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September 29, 2009

To the Honorable Copyright Royalty Judges

Re: Webcasting III

Accompanying this cover sheet are written testimony and exhibits for Intercollegiate
Broadcasting System and Harvard Radio Broadcasting Co., Inc.

Respectfully submitted,



William Malone

Their Attorney

Before the
COPYRIGHT ROYALTY BOARD
in the Library of Congress
Washington, D.C.

In the Matter of

Digital Performance in Sound Recordings
and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY
of
FREDERICK J. KASS, JR.

on behalf of
INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

Curriculum vitae

1. Frederick J. Kass, Jr. ("Fritz") is treasurer, director of operations (chief operating officer), and a director of the Intercollegiate Broadcasting System, Inc. In 1982 he purchased three acres in New Windsor New York and built and became an owner and the operator of a retail shopping center in New York, as a result of owning an electronics supply house in the '70s. Fritz is the former Director of Aviation for Orange County Airport, Montgomery, New York (1995 – 2006). He holds the rank of Captain (Ret) in the United States Navy (Reserve). Captain Kass receives monthly retirement pay from the United States Navy, and the State of New York,

for his past service. He served on the active duty in Vietnam combat zone at times during 1965, 1966, and 1967. Captain Kass volunteered for and was recalled to active duty in 1990 to serve the United States as the Assistant Chief of Staff for Operations and Plans for COMUSNAVCENT, the Navy Component Command for the United States Central Command. He served at United States Navy Central Command Headquarters in Bahrain, and in combat zones, and throughout the Persian Gulf Region through the middle of 1991. Captain Kass has received various medals, ribbons, and awards for his service.

2. Mr. Kass first became active in college radio in 1960 while an undergraduate at Lehigh University, where he served as Station Manager of campus stations WLVR and WRLN. He graduated from Lehigh in 1964 with a B.S. degree in Business. Mr. Kass received his Masters Degree in Business from the State University of New York at Albany in 1970, under a Department of Defense education program. He has been an unpaid volunteer officer and director of the Intercollegiate Broadcasting System, Inc., since 1961.

3. Since shortly after his graduation and service in the U.S. Navy, Mr. Kass has been involved as an unpaid volunteer in activities supporting the education and character development of America's youth, ranging from managing the day-to-day operations of IBS to advising the Hudson Valley Boy Scout Council (15,000 scouts) as their Vice President of Exploring to serving on the board of directors of the Eastern Orange County Chamber of Commerce for over a decade. In 2001, the Orange County Chamber of Commerce, an association of over 2,000 businesses, awarded Mr. Kass "Volunteer of the Year." Mr. Kass further educated America's sons and daughters as an adjunct faculty member for the College of Aeronautics, a four-year accredited college in New York State. At the college, he taught management and various

aviation subjects. Mr. Kass is a founder (1970), past president and Paul Harris Fellow of the New Windsor Cornwall Rotary Club. He currently continues his worldwide community service through Rotary International and annual contributions to the Rotary Foundation. In 2009 Fritz received the Rotary Benefactor Award from the New Windsor – Cornwall Rotary Club and Rotary District 7210. Fritz also sponsors many annual youth education projects and scholarships. These include an annual college scholarship for the most outstanding Air Force JROTC Cadet at Newburgh Free Academy, the local public high school and a scholarship for lesson to become a FAA licensed pilot for a local teenager. Facilitator of free flights for Young Eagles, youth ages 8 – 17, and many other multi-year opportunities to help area youth obtain critical life skills. Captain Kass, US Navy retired, is an U S Naval Academy designated information officer, a Blue and Gold Officer. Fritz interviews local youth who have applied to the USNA for admissions. At IBS he has been involved in negotiations with the performing rights organizations and SoundExchange née RIAA on behalf of IBS' member stations.

4. Through his work with the IBS board, managing IBS' national and coast to coast regional meetings of member-stations, manning IBS' central office, and visiting stations in the field since 1961, Mr. Kass has become familiar with the wide range of campus broadcast stations operating in North America, Asia, Australia and Europe.

Description of IBS

5. The Intercollegiate Broadcasting System was founded in the early '40s, when there were just a handful of unlicensed carrier current radio stations on American campuses, and was incorporated as a non-profit corporation in Rhode Island in 1944. As radio broadcasting has evolved over the decades, the functions of IBS have changed correspondingly. IBS has (i)

actively supported the interests of college radio at the Federal Communications Commission, (ii) distributed programming, (iii) provided technical and other guidance to member stations, (iv) had assisted the stations in selling national advertising 1950s until that market dried up, (v) has assisted member stations in obtaining copyright licenses from the performing rights organizations since 1970s, (vi) has conducted national and regional meetings for the education of, and exchange of experience among, its members, and (vii) has published newsletters and magazines (Journal of College Radio and College Radio) to keep member stations' staffs informed, etc. As student listenership shifted to FM radio from AM radio, IBS assisted many member stations in converting from unlicensed AM operation to licensed FM operation; and when campuses were wired for the Internet, IBS assisted many member stations in streaming. IBS has member stations in high schools as well as colleges, and IBS has sought to aid them in their particular problems.

6. Currently there are estimated to be 1,500 student-staffed stations and webcasting operations affiliated with domestic academic institutions. IBS is the largest organization representing such stations, and its membership includes over 1,000 such stations.

7. IBS' membership encompasses a wide variety of student-staffed operations, from in-building PA systems to high-power FM broadcast stations. The hours of operation vary widely, from a few hours per week to around-the-clock and from term-time to 365 days per year. FCC rules do not require even the licensed Educational FM stations to operate in vacation periods. The number of undergraduate staff members at each station ranges from a handful to over a hundred. Some stations are operated by academic departments as curricular activities or as laboratories, to provide practical experience for undergraduates; others are encouraged or

tolerated by college administrations as extra-curricular student activities. Funding sources vary from academic budgets to student activity funds to advertising to dues paid by staff members. Few salaries are paid; academic instructors are usually paid out of departmental budgets; occasional student managers are given stipends; and a few student staff members receive financial aid of one sort or another, tied to participation in the station's operations.

8. IBS' member stations are not in the business of selling music or anything else. They are interested in educating America's sons and daughters. The use of digital recordings, though essential as a practical matter, is merely incidental to their primary educational purpose. Operating a radio station offers opportunities to learn by doing. It gives the next generation many of the skills and abilities essential to success in our society, including personal responsibility and initiative, management skills, business skills, marketing, music, writing and journalism, engineering, digital communications, digital networking – streaming audio, and a lot of other extra-curricular knowledge. A generation or so ago a fair percentage of students matriculated with some of this knowledge already, it having rubbed off from voluntary or involuntary participation in small family businesses. Today the employment of the parents of a majority of students -- and those students who are themselves employed -- is as "salary men," to appropriate the Japanese term, and the students have no firsthand experience or perspective on standalone enterprises -- what makes them operationally successful and how one conducts himself or herself to succeed in such a modern society. These are abilities and skills that are not listed in the course syllabi. USA students and worldwide students are in a critical competition for world economic productivity.

9. From time-to-time IBS has surveyed its member stations to obtain information about operating budgets. The most recent survey showed that the average annual operating budget for campus stations to be about nine thousand dollars per year, but some having annual operating budgets of only \$250.00 or less. All member stations are, as far as IBS is aware, themselves non-profit and/or parts of non-profit institutions. Most IBS Member academic institutions are part of local, state, and even federal (e.g., military service academies) government.

10. Student staffs are typically characterized by relatively short tenure and high turnover, reflecting the academic environment from which they are drawn. This means in practice that operational procedures and the like are constantly being relearned by each successive college generation of students. These factors also place a practical limit on the complexity of procedures and practices that can be passed from one student generation to the next. A few stations even experience discontinuities in operation from one generation of staffers to the next.

11. As previously intimated, solely student volunteers staff most stations; some volunteers' participation tends to be somewhat "laid back." In most stations the depth of staffing is variable from semester to semester and even within a given semester as examination periods come and go. The volunteer nature of the staffing means that operations in these stations tend to be somewhat informal, and it places a practical limit on the number and intensity of formal duties that can be imposed on day-to-day operations.

12. Performance of digital recordings by college webcasters benefits the composer and artists of new music. Most college stations do not program music under rigidly

circumscribed formats dictated from above. A far wider variety of music is played by them than by their commercial broadcast counterparts. The academically affiliated stations, having young staffs, naturally present more new music by emerging artists. As emerging artists these musicians need and desire public exposure. They see presentation by these college stations as ways to build a following, and they promote themselves by distributing copies of their recordings and allied promotional materials to such stations. This is a mutually beneficial relationship. Many college stations, having restricted programming budgets, take advantage of such promotional disks and other materials, thereby assuring new works and artists of prompt exposure.

13. There is a technical aspect of defining “performance” that has a disproportionate impact on college and high school webcasters. Much of the listening to these stations is typically to programming not subject to compulsory license. The most listened-to programs of these stations are generally varsity sports broadcasts. Many of these stations carry recorded programs that are cleared-at-the-source. Many stations carry live and delayed broadcasts of lectures, public forums, concerts, and interviews with artists and public figures on campus. Various recorded digital performances are directly licensed by a direct “Creative Commons”-type license from the artists. In fact, as a result of the payola investigations by the New York State attorney general, money was made available by grants from the resulting New York State Music Fund to foster such direct licensing. As a consequence, educational webcasters owe nothing to SoundExchange under a statutory license for their use of such recordings.

IBS Relations with the Performing Rights Organizations

14. As alluded to earlier in my testimony, IBS has negotiated licensing agreements over the past three decades with the performing rights organizations, viz., ASCAP, BMI, and SESAC. A few member stations report operating under campus-wide licenses negotiated by the parent academic institutions. The IBS-negotiated licenses are tailored to the distinctive characteristics of campus stations. The stations' licenses with ASCAP provide for an annual fee of under \$300.00 and for reporting music played on a sampling basis, i.e., during a calendar week and a further sampling of a few stations designated annually by ASCAP; the licenses with BMI provide for an annual fee of under \$300.00 and for reporting music played on a sampling basis, i.e., 72 hours once a year, and the licenses with SESAC contain no reporting requirement.

15. Under the terms of the Small Webcaster Settlement Act of 2002, P.L. 107-321, IBS and other small webcasters negotiated a nonprecedential rate agreement for October 28, 1998 - December 31, 2004. Those rates and terms were published in the Federal Register, 68 Fed. Reg. 35,008 (June 11, 2003). Subsequently, RIAA, IBS, and Harvard Radio Broadcasting Co., Inc., negotiated a nonprecedential extension of those rates for 2005. The agreement had special provisions concerning recordkeeping and reporting, tailored the academically affiliated noncommercial webcasters' uses and capabilities.

16. The three signatories filed a "Joint Petition for Adjustment of Rates and Terms for Statutory Licenses Applicable to Noncommercial Webcasters Making Eligible Nonsubscription Transmissions" with the Office on August 26, 2004. A copy of that petition is attached as an exhibit hereto. The Office declined to publish the agreement in the Federal Register, and at that point the legal situation became contentious among the Office and the parties. Nevertheless, rates and terms were continued in effect in 2005 by intervening statutory enactment.

17. It remains IBS' basic position that such rates and terms are appropriate for its stations, subject to any need for clarification that has emerged since, and should be extended to the 2006-10 period for IBS member stations. IBS Members should only pay for their direct use of the statutory license by the IBS Member. There should be no minimum fee greater than that which would reasonably approximate the annual direct use of the statutory license, not to exceed \$25.00 annually.

18. In the course of Webcasting II IBS introduced the contemporary agreement between SoundEx and NPR/CPB for CPB-qualified webcasters. It provided that in 2004 CPB would make a single payment of \$80,000.00 to cover use of the statutory license for 798 CPB/NPR entities. It was determined that the average continuous annual listenership, continuous performances exceeded 200. Therefore the value of a single continuous use of the statutory license for a continuous CPB/NPR web stream was less than \$0.50 (50 cents) per continuous performance per year. Computation: \$80,000.00 divided by 798 equals \$100.25 per webcaster per year of 2004. \$100.25 per NPR/CPB webcaster divided by 200 equals value of a continuous statutory license performance per year, 50 cents. There was no reporting/recordkeeping provided for in the agreement.

19. Shortly after the commencement of Webcasting III CPB signed a licensing agreement with SoundEx covering webcasting by CPB-qualified stations. It provided for CPB to make a payment of \$1,850,000.00 to cover six copyright years, 2005 – 2010, for at least 450 NPR, NFCB, and CPB qualified stations/webcasters. (Note: the exact number is unknown. The 450 are the number given in the Federal Register. In 2004 there were 798 CPB/NPR entities plus approximately 150 NFCB additional Webcast II entities. Therefore the value of a continuous

annual performance under this CPB/NPR/NFCB/PRX/PRI/APM is expected to be no more than \$1.54 per continuous performance per year. The computations before adjustment are: \$1,850,000.00 divided by six years is \$308,333.33 per statutory performance year. Divided by 450 that is \$685.19 per web stream per year. Divided by 200 continuous listeners/performances that is \$3.43 per continuous performance use of the statutory license per year.)

20 Terms: IBS Member webcasts will be paying for their direct use of the SoundExchange collective statutory/compulsory performance music license. IBS Members also use, but should not pay SoundExchange for three other copyright performance licenses, the direct license between the webcaster, or their member organizations, like IBS, and the performance copyright holder artist/label, webcaster owned performance license, an example is a State College where the campus curricular band, vocal group, or music group, plays on campus and is broadcast over the radio station, and lastly where the performance copyright has been prepaid by another organization, an example being music programming performances re-broadcast from NPR, PRX, PRI, and APM, were CPB has prepaid SoundExchange for the performances over these networks, used by many IBS Members.

Certification

20. The foregoing facts and conclusions are true and correct to the best of my knowledge and belief.

Subscribed and sworn to under the penalties of perjury, 28 U.S.C. § 17465.


Frederick J. Kass, Jr.

New Windsor, New York
September 28, 2009

Exhibit (8/26/04 Joint Petition)

Before the
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Washington, D.C.

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In the Matter of)
)
)

Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
for Noncommercial Webcasters)
for 2005 and 2006 pursuant to Sections 112)
and 114 of the Copyright Act.)

Docket No. 2004-1 (CARP DTRA4)

**JOINT PETITION FOR ADJUSTMENT OF RATES AND TERMS FOR
STATUTORY LICENSES APPLICABLE TO NONCOMMERCIAL
WEBCASTERS MAKING ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS**

Pursuant to 17 U.S.C. §§ 112(e), 114 & 803 and 37 C.F.R. § 251.63(b),
SoundExchange, Inc., the nonprofit collective jointly controlled by representatives of
recording artists and sound recording copyright owners, previously designated by the
Librarian of Congress as the sole receiving agent for the collection of royalty payments
made by eligible nonsubscription transmission services pursuant to Sections 112 and 114
of the Copyright Act, and Intercollegiate Broadcasting System, Inc., whose members
include Noncommercial Webcasters¹ and Harvard Radio Broadcasting Co., Inc. (licensee
of WHRB (FM)), (collectively referred to as the "Petitioners"), hereby submit this Joint

¹ A "Noncommercial Webcaster" means a Webcaster that:

(1) is exempt from taxation under section 501 of the Internal Revenue Code of
1986 (26 U.S.C. § 501);

(2) has applied in good faith to the Internal Revenue Service for exemption from
taxation under section 501 of the Internal Revenue Code and has a commercially
reasonable expectation that such exemption shall be granted; or

(3) is operated by a State or possession or any governmental entity or subordinate
thereof, or by the United States or District of Columbia, for exclusively public purposes.

Petition to advise the Copyright Office of their settlement of the controversy over the rates and terms to be established in this proceeding for noncommercial entities making eligible nonsubscription transmissions and ephemeral phonorecords under statutory license. Specifically, the Petitioners have reached agreement on proposed rates and terms for the use of sound recordings in eligible nonsubscription transmissions together with related ephemeral recordings (collectively "Covered Activities") for the 2005 through 2006 statutory license period. Petitioners hereby request that the Office publish the attached proposed rates and terms set forth in Exhibit A for public comment pursuant to 37 C.F.R. § 251.63(b) in lieu of convening a Copyright Arbitration Royalty Panel ("CARP") to determine rates and terms for the Covered Activities for the years 2005 through 2006.

I. BACKGROUND

The Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") created a new exclusive right "to perform sound recordings publicly by means of a digital audio transmission." 17 U.S.C. § 106(6). The DPRA limited this right in several respects, including by the creation of a statutory license for performances by certain subscription services. 17 U.S.C. § 114(f). In 1998, the Digital Millennium Copyright Act ("DMCA") amended the statutory license in Section 114 to clarify coverage of certain categories of transmission services, including services making eligible nonsubscription transmissions and new subscription services. *See* 17 U.S.C. § 114(d)(2). It also amended Section 112 to address ephemeral reproductions that facilitate the making of certain digital audio transmissions, including those pursuant to the statutory license in Section 114. *See* 17 U.S.C. §§ 112(a) & (e).

The Copyright Office conducted a CARP proceeding that established royalty rates and terms for these statutory licenses applicable to eligible nonsubscription services for the period from October 28, 1998, to December 31, 2002. *See* Final Rule and Order in Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, 67 Fed. Reg. 45,239 (July 8, 2002) (the "Final Order"). With the enactment of the Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002), Congress authorized SoundExchange to negotiate rates and terms binding on all copyright owners and performers and available to noncommercial licensees as an alternative to the statutory rates and terms established in the Final Order. Such rates and terms, however, were not binding on Noncommercial Webcasters, which were permitted to elect to pay royalties under the Final Order or the rates and terms adopted pursuant to SWSA.

SoundExchange and the noncommercial entities signatory hereto agreed to alternative rates to those established under the Final Order pursuant to authority granted under SWSA, and the parties submitted those rates and terms to the Copyright Office on May 31, 2003. Those rates and terms were published in the Federal Register on June 11, 2003, and established alternative rates and terms for the period October 28, 1998 through December 31, 2004. *See* 68 Fed. Reg. 35,008.

On January 6, 2004, the Copyright Office published a notification of the initiation of the voluntary negotiation period to establish rates and terms for eligible nonsubscription transmissions and related ephemeral phonorecords for the period 2005 through 2006. 69 Fed. Reg. 689. Pursuant to that notification, parties may submit a voluntary settlement of rates and terms to the Copyright Office and request that the

Office publish the proposed rates and terms in the Federal Register for public comment. *Id.* at 690. "If no party with a substantial interest and an intent to participate in an arbitration proceeding files a comment opposing the negotiated rates and terms, the Librarian may adopt the proposed terms and rates without convening a [CARP]". *Id.*

II. THE PETITIONERS AND THEIR AGREEMENT

The Petitioners have reached agreement on proposed rates and terms governing the use of sound recordings in Covered Activities for the 2005 through 2006 statutory license period. Exhibit A to this Joint Petition contains proposed regulations that implement the agreement. The Petitioners hereby request that the Copyright Office promulgate the proposed regulations in Exhibit A.

Each of the Petitioners has a "significant interest" in the rates and terms that are the subject of the two relevant CARP proceedings within the meaning of Section 803(a) of the Copyright Act. 17 U.S.C. § 803(a).

SoundExchange represents as follows: It is a nonprofit organization jointly controlled by representatives of sound recording copyright owners and performing artists and was established to administer the Section 112 and Section 114 statutory licenses on behalf of the vast majority of sound recording copyright owners and performers in the United States. SoundExchange was the sole collective designated to receive and distribute royalties paid by statutory licensees for the 2003-2004 rate period and one of two collectives designated to receive and distribute royalties paid by statutory licensees during the 1998 through 2002 rate period. SoundExchange's member record companies create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States.

The Intercollegiate Broadcasting System, Inc., is a Rhode Island not-for-profit corporation with over nine hundred non-profit member radio stations and webcasters 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.

III. NONPRECEDENTIAL NATURE OF NEGOTIATED RATES AND TERMS

SWSA provided that neither the legislation nor any agreement negotiated pursuant thereto shall "be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving" the establishment of royalties or notice and recordkeeping provisions under Sections 112 and 114. That is, the rates and terms negotiated pursuant to SWSA were to be considered non-precedential. Because Petitioners are essentially seeking to have the rates and terms that are in effect for 2004 and which were negotiated pursuant to SWSA pushed forward for an additional two-year statutory period, they believe the non-precedential effect of those rates should apply for the 2005-06 rate period and request that the Federal Register notice announcing the settlement set forth that it is non-precedential. The rates and terms negotiated by the Petitioners represent a compromise motivated by extraordinary and unique circumstances and should not be given any precedential effect whatsoever.

IV. CONCLUSION

Pursuant to 17 U.S.C. §§ 112(e), 114 and 803 and 37 C.F.R. § 251.63(b), the Petitioners respectfully request that the Copyright Office publish the rates and terms set forth in Exhibit A for public comment and thereafter adopt such rates and terms for the years 2005 and 2006.

Respectfully submitted,

By <u>William Malone/mjw</u>	By <u>Michele J. Woods</u>
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Counsel for SoundExchange, Inc.

*Counsel for Intercollegiate Broadcasting
System, Inc. and Harvard Radio
Broadcasting Co., Inc. (licensee of WHRB
(FM))*

August 26, 2004

Exhibit A

37 CFR Part 263

Rates and Terms for Certain Transmissions and the Making of Ephemeral Reproductions by Noncommercial Licensees

263.1 General.

(a) *Scope.* This part 263 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Noncommercial Webcasters in accordance with the provisions of 17 U.S.C. 114, and the making of certain ephemeral recordings by Noncommercial Webcasters in accordance with the provisions of 17 U.S.C. 112(e), during the License Period.

(b) *Legal compliance.* Noncommercial Webcasters relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 shall comply with the requirements of those sections, the rates and terms of this part and any other applicable regulations.

(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 sound recording copyright owners and Noncommercial Webcasters making digital audio transmissions of sound recordings or ephemeral recordings shall apply in lieu of the rates and terms of this part to transmissions or recordings within the scope of such agreements.

263.2 Definitions.

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

(a) *Aggregate Tuning Hours* means the total hours of programming that a Noncommercial Webcaster has transmitted during the relevant period to all listeners within the United States over the relevant channels and stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions, less the actual running time of any sound recordings for which the Noncommercial 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 Webcaster transmitted 1 hour of programming to 10 simultaneous listeners, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Webcaster's Aggregate Tuning Hours would equal 10.

(b) *Broadcaster Simulcast* means a simultaneous Internet transmission or retransmission of an over-the-air terrestrial AM or FM radio broadcast, including one with previously broadcast programming substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained and one with substitute advertisements, where such Internet transmission or retransmission is made by a Noncommercial Webcaster that owns or operates the over-the-air radio station making the AM or FM broadcast.

(c) *Copyright Owner* is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

(d) *Ephemeral Recording* is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording for the purpose of facilitating a 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).

(e) *Incidental Performance* is a Performance that both:

(1) 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, sports and business programming, brief background performances during disk jockey announcements, brief performances during commercials of 60 seconds or less in duration, or brief performances during sporting or other public events; and

(2) 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 30 seconds (as a sound recording used as a theme song is featured).

(f) *License Period* means the period commencing on January 1, 2005 and ending on December 31, 2006.

(g) *Listener* is a player, receiving device or other point receiving and rendering a transmission of a public performance of a sound recordings made by a Licensee, irrespective of the number of individuals present to hear the transmission.

(h) *Noncommercial Educational Entity* or *NEE* is a Noncommercial Webcaster that is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are, during the course of the year, staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, but that 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.

(i) *Noncommercial Webcaster* means a Webcaster that —

(1) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(2) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(3) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

(j) *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 or retransmission (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., the sound recording is not copyrighted);

(2) a performance of a sound recording for which the Noncommercial Webcaster has previously obtained a license from the copyright owner of such sound recording; and

(3) an Incidental Performance.

(k) *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).

(l) *Webcaster* means a person or entity that has obtained a compulsory license under section 112 or 114 and the implementing regulations therefore to make eligible nonsubscription transmissions and ephemeral recordings.

263.3 Election for payment of royalty rates available to Noncommercial Webcasters under section 263.4.

(a) *General.* A Noncommercial Webcaster may elect to be subject to the rates and terms set forth in section 263.4 by complying with the procedures set forth in 263.3(b).

(b) *Election process.* A Noncommercial Webcaster making digital audio transmissions of sound recordings that wishes to elect for the first time to be subject to

the rates and terms set forth in section 263.4 in lieu of the rates and terms set forth in section 263.5 for the License Period shall submit to SoundExchange, Inc. a completed and signed election form (available on the SoundExchange web site at <http://www.soundexchange.com>) by no later than _____ [Copyright Office to insert the date that would be 30 days after publication of these Rates and Terms in the Federal Register]; provided, however, that any Noncommercial Webcaster that has previously elected to pay royalties under the rates and terms published in the Federal Register on June 11, 2003, 68 Fed. Reg. 35008, need not file a new election with SoundExchange. Notwithstanding the preceding sentence—

(1) if a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license or ephemeral phonorecords under the section 112 statutory license, then the Noncommercial Webcaster may make its election by no later than the first date on which it would be obligated under these Rates and Terms to make a royalty payment for the use of sound recordings under the section 112 or 114 statutory license; and

(2) a NEE may make its election by the later of (i) 45 days after the month in which the Noncommercial Webcaster first made a digital audio transmission of a sound recording under statutory license or (ii) the first day of the calendar quarter following the quarter in which the NEE commenced digital audio transmissions of sound recordings under statutory license.

(c) *Effect of election or nonelection.*

(1) *Election.* If a Noncommercial Webcaster timely elects under section 263.3(b) to be covered by the rates and terms set forth in section 263.4, then the Noncommercial Webcaster shall thereafter be obligated to pay royalties under and comply with the provisions of section 263.4 through the remainder of the License Period, provided that such Noncommercial Webcaster continues to meet the conditions for eligibility as a Noncommercial Webcaster.

(2) *Nonelection.* A Noncommercial Webcaster that does not make a timely election under section 263.3(b) shall pay royalties as otherwise provided under section 263.5 for the License Period.

(d) *Proof of eligibility.* A Noncommercial Webcaster that makes an election pursuant to section 263.3(b) shall make available to SoundExchange, within 30 days after SoundExchange's written request at any time during the 3 years following such election, sufficient evidence to support its eligibility as a Noncommercial Webcaster and, if applicable, as an NEE. Any proof of eligibility provided hereunder shall be provided with a certification signed by the chief executive officer of the Noncommercial Webcaster, or other person with similar management authority over the Noncommercial Webcaster, certifying that the information provided is accurate and the person signing is authorized to act on behalf of the Noncommercial Webcaster.

(e) *Limitation on participation in certain CARP proceedings.* A Noncommercial Webcaster that elects to be subject to the rates and terms in section 263.4 agrees that it has elected those rates and terms in lieu of participating in a copyright arbitration royalty panel ("CARP") proceeding to set rates and terms for the License Period and in lieu of any different rates and terms that may be determined through such a CARP proceeding. Once a Noncommercial Webcaster has elected the rates and terms in section 263.4, it shall be prohibited from participating in any such CARP proceeding for the License Period.

263.4 Royalty fees for public performances of sound recordings and for ephemeral recordings for Noncommercial Webcasters electing under section 263.3(b).

(a) *Minimum annual fees for Noncommercial Webcasters electing under 263.3(b).*

(1) *NEEs transmitting a single channel.* Except as provided in section 263.4(a)(3) and subject to section 263.4(b), each NEE shall pay a nonrefundable minimum annual fee of \$500 for each year of the License Period, except in the case of an NEE (i) that is, or is affiliated with, an educational institution with fewer than 10,000 enrolled students or (ii) where substantially all of the programming transmitted by such NEE is reasonably classified as news, talk, sports or business programming, in which case the minimum annual fee shall be \$250. The minimum annual fee is not proratable and shall be due in its entirety for all or any portion of a year in which the NEE makes a Performance of a sound recording under the section 114 statutory license.

(2) *Other Noncommercial Webcasters transmitting a single channel.* Except as provided in section 263.4(a)(3) and subject to section 263.4(b), each Noncommercial Webcaster that is not an NEE shall pay a nonrefundable minimum annual fee of \$500 for each year of the License Period, except in the case of a Noncommercial Webcaster where substantially all of the programming transmitted by such Noncommercial Webcaster is reasonably classified as news, talk, sports or business programming, in which case the minimum annual fee shall be \$250. The minimum annual fee is not proratable and shall be due in its entirety for all or any portion of a year in which the Noncommercial Webcaster makes a Performance of a sound recording under the section 114 statutory license.

(3) *Noncommercial Webcasters transmitting multiple channels.* Notwithstanding Sections 263.4(a)(1) or (2), the nonrefundable minimum annual fee shall be \$500 for each year of the License Period for any Noncommercial Webcaster that makes a Performance of a sound recording on more than one channel or station of programming; provided that—

(i) if the Performances of sound recordings over any channels or stations in excess of one consist only of Incidental Performances, then

the nonrefundable minimum annual fee shall be as provided in Sections 263.4(a)(1) or (2) as applicable;

(ii) if substantially all of the programming on all of a Noncommercial Webcaster's channels and stations is reasonably classified as news, talk, sports or business programming, then the minimum annual fee for such Noncommercial Webcaster shall be \$250;

(iii) if a Noncommercial Webcaster that owns or operates multiple over-the-air terrestrial AM or FM radio stations offers more than one Internet channel or station on which substantially all of the programming consists of Broadcaster Simulcasts, then—

(A) a nonrefundable minimum annual fee otherwise determined in accordance with this section 263.4(a)(3) shall extend to only three such Internet channels or stations offering Broadcaster Simulcasts, as well as associated Internet-only channels (subject to section 263.4(c));

(B) additional nonrefundable minimum annual fees shall be payable under this Section 263.4(a)(3) for additional groups of up to three Internet channels or stations offering Broadcaster Simulcasts, as well as associated Internet-only channels (subject to section 263.4(c));

(C) each such group of up to three such Internet channels or stations, as well as associated Internet-only channels (subject to section 263.4(c)), shall be treated as a separate Noncommercial Webcaster for purposes of sections 263.4(a)(3)(ii), (b) and (c);

(D) all such channels or stations offering Broadcaster Simulcasts in a group shall be treated as a single channel or station for purposes of section 263.4(c);

(E) any additional channels or stations considered with the group for purposes of section 263.4(c) shall also be considered with the group for purposes of section 263.4(b); and

(F) accordingly, the Noncommercial Webcaster may offer two additional Internet-only channels or stations with each group of up to three channels or stations offering Broadcaster Simulcasts without triggering payments under section 263.4(c)(2), but all of such channels or stations (up to a total of five) shall be considered together for purposes of determining whether the

Noncommercial Webcaster exceeds the 146,000 Aggregate Tuning Hours threshold in section 263.4(b); and

(iv) for purposes of determining the number of channels or stations of programming offered by a Noncommercial Webcaster, an "archived program" (as defined in 17 U.S.C. 114(j)(2)) that complies with the conditions in 17 U.S.C. 114(d)(2)(C)(iii)(I) and (II) shall not be considered a separate channel or station of programming except in the case of a Noncommercial Webcaster that exclusively makes digital audio transmissions of archived programming.

(v) The minimum annual fee is not proratable and shall be due in its entirety for all or any portion of a year in which the Noncommercial Webcaster makes a Performance of a sound recording under the section 114 statutory license.

(b) *Usage fees for Noncommercial Webcasters making election under 263.3(b).*

(1) *In General.* Subject to section 263.4(c), the nonrefundable minimum annual fee payable under section 263.4(a) for each year of the License Period shall constitute full payment for digital audio transmissions totaling not more than 146,000 Aggregate Tuning Hours per month. If in any month during the License Period a Noncommercial Webcaster makes digital audio transmissions of sound recordings under statutory license in excess of 146,000 Aggregate Tuning Hours, then the Noncommercial Webcaster shall pay additional usage royalties for those digital audio transmissions in excess of 146,000 Aggregate Tuning Hours at the following rates, subject to the election provided in section 263.4(b)(2):

(i) \$0.0002176 (.02176¢) per Performance; or

(ii) \$.00251 (.251¢) per Aggregate Tuning Hour, except in the case of channels or stations where substantially all of the programming is reasonably classified as news, talk, sports or business programming, in which case the royalty rate shall be \$.0002 (.02¢) per Aggregate Tuning Hour.

For the avoidance of doubt, a Noncommercial Webcaster shall calculate its Aggregate Tuning Hours of digital audio transmissions each month and shall pay any additional royalties owed for such month as provided above in this section 263.4(b), but the Noncommercial Webcaster shall not owe any additional royalties for any subsequent months until such time as the Noncommercial Webcaster again exceeds the 146,000 Aggregate Tuning Hour threshold during a given month.

(2) *Election of Per Performance or Aggregate Tuning Hour Rate.* The first time a Noncommercial Webcaster is required to pay usage royalties under section 263.4(b)(1) during the License Period, the Noncommercial Webcaster shall notify SoundExchange in writing on a form to be made available by SoundExchange of the method that it shall use to calculate its liability under section 263.4(b)(1) for the remainder of the License Period, if any. Specifically, the Noncommercial Webcaster shall make an election to calculate royalties on either a Performance basis as set forth in section 263.4(b)(1)(i) or an Aggregate Tuning Hour basis as set forth in section 263.4(b)(1)(ii). Thus, for example, a Noncommercial Webcaster may not in one month when its digital audio transmissions exceed 146,000 Aggregate Tuning Hours calculate its usage additional royalties based on the Performance royalty and in another month when its digital audio transmissions exceed 146,000 Aggregate Tuning Hours calculate its additional royalties based on the Aggregate Tuning Hour royalty.

(c) *Fees for more than three channels of programming for Noncommercial Webcasters electing under 263.3(b).* Subject to section 263.4(a)(3)(iii), if in any year of the License Period a Noncommercial Webcaster makes digital audio transmissions of sound recordings on more than three channels or stations of programming, then—

(1) the Noncommercial Webcaster shall by written notice to SoundExchange at the time of its first payment for each year of the License Period or its inception of its first channel or station in excess of three, whichever is later, designate three channels or stations for which the nonrefundable minimum annual fee payable under section 263.4(a)(3), and any additional usage royalty payments under section 263.4(b), shall constitute full payment; and

(2) the Noncommercial Webcaster shall pay royalties for all its digital audio transmissions of sound recordings under statutory license over its other channels and stations at the statutory rates for digital audio transmissions made by commercial eligible nonsubscription transmission services at such time (i.e., the successor to the rates set forth for 2003-2004 in section 262.3), provided that—

(i) the Noncommercial Webcaster shall not be required to make any minimum annual payments that otherwise apply to commercial eligible nonsubscription transmission services;

(ii) the nonrefundable minimum annual fee payable under section 263.4(a)(3) shall not be creditable toward such payments for its other channels and stations;

(iii) such payments for its other channels and stations shall be due at the times provided in section 263.6(b) rather than any different times otherwise applicable to commercial eligible nonsubscription transmission services, except that if the statutory rate for digital audio transmissions made by commercial eligible nonsubscription transmission

services has not then been determined, such payments for its other channels and stations shall be due 45 days following the month in which the statutory rate is determined; and

(iv) the Noncommercial Webcaster shall comply with other terms relating to royalty payments that otherwise apply to commercial eligible nonsubscription transmission services (e.g., terms concerning any election among payment options, as set forth in part 262).

For the avoidance of doubt, by operation of Section 263.4(a)(3), when a Noncommercial Webcaster that owns or operates multiple over-the-air terrestrial AM or FM radio stations offers more than one Internet channel or station on which substantially all of the programming consists of Broadcaster Simulcasts: (i) such Broadcaster Simulcasts shall in no event be subject to the statutory rates for digital audio transmissions made by commercial eligible nonsubscription transmission services, and (ii) only programming offered on Internet-only channels or stations in excess of two that may be associated with a group of up to three channels or stations offering Broadcaster Simulcasts may be subject to that statutory rate as provided in this section.

(d) *Payment in lieu of providing reports of use for Noncommercial Webcaster electing under 263.3(b).*

(1) *No obligation to provide reports of use.* Notwithstanding any other regulations adopted by the Librarian of Congress or the Copyright Office, a Noncommercial Webcaster making an election under section 263.3(b) shall not be required to provide reports of use of sound recordings to SoundExchange for the License Period. The payment required by section 263.4(d)(2) is intended to facilitate SoundExchange's ability to collect or otherwise acquire substitute data on which to base distributions to Copyright Owners and Performers of payments made by Noncommercial Webcasters, although SoundExchange shall be under no obligation to spend such payments in any particular way or to collect or otherwise acquire any particular data by any particular means. Subject to section 263.6(h), SoundExchange may base its distributions to Copyright Owners and Performers of payments made by Noncommercial Webcasters on any data or methodology determined by its board of directors.

(2) *Payment in lieu of reports of use.* A Noncommercial Webcaster making an election under section 263.3(b) shall, in addition to the nonrefundable minimum annual fees paid for each year of the License Period, pay an additional payment of \$25 for each year of the License Period in lieu of the provision of reports of use of sound recordings. The payment due under this section 263.4(d)(2) shall be due at the time minimum annual fees are paid under section 263.4(a).

(3) *Participation in Task Force.* The task force created pursuant to Section 7(b) of the May 31, 2003 noncommercial webcaster agreement, negotiated under the Small Webcaster Settlement Act of 2002 and published in the Federal Register on June 11, 2003 (68 Fed. Reg. 35,008), shall continue to be obligated to use reasonable efforts to work with SoundExchange to determine data fields and report formats and recommend policies, procedures and systems for the delivery of electronic reports of use of sound recordings to SoundExchange sufficient to permit SoundExchange, beginning in 2007, to distribute the royalties paid by Noncommercial Webcasters to those Copyright Owners and Performers whose sound recordings are transmitted by Noncommercial Webcasters based on data reported by or on behalf of Noncommercial Webcasters. In the absence of substantial consensus among the Noncommercial Webcasters concerning the membership of such task force, each Noncommercial Webcaster shall be obligated to use reasonable efforts to do the foregoing.

(e) *Ephemeral Recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of any reproductions of a phonorecord during the License Period, and used solely by a Noncommercial Webcaster making an election under section 263.3(b) to facilitate transmissions for which it pays royalties as and when provided in this section 263.4(a)-(c) shall be deemed to be included within, and to comprise 8.8% percent of, the Noncommercial Webcaster's royalty payments under section 263.4(a)-(c).

(f) *Reporting.* Each Noncommercial Webcaster making digital audio transmissions in excess of 146,000 Aggregate Tuning Hours in any month shall report its Aggregate Tuning Hours of digital audio transmissions to SoundExchange in a monthly statement of account to be filed under section 263.6. Each Noncommercial Webcaster having a statutory license during the License Period and not making digital audio transmissions in excess of 146,000 Aggregate Tuning Hours in any month shall so certify in the statement of account accompanying its first payment following the end of a calendar year within the License Period, including the payment of any minimum annual fees, if any. For the avoidance of doubt, the statements of account filed by a Noncommercial Webcaster for the years 2006 and 2007 (with the payment of each year's minimum annual fee) shall state that the Noncommercial Webcaster did not exceed 146,000 Aggregate Tuning Hours in any month of 2005 or 2006, as the case may be, if true. A Noncommercial Webcaster whose transmissions exceeded 146,000 Aggregate Tuning Hours in some, but not all, months of a given calendar year during the License Period shall not be required to certify its Aggregate Tuning Hours in the statement of account accompanying its first payment following the end of that year but shall only be required to report its Aggregate Tuning Hours in the statement(s) of account submitted for those months in which its Aggregate Tuning Hours exceeded 146,000.

263.5 Fees for Noncommercial Webcasters not making an election under section 263.3(b).

(a) *General.* The following rates and terms shall apply to Noncommercial Webcasters not making an election under 263.3(b).

(b) *Minimum Annual Fee.* A Noncommercial Webcaster not making an election under section 263.3(b) shall pay a nonrefundable, nonprorated minimum annual fee of \$500 for each year of the License Period during which the Noncommercial Webcaster makes digital audio transmissions of sound recordings or ephemeral phonorecords under statutory license.

(c) *Performance Fees.* A Noncommercial Webcaster not making an election under section 263.3(b) shall pay the following fees for the making of digital audio transmissions of sound recordings:

(1) for Broadcast Simulcasts, a royalty of \$0.0002 (.02¢) per Performance;

(2) for other Internet transmissions, including up to two side channels of programming consistent with the mission of the station, a royalty of \$0.0002 (.02¢) per Performance; and

(3) for Internet transmissions on other side channels of programming, a royalty of \$.0007 (.07¢) per Performance.

(d) *Ephemeral Fees.* For the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording, a Noncommercial Webcaster shall pay an additional section 112(e) royalty equal to 8.8% of the Performance royalty liability calculated under Section 263.5(c).

263.6 Terms for making payment of royalty fees and statements of account.

(a) *Timing of payment of minimum annual fees.* The nonrefundable minimum annual fee for each year of the License Period shall be due by January 31st of such year; provided, however, when a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its first payment of a nonrefundable minimum annual fee within 45 days following the month in which the Noncommercial Webcaster commences digital audio transmissions of sound recordings under the section 114 statutory license, except in the case of a NEE making an election under section 263.3(b), which may pay its minimum annual fee at the time its election is due under 263.3(b)(2).

(b) *Timing of payment of other fees.* Any payments due under sections 263.4(b) or (c) or 263.5 shall be due 45 days following the month in which the liability accrues.

(c) *Remittance.* Payments of all amounts due under this Part 263 shall be made to SoundExchange, Inc. and shall under no circumstances be refundable. Payments shall be accompanied by the statement of account required under section 263.6(g).

(d) *Continuing obligation to pay.* If statutory rates and terms for Noncommercial Webcasters for the period beginning January 1, 2007, have not been established by December 31, 2006, then Noncommercial Webcasters shall continue to make payments at the rates established under this part 263 for the License Period until such successor rates and terms are established. Such interim royalties shall be subject to retroactive adjustment based on the final successor rates. Any overpayment shall be fully creditable to future payments, and any underpayment shall be paid within 45 days after establishment of the successor rates and terms, except as may otherwise be provided in the successor terms.

(e) *Late payments.* A Noncommercial Webcaster shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by SoundExchange after the due date. Late fees shall accrue from the due date until payment is received by SoundExchange. Such late fees shall be without prejudice to other remedies of copyright owners.

(f) *Adjustment of schedule if this part not adopted until after January 1, 2005.* If the rates and terms established in this part 263 are not adopted in a final rule until after January 1, 2005, then any initial payments due hereunder shall be due by the later of the date set forth in this part 263 or 45 days following the publication of this part 263 in the Federal Register.

(g) *Statements of account.* To the extent a statement of account is required under this part 263, the Noncommercial Webcaster shall complete and submit the statement of account prepared by SoundExchange for Noncommercial Webcasters and made available on its web site located at <http://soundexchange.com>. A statement of account shall include only the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment, and, in the case of Noncommercial Webcasters paying royalties under 263.5, if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month;

(2) The name, address, business title, telephone number, facsimile number, electronic mail address and other contact information of the individual or individuals to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Noncommercial Webcaster or a duly authorized agent of the owner, if the Noncommercial Webcaster is not a partnership or a corporation;

(ii) A partner or delegee, if the Noncommercial Webcaster is a partnership; or

(iii) An officer of the corporation, if the Noncommercial Webcaster is a corporation,

provided, however, that a student may not sign a statement of account for a NEE.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Noncommercial Webcaster is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

"I, the undersigned owner or agent of the Noncommercial Webcaster, or officer or partner, if the Noncommercial Webcaster is a corporation or partnership, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence."

(h) *Distribution of Payments.*

(1) SoundExchange shall distribute royalty payments directly to Copyright Owners and Performers, according to 17 U.S.C. 114(g)(2); provided that SoundExchange shall only be responsible for making distributions to those Copyright Owners and Performers who provide it with such information as is necessary to identify and pay the correct recipient of such payments. SoundExchange shall distribute royalty payments on a basis that values all performances by a Noncommercial Webcaster equally based upon the information obtained by SoundExchange for the distribution of royalty payments; provided, however, Performers and Copyright Owners that authorize SoundExchange may agree with SoundExchange to allocate their shares of the royalty payments made by any Noncommercial Webcaster among themselves on an alternative basis.

Parties entitled to receive payments under 17 U.S.C. 114(g)(2) may agree with SoundExchange upon payment protocols to be used by SoundExchange that provide for alternative arrangements for the payment of royalties consistent with the percentages in 17 U.S.C. 114(g)(2).

(2) SoundExchange shall inform the Register of Copyrights of:

(i) Its methodology for distributing royalty payments to Copyright Owners and Performers who have not themselves authorized it (hereinafter "nonmembers"), and any amendments thereto, within 60 days of adoption and no later than 30 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that SoundExchange receives from a nonmember concerning the distribution of royalty payments, within 60 days of receiving such written complaint; and

(iii) The final disposition by SoundExchange of any complaint specified by paragraph (h)(2)(ii) of this section, within 60 days of such disposition.

(3) SoundExchange may request that the Register of Copyrights provide a written opinion stating whether its methodology for distributing royalty payments to nonmembers meets the requirements of this section.

(i) *Permitted Deductions.* SoundExchange may deduct from the payments made by Noncommercial Webcasters under sections 263.4 and 263.5, prior to the distribution of such payments to any person or entity entitled thereto, all incurred costs permitted to be deducted under 17 U.S.C. 114(g)(3); provided, however, that any party entitled to receive royalty payments under 17 U.S.C. 112(e) or 114(g) may agree to permit SoundExchange to make any other deductions.

(j) *Retention of Records.* Books and records of a Noncommercial Webcaster and SoundExchange relating to the payment, collection and distribution of royalty payments shall be kept for a period of not less than 3 years.

263.7 Confidentiality.

For purposes of this part, "Confidential Information" shall mean nonpublic information contained in a statement of account necessary to calculate liability under the statutory license. SoundExchange shall not disclose Confidential Information in a manner that reveals the identity of the service providing the Confidential Information; provided, however, that SoundExchange may disclose Confidential Information that reveals the identity of the service providing the Confidential Information as part of an audit, CARP or other legal proceeding, to comply with legal obligations generally, and to any sound recording copyright owner or performer entitled to receive statutory royalties.

Sound recording copyright owners and performers shall not publicly disclose such Confidential Information other than for enforcement purposes or sell any Confidential Information to a third party. SoundExchange and sound recording copyright owners and performers shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but in no event less than the standard of care used to safeguard their own confidential information.

263.8 Verification of statements of account.

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

(b) *Frequency of verification.* SoundExchange may conduct a single audit of a Noncommercial 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.* SoundExchange must file with the Copyright Office a notice of intent to audit a particular Noncommercial 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 Webcaster to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of records.* The Noncommercial 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 and retain such records for a period of not less than 3 years. SoundExchange 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 and 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 SoundExchange, 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 Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; provided that the appropriate agent or employee of the Noncommercial 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.* SoundExchange 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 Webcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

263.9 Verification of royalty payments.

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

(b) *Frequency of verification.* A Copyright Owner or a Performer may conduct a single audit of SoundExchange 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 Office a notice of intent to audit SoundExchange, 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 SoundExchange. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of records.* SoundExchange 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 and retain such records for a period of not less than 3 years. 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 and 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 SoundExchange in order to remedy any factual errors and clarify any issues relating to the audit; provided that the appropriate agent or employee of SoundExchange 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 SoundExchange shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

263.10 Unclaimed funds.

If SoundExchange is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, SoundExchange shall retain the required payment in a segregated trust account for a period of 3 years from the date of payment. No claim to such payment shall be valid after the expiration of the 3-year period. After the expiration of this period, SoundExchange 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.

263.11 Default.

If a Noncommercial Webcaster fails to comply with the conditions of the statutory licenses set forth in 17 U.S.C. 112 and 114, this part and any other applicable regulations, then a sound recording copyright owner or its agent may give written notice to the Noncommercial Webcaster that, unless the breach is remedied within thirty days from the date of notice and not repeated, the Noncommercial Webcaster's authorization to make public performances and ephemeral reproductions under this part will be automatically terminated. Such termination renders any public performances and ephemeral reproductions as to which the breach relates actionable as acts of infringement under 17 U.S.C. 501 and fully subject to the remedies provided by 17 U.S.C. 502-506 and 509.

Before the
COPYRIGHT ROYALTY BOARD
in the Library of Congress
Washington, D.C.

In the Matter of

Digital Performance in Sound Recordings
and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

Testimony of

JOHN E. MURPHY

on behalf of
INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

Curriculum vitae

1. John E. Murphy has been General Manager of WHUS Radio, since 1979. WHUS an educational FM station in Storrs, Connecticut, is licensed to the University of Connecticut. Mr. Murphy has more than forty years' experience in the broadcast industry. By the time he had graduated from high school he had worked on the staff of WRNW (FM), Mt. Kisco, New York, as a gofer and in addition had produced and announced occasional live, late-night and weekend shows. He attended Syracuse University on a Regents Scholarship 1970-74, with a dual major in engineering and liberal arts-communication. While in Syracuse, he worked at Stations WAER (FM) 1970-74 and WONO (FM) 1973-75 and later WEZG (FM) and WSOQ (AM) 1975-77. He received a B.A.-level equivalency determination from Connecticut State University in 1983 and

did further work at Goddard College, Plainfield, Vermont, in the Bachelors program in 1985, where he is now completing a Master of Arts program. During 1977-78 he was employed as a recording engineer by All-Platinum Recording Studios and Sugar Hill Records in Englewood, N.J. As a member of the adjunct faculty at Eastern Connecticut State University since 1983 he teaches five different courses in the Communications Department as needed. He has also produced four hundred weekly and monthly live cable programs since 1993 on the Windham, Connecticut, cable systems and produced numerous live programs on the Newtown, Connecticut, cable system during 1997-99.

College Radio Experiences

2. While WHUS itself is more accurately characterized as a community radio station, it is based at a university and is operated by students working in collaboration with local citizens. Since coming to WHUS I have also consistently worked with students from other, more typical college radio stations. I served as a member of the Board of Directors of the Intercollegiate Broadcasting System from my first election in 1981 until 2004. I served as director of station relations 1988-93, as President 1994-96, and served as Chairman from 1999 to 2004. I have attended IBS' national and regional conferences for over twenty-five years.

3. IBS sponsors a national and various regional conferences for the staffs of member-stations and prospective members. I served as a worship leader at these conferences for over twenty-five years, and I still do. As a leader of workshops I regularly engage in talking "shop" with the students who attend. At these conferences I am typically engaged in many informal conversations with students outside the formal workshops. In addition, during the school year between conferences I respond to frequent calls seeking advice on topics relating to the operation of student-staffed stations. From these interactions with students from all around

the country I have acquired a broad understanding of the common operational problems and practices of these stations.

4. Most college stations use music in a manner readily distinguishable from that of most commercial radio stations. Students do not take a “commercial” attitude toward the music that they play; they do not talk of the music they play as a “product” merely to be delivered to listeners. They display very respectful, rather than market-driven or exploitive, attitudes toward the artists whose music they play. They tend to be curators of the genres of music they like. The ethic and culture of college radio has historically provided artists and the music industry with a truly genuine and pure and free media space for reaching the public without commercial limitations or constraints. Artists have recognized college radio for decades as one of the few places where they could receive exposure and support in their early formative stage, before they developed an audience or record company interest.

5. Most college station managers do not attempt to dictate the music to be played but rather leave that to the diverse interests and knowledge of their programming personalities. Generally there are no “must play” song lists imposed by station management. Some stations do have “push files” in their studios displaying recent recordings by new artists and new types of music by established artists for the information of their programming staffs. There may be percentage-of-airplay requirements, to make sure the radio station continuously supports the exposure of new artists and new recordings, but the focus is on the artist or genre and not the song. A majority of the programs on most college stations utilizing recorded music are programmed “on the fly,” that is, in the course of the broadcast itself, influenced by the interests and inspirations of the air personality and by the reactions anticipated and received from listeners in the course of the broadcast.

6. One of the fundamental characteristics of college stations displayed at the IBS conferences and in the subsequent telephone calls from students seeking advice is the unceasing turnover in the volunteer staffs and management. The transfer of learning from one staff generation to the next is typically informal and incomplete. So these IBS conferences and consultations perform the role of transferring information and experience from one generation of station staffers to the next. Over the years then the educational process is on-going and repetitive with each new generation of staffers; it is never accomplished once-and-for-all times..

7. The most common questions on which college stations' staffs seek information and consultation focus on issues of station management, programming, technology and fund-raising. Being a "manager" is quite a new role for most undergraduates; it's something they haven't done yet, and college radio gives them an opportunity to experience the challenges of people-management. Budgeting is a perennial problem. Many of the stations, particularly at smaller institutions, are struggling at the "survival" level. Their options for raising money are quite limited. They are desperate for funds to improve the level and quality of their operations. Some schools even prohibit their radio stations from raising funds from outside sources, for example, from local business program underwriting or grants. Some of the telephone calls I get are from stations that can't even afford to send staffers to an IBS regional conference.

8. Perhaps surprisingly I am consulted on programming issues less frequently than management and financial problems. This infrequency may be evidence of the stations' being under little pressure to focus on audience size. Also, stations are often limited or distracted from growth and audience development by their continuing struggle to maintain even the most basic level of operations. One area of apparent growth for college radio online listening is college

athletics, with many stations generally experiencing their highest web-based audiences during coverage of varsity sports, rather than during music programming.

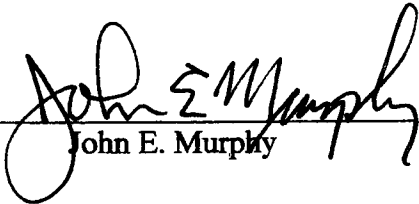
9. In recent years interest in webcasting by high school students has become noticeable among attendees at the IBS conferences. These high school operations have many of the same problems as college stations, but with some additional obstacles thrown-in. Resources and hours of operation are often constrained by such mundane factors as limited building access, content regulation, and limited potential audiences. But I see a great potential for growth of this segment of webcasters. Webcasting is a great opportunity for students to start learning music, announcing, writing, computer, and management skills that will serve them well in their lives and as members of their communities.

10. Digital literacy is a critical understanding and skill set that students will need in the future. Whatever their field of interest it will be connected in some way to the Internet, and employees with competency in the creation of content for websites will be increasingly in demand.

Certification

11. The foregoing facts and conclusions are true and correct to the best of my knowledge and belief.

Subscribed and sworn to under the penalties of perjury, 28 U.S.C. § 17465.


John E. Murphy

Storrs, Connecticut
September 25, 2009

Before the
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Washington, D.C.

In the Matter of)

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

Docket No. 2009-1
CRB Webcasting III

Testimony of

BENJAMIN SHAIKEN

on behalf of
INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

1. My name is Ben Shaiken. I am a senior student at the University of Connecticut in Storrs, majoring in Sociology with a minor in Political Science and Urban and Community Studies.

2. I have been involved in college radio for almost five years now. While still in high school, I took a training class and become certified to broadcast on WHUS Radio. The University is on the semester system, so consequently WHUS changes its schedule three times per year, Fall, Spring and Summer. I began my first two regularly scheduled broadcast programs in the summer semester of 2005. I hosted one freeform radio show, called "The Good Times Party Brigade," where I played a mixture of blues, classic rock, soul, funk and hip-hop. I also began hosting a blues-centered show called "Cakewalk Into Town." I continued to host different shows at WHUS until the end of the summer in 2006, when I moved to Chicago, IL to attend DePaul University. In addition to the shows mentioned above, that summer I also hosted a hip-

hop music show called “Oodles of O’s,” and co-hosted a funk and soul show called “The Piano Has Been Drinking.”

3. Upon arriving at DePaul University, I promptly sought out their radio station, Radio DePaul, which is a webcasting-only station. I hosted a hip-hop music show there for their three schedules during my freshman year (2006-2007) of college, in the Fall, Winter and Spring quarters. In April 2007, I was elected Fundraising Director at WHUS, and in June of 2007, I officially withdrew from DePaul University and enrolled in the University of Connecticut. I have been continuously broadcasting on WHUS since the summer of 2007, often hosting more than one show. I currently co-host and engineer a hip-hop show called “Boombox from the Boondox” (sic). In my years at WHUS I have attended a half-dozen college radio conferences sponsored by the Intercollegiate Broadcasting System. I have made oral presentations at such conferences and have had an opportunity to learn from other attendees and presenters how college radio stations solve common problems.

4. I was elected operations manager of WHUS in April 2008 and again in April 2009. I am, in effect, the student manager of the station, i.e., chairman the general operations board and of the staff. My responsibilities extend broadly across the activities of all the volunteers on the station staff. The student volunteers at WHUS do not get academic credit for their work at the station; they volunteer because they find the activities rewarding and because it gives them real-world experience they wouldn’t otherwise be getting in college.

5. I’m telling this story to give some feel for life and work inside a noncommercial broadcasting organization and, more particularly why and how noncommercial stations use recorded music. I’ll start by describing the role of the Music and Program Directors at the two noncommercial stations that I’ve worked at. As a manager, I am intimately aware of the work

and the mentality of those two positions. As a broadcaster, I have experienced the end product of their work first hand.

6. Typically the Program Director is responsible for creating and maintaining a schedule of which DJ is on air at which time. He is responsible for making the quality of the air product as high as possible. In my experience a noncommercial station does not define this quality in monetary terms. Thus, the Program Director is not concerned with arranging the schedule to most optimize the station's financial interests. Since I have been Operations Manager, I have been a member of the scheduling committee, the body that works with the Program Director each semester to compose an air-shift schedule. In the five schedules that I have served on this committee for, I have never seen financial interests being considered when determining what kind of music will be on air. In his role, the Program Director is primarily concerned with making sure the DJ is most comfortable in his or her timeslot and making sure the individual shows flow together in the most seamless way possible.

7. The Music Director plays a similar role as to content of the station's music programs. He is responsible for managing both an extensive library of existing LPs and CDs and also the continuous flow of new music that arrives at the station in all media -- CDs, vinyl records and digitally. At WHUS he also manages a group of volunteers who direct different genres of music. Like the Program Director, the Music Director is not driven by or focused on any financial gain for the station by his work. In most genres, there is a section of the library called the "Push File." This area is designated for what he, or a genre director, feels is the best of the new music that has come out recently. The Push File is not a dictated playlist of songs that must be played. It is simply a suggestion of music that is new and is good. DJs are selective about what they'll play, and any DJ, should he or she not like any particular recording, does not

have to play it. The Music Director at WHUS is driven primarily by the quality of the music that he is receiving and by whether someone else at the station might be interested in airing all or part of it. Most of the DJs are known to have particular genres of music in which they have acquired a background, or at least have some familiarity and interest, that they can convey to the station's body of listeners in a meaningful way. That certain music might be more profitable financially for the station is not part of that equation.

8. What these Directors, coupled with the culture and nature of a noncommercial station, foster is a place where DJs can play whatever music they find interesting. As a DJ, myself, I have always programmed my shows to reflect what music I am enjoying at that particular moment, or what music I feel my audience might enjoy.

9. One of the other factors that I feel it is important to note is that of the flexible format of noncommercial stations such as WHUS and Radio DePaul. During my time broadcasting on these stations, I have hosted or otherwise been a part of a total of at least ten different radio shows, broadcasting genres of music including blues, ska, funk, soul and hip-hop. As a manager, I have seen broadcasters with musical interests far wider and more diverse than mine pass through the station and program their own shows to showcase particular genres in the best way they can. The diversity of the programming and the flexible format make for a diverse and unique listening experience. The stations' programming is not driven by the desire to hype an audience or promote one specific kind or list of music. Instead it is meant to inform the audience and broaden their musical horizons.

Certification

10. The foregoing facts and conclusions are true and correct to the best of my knowledge and belief.

Subscribed and sworn to under the penalties of perjury, 28 U.S.C. § 17465.

Benjamin Shaiken

Storrs, Connecticut
September 25, 2009

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January 27, 2009

Market Collapse Weighs Heavily on Endowments

By Goldie Blumenstyk

College endowments earned an average return of minus-3 percent for the 2008 fiscal year and an estimated minus-22.5 percent in the five months after that, two new reports out today show.

The declines are already having an impact. More than a quarter of all institutions said they planned to draw less money from their endowment this year than they had expected to spend.

After a half-decade of soaring returns, it was the first time endowment investments lost money since the early 2000s, when, in the wake of the collapsing technology bubble and the terrorist attacks of September 11, endowments returned a minus-3.6 percent in 2001 and minus-6 percent in 2002 (see tables).

The only category of institutions that managed to eke out an average positive return in the 2008 fiscal year were the 77 with endowments worth more than \$1-billion. Even their return—0.6 percent—was a far cry from the 21.3 percent return they posted a year earlier.

As in the previous year, the largest endowments at the end of the fiscal year were those of Harvard (\$36.6-billion), Yale (\$22.9-billion), Stanford (\$17.2-billion), and Princeton (\$16.3-billion) Universities. All have subsequently dropped in value by about 20 percent.

The investment declines were hardly a surprise. For the last year, markets have been roiled by a global recession, a credit crisis of unprecedented proportions, and the collapse and near-collapse of several major international banks.

"Things went south just as quickly in the endowment world as they did in the economy," said John Walda, president of the National Association of College and University Business Officers, the organization that conducted the annual survey with TIAA-CREF Asset Management.

For both the fiscal year and the five months that followed, colleges' returns were better than many of the market-performance indices. The Standard & Poor's 500 stock index returned a minus-13.1 percent for the fiscal year; from July 1 to November 30, the S&P fell

by 29.9 percent.

Surprising Results

Despite the troubled economy and volatile markets, the 36th annual "Nacubo Endowment Study" found that more than half of all endowments ended their fiscal year in June with larger total values than they had a year earlier, with an average increase of 0.5 percent. Fifty-five institutions reported overall endowment growth of greater than 10 percent.

The biggest endowment to see a sizable percentage gain was that of Oklahoma State University and its foundation, which grew by nearly 32 percent, bringing the endowment to \$617-million at the end of fiscal year. Foundation officials said the gain was propelled by a positive investment return of 4.5 percent and the success of an April-through-June push for endowment gifts to match challenges from the state and a private donor, which brought in \$65-million.

The survey included responses from 796 institutions from the United States and Canada. (The accompanying database of changes in endowment value lists 791 institutions because a few university-related foundations respond separately but report their data with the institution.)

Because of the abrupt downturn in the markets since the summer, Nacubo and its new endowment-study partner, the Commonfund Institute, conducted a follow-up study on endowment performance in December. That survey, which included responses from 435 of the survey respondents, found that endowments had fallen in overall value by an estimated average of 22.9 percent. (At least five of the largest 10 endowments did not respond.)

In dollars, that translates to an estimated decline of \$94.5-billion in market value for the institutions in the annual survey.

The findings in the follow-up study reflect the two-pronged problem colleges face. Negative returns are eating into endowment values, and philanthropy hasn't been adequate to make up for the losses and endowment spending. After the markets dove, "gifts did not help to hold those values up," said John S. Griswold Jr. executive director of the institute.

Large private colleges depend on their endowment income to cover 15 to 20 percent of their operating costs, and at some of the wealthiest institutions, it provides as much as 45 percent.

(On Tuesday the institute also released its "2009 Commonfund Benchmarks Study of Educational Endowments," which found that 628 schools and colleges earned minus-2.7 percent on their

endowment investments in the 2008 fiscal year. The study included results from 470 colleges and universities, but it does not provide data or analysis separately for each college respondent.)

Spending Plans

With markets not expected to recover quickly, many colleges are taking a cautious spending approach. Faced with substantially smaller endowments, fewer than 4 percent of respondents said they plan to increase the rate of spending from their endowment next year. (Among institutions with endowments greater than \$500-million, the proportion was slightly higher, at 7.5 percent.) More than a third of respondents said they still didn't know what they would do or did not respond.

In 2008 the average rate of spending from endowments was 4.6 percent, the same as it was in 2007. The rate of spending is determined by dividing the amount of endowment money spent by the value of the endowment at the beginning of the year. Over the past 18 months, several state and Congressional leaders have criticized wealthy colleges for failing to spend at least 5 percent of their endowment value each year.

One of the most vocal of those critics, U.S. Sen. Charles E. Grassley, a Republican from Iowa, reiterated that message with a written statement timed for release with the reports. "I hope colleges won't use the recent volatility as an excuse to raise tuition or freeze student aid," he said. "Colleges' smart saving and investing could really help students right now. And the right kind of modest payout requirement for endowments above a certain dollar amount might do a lot of good for universities and students regardless of economic conditions."

Kevin P. Hegarty, chief financial officer at the University of Texas at Austin, said it was disappointing to see some colleges decide to avoid tapping deeper into their endowments now, as they face financial squeezes from declines in state financing and private giving, and increasing demand for student aid.

"Wasn't that the argument for payouts less than the returns" when the gains were stronger? he asked. Austin, part of the giant University of Texas system, which has the fifth-largest endowment in the country (\$16.1-billion), plans to increase spending from its share of the endowment by the rate of inflation next year.

Mr. Walda said he sympathized with college trustees and other leaders who are now walking the "tightrope" in deciding how to respond to the severe drop in endowment values. "I'm not surprised that 35 percent just don't know at this point," he said.

Still, as he noted, endowments are designed to be long-term investments, and if you look back over the past decade, "it's still a very positive picture."

For the 10 years ending June 30, 2008, colleges' overall return was a positive 6.5 percent.

Investment Strategies

The diversification that colleges have been pursuing over the past several years has helped them, Mr. Walda and others said.

That trend continued in 2008.

Between the ends of fiscal 2007 and 2008, the proportion of all college endowment assets invested in "alternatives"—private equity, venture capital, hedge funds, real estate, and natural resources—rose from 18.9 percent to 23.5 percent. The proportion of assets invested in stocks fell from 57.6 percent to 51.9 percent.

For some colleges, which have increasingly been shifting assets away from bread-and-butter investments like stock and bonds, and into alternative investments, like hedge funds and natural resources, the worst may yet be to come.

Over the next few months, many credit-squeezed hedge funds and private-equity funds may be calling on investors to fulfill their investment pledges, which could force some colleges into selling other assets at a loss to come up with the money. And colleges that managed to cushion their overall losses in 2008 by investing in oil and natural gas could find themselves with deep losses, if plummeting prices don't recover.

"Everyone is realizing that they need more liquidity than they thought they did," said Kathryn J. Crecelius, chief investment officer at the Johns Hopkins University.

Johns Hopkins had a return of minus-1.3 percent for 2008, and declines in line with its peers in the months that followed. Between 2007 and 2008, the overall endowment sank in value by nearly 10 percent, to \$2.5-billion, but Ms. Crecelius said most of that was attributable to a decision to remove funds the university had been counting as endowment that should not have been classified that way.

Despite the negative return, Ms. Crecelius said, Johns Hopkins is in "a very good position compared to many of our peers" because it has the capital it needs to cover its commitments. Also, it relies on its endowment for only about 5 percent of its operating costs.

By contrast, institutions like Dartmouth College and Harvard, which

depend on endowment funds by as much as seven times that, have recently imposed hiring freezes and spending cuts. Dartmouth, which had already announced it won't fill all 70 positions left vacant by its retirement-incentive program, last week said that "some staff layoffs are inevitable" because of the endowment declines. Like many other institutions that pledged last year to increase financial aid, Dartmouth said it planned to maintain that program.

Beating the Market

While few institutions have managed to find market-beating investment strategies for the past several months, some who beat the averages in fiscal 2008 credited their contrarian tactics. For Texas Christian University, that meant beefing up holdings in oil and gas and cutting back on investments in stocks, particularly in stocks of companies in emerging markets (which ended up doing badly), even though for years at investment conferences, "everybody's just thumping the table about international equities," said James R. Hille, chief investment officer.

The result: Texas Christian notched a positive return of 5 percent for 2008. With energy investments accounting for 15 percent of the university's portfolio (much above the average allocation of 2.2 percent), the endowment benefited when prices surged, "Although," Mr. Hille noted, "we're going to pay for that this year."

Christopher L. Bittman, chief investment officer at the University of Colorado Foundation, followed a similar strategy, selling emerging-market stocks and loading up on bonds during the past 18 months. For a while, he said, "we looked pretty foolish," especially when international stocks "screamed ahead." But he said the positions, including an allocation to bonds that has gone from about 5 percent to about 13 percent, seems appropriate now.

Lately, he's been eyeing the kinds of investments that have been battered by the markets, including real estate, high-paying debt issued by companies in financial trouble, and shares of private-equity funds that some cash-strapped investors are unloading at bargain-basement prices.

He's even put a portion of the foundation's endowment into a cattle and sheep farm in Australia. Markets are in turmoil and the foundation, which notched a 1 percent return in 2008, is down notably since then. While few investment experts are predicting a market rally any time soon, Mr. Bittman said he sees cause for optimism. "Honestly, I think there are some opportunities in this mess."

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March 5, 2009

Endowment Declines Continue, Survey Indicates

By Goldie Blumenstyk

A new survey from the Commonfund Institute on the investment performance of 235 education endowments found that the funds earned an average return of minus-24.1 percent in the six months ending December 31, 2008.

A report on the findings includes results from 118 private colleges, 67 public colleges, and 50 independent schools. The institutions of higher education fared only marginally better than the schools, with the private colleges reporting a return of minus-23.7 percent and the public colleges a return of minus-23.6 percent. The average return for schools in the survey was minus-25.1 percent.

The data were gathered in an online survey in January and February.

"It's bad news, absolutely," said John S. Griswold, executive director of the institute. "This is creating a lot of pain right now."

With the market plunges of the last few weeks, Mr. Griswold said, the decline since July 1 and the start of the 2009 fiscal year has no doubt grown. By now, "it's probably 30 percent," he said in an interview this week.

The latest report, part of the "2009 Commonfund Benchmarks Study Year-End Update," includes fewer institutions than the one Commonfund and the National Association of College and University Business Officers reported on in January. That report found that 435 colleges had seen an estimated loss of 22.9 percent on their endowments for the first five months of the 2009 fiscal year (*The Chronicle*, February 6).

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College endowments lost 24 percent in 6 months

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By Svea Herbst-Bayliss

BOSTON (Reuters) - U.S. colleges and universities lost nearly one-quarter of their endowments' worth in the first half of their fiscal year, forcing them to cut staff and budgets just like corporations hurt by the financial crisis.

From July through December, U.S. schools' endowments dropped an average of 24.1 percent, according to a report released by the Commonfund Institute, a nonprofit group that polled 629 educational endowments on their results.

Illustrating just how severely the financial crisis is affecting higher education, even wealthy colleges like Harvard are freezing salaries, offering early retirement, reassessing construction projects and

considering selling off art collections.

Smaller schools, with endowments of \$10 million or less, fared even worse with their endowments losing 30.2 percent, according to the study which will be released on Thursday.

"These are the worst-ever half year results that educational endowments have seen," Commonfund Executive Director John Griswold said in an interview. "Even the most diversified endowments suffered serious declines."

Harvard University, the country's richest, reported in December that its endowment had shrunk by \$8 billion to \$29 billion in four months and that it expects that loss to widen to 30 percent by the end of the fiscal year on June 30, 2009.

Commonfund, which provides nonprofit organizations with investment information and professional development programs, traditionally reports on these numbers only once a year.

However, the group prepared this rare half-year study between January and February 2009 to assist investment committees in making changes to cope with extremely difficult market conditions. "Some people like the comfort of knowing they are not they are not alone," Griswold said.

Endowments have long provided an important lifeline for schools as these often use at least 5 percent a year to pay for salaries, maintain buildings and contribute to financial aid to help offset the considerable cost of attending private high schools and four year colleges.

Last year bets on U.S. equities dealt endowments the biggest blow. "It was the stock market," Griswold said, noting that the Standard & Poor's 500 index lost about 38 percent in 2008. Larger schools were able to navigate the market slightly better, the report said, noting that schools with endowments of \$1 billion or more lost 21.7 percent.

Alternative strategies like hedge funds helped larger endowments survive the market decline better as the average hedge fund lost only 19 percent in 2008.

(Reporting by Svea Herbst-Bayliss; editing by Richard Chang)

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June 8, 2009

Standard & Poor's Report Lays Out Challenge for Coming Years

Standard & Poor's Report Lays Out Challenge for Coming Years

A new report from Standard & Poor's offers a mixed picture for colleges' prospects in the coming years, but one takeaway is clear: Colleges should expect to feel pain through 2012.

"We believe that the cuts that many institutions have made in fiscal 2009 may offset lower revenues this year, but that managing additional cuts in fiscals 2010, 2011, and 2012 could be more difficult," says the plainly titled report, "The Recession Is Testing U.S. Higher Education's Resilience and Credit Quality."

The report says that 2009 enrollment may remain steady, but that trouble in credit markets, investments, retirement plans, and home equity may spell trouble for some colleges, particularly private ones. Although applications are reportedly up, the report says, "many institutions are also citing a lower amount of deposits, compared with last year."

The report issued other warnings for bread-and-butter issues in college management: endowment, fund raising, and state money. Colleges' heavy dependence on endowments — which provide up to 45 percent of operating revenues at some institutions — may mean that they will have to make significant cuts in their operating budgets.

S&P expects fund-raising revenue to be lower in the next two years than it was in the past two, with colleges in the silent phase of fund raising waiting out the recession. And even as states cut their budgets, many public colleges may see increased demand, as they are perceived as a cheaper alternative to private colleges. —*Scott Carlson*

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Certificate of Service

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