“NEWs”) under the provisions of the Webcaster Settlement Act of 2009 and jointly filed a Motion to Adopt Partial Settlement in this proceeding.

7. I have co-authored comments before the United States Federal Communications Commission on behalf of the members of CBI with respect to “Localism”<sup>3</sup> and “Program Retention”<sup>4</sup>.

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<sup>3</sup> FCC MB Docket No. 04-233

<sup>4</sup> FCC MB Docket No. 04-232

8. I have been employed by for-profit, commercial stations, and held such titles as traffic manager, production manager, Chief Operator, copywriter, marketing consultant and contract engineer.

9. I have served as the Broadcast Committee chair for College Media Advisers (“CMA”). In this role, I organized the broadcast sessions (over 70) for the 2003 National Student Media convention, of which CBI is a partner. I have also organized the sessions for the 2003 and 2004 Spring National conventions.

10. I am the recipient of the Reid H. Montgomery Distinguished Service Award from CMA, for work without which “many college stations’ Internet presence – for many of them their only presence – would have been silenced.” I am also the recipient of the CMA 2009 Distinguished Broadcast Advisor Award.

11. At the request of The Chronicle of Higher Education, I answered questions concerning college webcasting in a live Internet discussion in their regular feature “Colloquy Live”. The session was entitled, “Webcasting Fees and College Radio” (August, 2002).

12. I hold a Bachelor of Arts (B.A) degree in Broadcast Communication from State University of New York at New Paltz. I first became involved in student radio in 1982, at Cazenovia College’s 10-watt station WITC-FM.

13. I base this testimony on information that I learned in my work as an employee, student, contractor and a volunteer in the field over the past 27 years, and upon resources that are available to me that I commonly rely upon in conducting my duties as an employee and a volunteer.

#### **Proposed Settlement**

14. Under the authorization granted in the Webcaster Settlement Act of 2009, Pub. L. No. 111-36 (to be codified at 17 U.S.C. § 114(f)(5)), SoundExchange and CBI sought to reach an agreement for the reproduction and performance of sound recordings under Sections 112(e) and 114 of the Copyright Act that, once published in the Federal Register, shall be binding on all copyright owners

and performers, in lieu of any determination by the Copyright Royalty Judges, and available, as an option, to any webcaster meeting the eligibility conditions of such agreement. Pursuant to that Act, CBI and SoundExchange reached an agreement concerning royalty rates and terms for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet during the period 2011 - 2015.

15. That agreement has been published in the *Federal Register* by the Copyright Office pursuant to 17 U.S.C. § 114(f)(5)(B). 74 Fed. Reg. 40,616 (Aug. 12, 2009). Under the Webcaster Settlement Act, the agreement is now "available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement." 17 U.S.C. § 114(f)(5)(B).

16. On August 13, 2009, CBI and SoundExchange submitted a "Joint Motion to Adopt Partial Settlement" ("Joint Motion") in this instant proceeding.<sup>5</sup> The Joint Motion includes proposed rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet, and related ephemeral recordings which specifies statutory rates and terms for "Eligible Transmissions" by "Noncommercial Educational Webcasters" that are identical to the rates and terms in agreed upon by SoundExchange and CBI in their settlement under the authority of the Webcaster Settlement Act of 2009.

17. 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 of the participants in a proceeding.

18. CBI believes that the rates and terms contained in the proposed settlement are reflective of a marketplace transaction between a willing buyer and a willing seller and that the Judges should provide other interested parties in this proceeding an opportunity to comment on the agreement so the Judges may make a determination whether or not the proposed settlement provides a reasonable basis for setting rates and terms for the eligible entities.

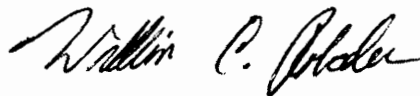
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<sup>5</sup> A copy of the Joint Motion is attached.

19. CBI believes proposed settlement does provide a reasonable basis for setting rates and terms for the covered entities. Further the proposed settlement would resolve most, if not all, of the tensions in the open recordkeeping proceeding (RM. Docket 2008-7). The Judges, by adopting the proposed settlement, would remove many of the barriers that NEWs face in meeting the regulatory requirements concerning recordkeeping and reporting. By allowing NEWs to utilize service-appropriate reporting options, SoundExchange will be able to gather more data more efficiently, which will benefit copyright holders and artists in the form of reduced overhead eating into royalties and by enabling speedier distributions.

Except as noted, I have personal knowledge of the facts in this testimony and the foregoing is true and correct to the best of my understanding.

Dated: September 26, 2009



William C. Robedee  
Immediate Past President  
College Broadcasters, Inc.  
[WillR@rice.edu](mailto:WillR@rice.edu)  
713-348-2935



## DECLARATION OF SERVICE

I, Erica Johnstone, hereby declare:

I am over eighteen years of age and not a party to the within cause. My business address is 12 Geary Street, Suite 701, San Francisco, CA 94108. On **September 28, 2009**, I served a copy of the Direct Case of College Broadcasters, Inc. ("CBI") consisting of: CBI's proposed rates and terms, embodied in Exhibit A to the Joint Motion of CBI and SoundExchange to Adopt Proposed Partial Settlement, dated August 13, 2009, and the Direct Written Testimony of Will Robedee, by overnight mail on each of the following:

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*Counsel for Apple*

I declare under penalty of perjury that the foregoing is true and correct. Executed on  
September 28, 2009 at San Francisco, California.

  
Erica Johnstone

]