Before the
United States Copyright Office
Library of Congress

In the Matter of	)	
	)	
Notice and Recordkeeping for	)	Docket No. RM-2002
Use of Sound Recordings	)	
Under Statutory License	)	

To: Copyright Arbitration Royalty Panel

Comments of Collegiate Broadcasters, Inc.

Collegiate Broadcasters, Inc. ("CBI"), a non-profit organization, by counsel, hereby respectfully submits its comments in response to the *Notice of Proposed Rulemaking* (the "Notice"), published in the Federal Register on February 7, 2002. The Notice seeks comment from the public on the statutory license for eligible subscription digital audio under Section 114 of the Copyright Act, including proposed notice and recordkeeping requirements for licensees.

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

CBI submits these comments on behalf the members of the organization named at the end of this document.

These comments address the reporting requirements in the Notice and explain that the "Intended Playlist" recordkeeping requirements are overly burdensome to the resources of Educational and Community ("EC") stations. CBI believes the reporting requirements will cause certain webcasting operations to cease altogether. Additionally, CBI submits other specific issues raised by the Copyright Office in its Notice.

References to "stations" in these comments include all EC stations that can demonstrate §501(c)(3) Federal non-profit tax-exempt status, with the exception of radio stations covered under the RIAA/CPB agreement, including "webcast only" operations, which will be demonstrated to be a misnomer.

Educational and Community Stations

The vast majority of stations that fall under this heading are staffed almost entirely by volunteers who are either students or members of the community in which the station is located. The stations receive the bulk of their funding through one of three sources: 1) student fees; 2) donations; or 3) from a University as part of an academic program of study.

The EC stations serve to educate the staff, management and audience. Students and volunteers learn valuable career skills, including broadcast operations, management, budgeting, personnel, scheduling, production and programming skills. The audience is educated through the programming developed by these stations, which is often strikingly different than what is available from commercial stations.

Stifling the ability of students and educational institutions to contribute to the marketplace and society is counterproductive to the goals of a free market society. The unreasonable reporting requirements proposed in the Notice could force the research and development of this technology to suffer greatly, as Universities have historically been highly involved with change. Student webcasters, regardless of their Federal Broadcast license status, deserve special consideration because of their unique contribution to the performance of copyrighted works in the digital domain with respect to reporting requirements. This relief would be consistent with rate proceedings by the CARP and with previous congressional action with respect to PRO's and analog broadcasts by non-CPB, non-commercial stations.

The reporting requirements are so onerous on EC stations, that many of the unlicensed (Part 15, Cable TV and FM) will cease to exist. Many of these stations struggled greatly to achieve any audience due the extremely limited potential audience (essentially those that live on campus). Webcasting made many of these stations much more widely viable in terms of recruiting volunteers and recognition within the community, thus enhancing the opportunities for larger potential audiences and in turn additional and enhanced educational experiences.

Many EC stations do not have the computerized systems generally found in many commercial and CPB-funded public radio stations that would allow for the automation of recordkeeping tasks required under the Digital Millennium Copyright Act ("DMCA"). Further, the music collections of EC stations are often not cataloged in computer databases, and the cost of inputting the data required by the DMCA would be enormous and extremely time consuming. The amount of data required to be reported to the Collective in the Notice demands a computerized operation. Also, many EC stations are multi-formatted and the number of recordings played on the air can be immense compared to those of tightly formatted commercial stations. The libraries accumulated over many years includes tens of thousands of compact discs and albums that continue to receive airplay, while most commercial stations program from but a few recordings (600-1000 songs). Even in the case of commercial stations, with limited musical selections, a computerized system is needed. With respect to the EC stations, the demands are greater

than that of the commercial broadcaster with restricted playlists. It is highly unlikely that the limited resources of EC stations would allow them to comply with the reporting requirements.

Another problem is the cost of the computer hardware acquisition and software (still undeveloped) necessary to comply with the reporting requirements specified in the Notice. The volunteers at these stations are already donating their time, energy -- and in some cases, fiscal resources -- to produce their programs. To expect volunteers to contribute many additional hours to input the data needed to comply with the DMCA would be unreasonable and an insurmountable task for numerous stations.

One station, when asked to estimate the person hours needed to comply, responded with some eye opening statistics:

> •It was estimated that it would take 5400 person hours to enter the data, IF AVAILABLE[1], for a CD library of 10,000 and an additional 10,800 person hours to enter a record collection of 20,000 items.
>
> •Maintenance would require 1080 person hours per year.
>
> •Database Maintenance would require an additional 100 hours per year.

Note these figures do not include the "listener logs". For a station entirely staffed by volunteers, with limited resources, this is unmanageable.

The Copyright Office is afforded a means to amend the proposed rules to allow EC stations to be exempted from the "intended playlist" requirements.

First, §114(f)(2)(A) of the Copyright Act states, "In establishing such rates and terms, the Copyright Arbitration Royalty Panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A)."

This section gives the Copyright Office considerable discretion. Given the following, it would be permissible and consistent with the intent of Congress to eliminate or substantially reduce the reporting requirements of Educational and Community stations.

The Corporation for Public Broadcasting has recently reached an agreement with the RIAA concerning this issue. While the details of this agreement are hidden from public scrutiny, it is public knowledge that those stations which agree to the terms of the deal will not be required to adhere to the reporting requirements, provided they have less than 10 full-time employees.

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[1]As noted later in these comments, many of the items called for in the Notice are not available at all or in other cases not easily obtainable.

We find it highly questionable and offensive that the RIAA be allowed to enter into an agreement with such confidentiality clauses that it precludes the public from scrutinizing its contents for apparently the sole reason of protecting itself the intent of Congress when it adopted, §114(f)(2)(A). Apparently this did not escape the attention of the Copyright Abritration Royalty Panel, when it stated on page 50 of its Rate Arbitration Report,

> "These clauses prohibit any licensee from discussing the terms and conditions of the agreement with other parties. *See* RIAA Exs. 60 DR- 84 DR. But it simultaneously reserved its own right to use each agreement however it wished at the CARP proceeding. *See id.* These clauses belie the notion that RIAA's primary concern was to establish precedents for other potential licensees."

If the Copyright Office is compelled to retain the reporting requirements, even in light of the CPB/RIAA agreement, there is an alternative that should be considered for EC stations. Currently, many EC stations meet their BMI reporting requirements for their broadcast operations by completing handwritten or, optionally electronic logs for a three day period. These logs require much less information (time, Program Name, Song Title, Name of Composer(s)/Writer(s), Call Letters and Date) and allow the organization to fairly distribute copyright fees due to sampling. Similar (or concurrent) reporting would allow reasonable access to the Collective in this proceeding.

CBI acknowledges that it may be necessary to collect data concerning the use of copyrighted material, in order to fairly compensate the artists, to the extent that fees are collected. Reporting requirements recently practiced by BMI would provide relief to Educational and Community stations that is reasonable, equitable and most importantly possible.

In the CARP report on rate arbitration, the panel took into account some relevant information in determining the minimum fee for eligible nonsubscription services, of which EC stations are a subset.

In discussing how the minimum rate was set, the panel offers two rationales for a minimum fee (both references are on page 95 of the report):

> 1. "...to protect against a situation in which the licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties.
>
> 2. ... the intrinsic value of the services access to the full blanket license, irrespective of whether the service actually transmits any performances."

Later the report states, "Whichever the purpose of the minimum fee requirement, the panel believes that the lowest fee negotiated by the RIAA under the per performance fee model would cover perceived administrative costs and the value for access to the

blanket license."

When the reporting requirements for EC stations are modified as suggested, it is clear that the administrative costs of the RIAA would be reduced significantly with respect to those stations. Since the burden is greatly reduced, the only value left is the access to the blanket license. Given the on the face acceptance of a reduced rate in the rate proceeding for non-commercial, non-CPB stations and the reduced cost of business, the minimum rate could also be reduced to one third of the "Commercial" rate and extended to all non CPB/NCE's. To further reduce the recordkeeping burden of EC stations and the collective, the EC stations should be given a blanket rate, not a minimum rate.

CBI acknowledges that this proceeding is separate from the rate proceeding, but the issues are interrelated. CBI did not participate in the arbitration, due to its limited resources. In fact, the CARP noted on page 89 that,

> Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations ("non-CPB broadcasters") presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. *See* Tr. 9009-13. The record tells little about those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those that are not.

This discussion of the reporting requirements allows an opportunity to express the need to reexamine the rates, particularly since the changes needed to insure the viability of these stations are so extensive.

Second, the intended playlist requirement is also unrealistic in that some of the data requested is not available to EC stations in a manner that is conducive to compiling the database needed to generate the reports.

For example, most of the promotional records and CDs received by stations have their UPC codes destroyed by the labels or distributors. Many of the older pieces of music don't have UPC codes. Many of the early promotional releases don't have copyright information or a retail album title on the covers.

As clearly demonstrated above, it is, in many cases, an unmanageable project to establish a method to comply with the reporting requirements for Educational and Community stations because of the scope of the project, lack of resources and unavailable data. Since these stations cannot comply with the reporting requirements, they should also be afforded relief from the fees. Given the small audiences of these stations, the fee should be dropped or a blanket fee should be adopted that is lower than the proposed minimum fee.

Notice of Use

"The Office proposes to require all Services, including those which have previously filed a general Notice of Use for the section 114 license, to file a new Notice of Use. It is the Office's impression that many Services that have filed Initial Notices under the current regulation have ceased using the statutory license and, in many cases, have gone out of business altogether. Requiring all Services to refile a Notice of Use will make the Office's records more reliable, retiring records identifying Services that are no longer using the statutory license. The Office invites comments on this proposal."

CBI does not object to the requirement to file a new notice, provided that those filing are not required to pay the fee a second time.

"Moreover, the Office proposes that all Notices of Use be prepared using a standard form developed for this purpose. In this way, there will be an accurate uniform record currently identifying all Services using these statutory licenses, indicating which licenses are to be used, the type of transmissions to be made under the section 114 license, and information concerning the date of first transmission or the date for making an ephemeral recording of a sound recording. Under current practice, in which parties may submit a notice based on a suggested, but nonmandatory, format, a Notice is more likely to be misfiled and the information in the Notice is less likely to be easily recognized. Parties may comment on the elements required as part of the notice, on when the updated notice should be filed, and on the layout and utility of the proposed standard form. A prototype of the proposed form has been posted on the Copyright Office website at: http://www.loc.gov/copyright/forms/form112-114nou.pdf."

CBI does not object to a standardized form, though a better proposal would be to develop an online form. This would help reduce the bookkeeping burdens on the Copyright Office. Changes would need to be made to the form to make it understandable to the average user. The terminology on the form leaves the uninitiated confused. If the terminology is not changed, the form should come with instructions and explanations. The burden on the Copyright Office to use easily understandable language is minimal. Many EC stations have limited access to legal counsel. It would be burdensome and in some cases expensive for these stations to seek legal advice in order to register their activities.

If the proposed rules are adopted, the notices will be placed in the public file in the Licensing Division of the Copyright Office, where copyright owners may go to access the information concerning use of sound recordings under the licenses. The Office proposes to discontinue its current practice of posting copies of all notices on its website. The Office questions the continued utility of making this information available on the website, which requires the expenditure of substantial resources.

If the Copyright Office adopts the online form, the need for manual recordkeeping would be minimized and the ability to post this information could be automated. The

ability to access information on the website would allow a station to confirm that its registration had been processed correctly. After the initial expenditure of resources to develop the online system, the Copyright Office would have reduced its use of resources substantially and improved its service to those affected.

The Office proposes to provide copies of all notices of use to the Collective or Collectives designated through the CARP process to receive and distribute royalties under the statutory license, and believes that this, combined with the availability of the notices for inspection and copying in the Licensing Division, adequately makes the information in the notices available to all interested parties.

These proposed changes only serve the copyright holders and would require an expenditure of resources on the behalf of the Collective at taxpayer expense, while not providing those that are in compliance with the same level of "support". As an example, suppose a small, noncommercial station with an annual budget of under $10,000 per year were to be challenged by the Collective or Collectives. It would have to pay someone a fee, just to prove it complied with this requirement.

Moreover, the Office seeks comment on a possible change to the requirement that all notices be filed in the Copyright Office. Would it be more efficient for a Service to file its Notice of Use directly with the designated collection entity, rather than with the Copyright Office? What would be the propriety and efficiencies of having Services file Notices of Use not with the Office, but directly with the Collective designated to receive royalties from the statutory licensees, and requiring the Collective to make the notices available to the public for inspection and copying?

As mentioned earlier in these comments, the Copyright Office could establish a system that is automated and available on its web site. The results of the data collected could then be made available through an online database. This would allow an independent party to maintain the records and make them equally available to the parties. The Copyright Office proposal allows the owners of the copyright to possess the information needed to enforce the copyright without an independent and unbiased intermediary.

Moreover, the Office is seeking comment on the advisability of requiring periodic filings of the notices of use in order to establish a continually current and updated file of Services operating under either the section 114 and section 112 licenses. If the Office finds there is a need for maintaining an updated file, the final rule will specify that each Service must file a new Notice of Use with the Office every year (or other time period to be determined).

This would be appropriate and prudent. In the instance of licensed broadcasters, there periodic filing should coincide with license renewal or a change in ownership.

In addition to the information in the Intended Playlists, RIAA has made additional

requests for information in two instances. In the case of eligible nonsubscription transmissions and transmissions made by a new subscription Service, RIAA has requested that these Services include a ``Listener's Log'' in the Report of Use. The ``Listener's Log'' will identify the name of the Service, the channel or program accessed, information on the user, such as date and time the user logged in and out, the time zone of the place at which the user received the transmission, the user identifier, and the country in which the user received the transmission. RIAA has also requested that a Service making ephemeral phonorecords of sound recordings under section 112(e) include an ``Ephemeral Phonorecord Log'' in its record of use. The ``Ephemeral Phonorecord Log'' would, among other things, include the name of the Service, the date the phonorecord was made or destroyed, and specific information about the sound recording from which the ephemeral phonorecord was made. Commentors should discuss in detail the reasons for including or excluding specific elements of the Listener's Log and the Ephemeral Phonorecord Log. Other interested parties, however, may find the requirements too stringent and burdensome in spite of RIAA's assertions. Such parties should identify any problems they perceive with the proposed regulations and explain with specificity the reasons why the regulations are unworkable or unduly burdensome, or exceed the needs of the copyright owners.

The listener log is simply unattainable as of this writing for EC stations. A telephone survey revealed no sources for an off-the-shelf software solution to this proposal. Customized software applications would cost Educational and Community stations fees that are unreasonably burdensome based on their limited fiscal resources.

In fact, we see no need for such information to be collected. The reporting requirements are supposed to enable fair distribution of fees. The listener log requirement should be eliminated because the provided data does not assist in the distribution of fees.

With respect to webcasting, the separate ephemeral recording fees and reporting requirements are redundant and burdensome on all parties. Ephemeral recordings are required to webcast and destroyed as they are created. There is no accessible or retrievable copy available after transmission, unless the file is intentionally archived. Unless the material is archived, the reporting requirement and associated fees are burdensome, costly, detrimental and unfair for "vapor".

This idea was included in the Copyright Office report to Congress, beginning on page 142 of "A Report of the Register of Copyrights Pursuant to Section 104 of the Digital Millennium Copyright Act". The Copyright Office suggested that ". . . Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work."

While the CARP found that the exemption for a single copy could be sufficient, in some cases, it is certainly not sufficient for EC stations that tend to offer numerous streams of technically different and duplicative program content streams. The exemption

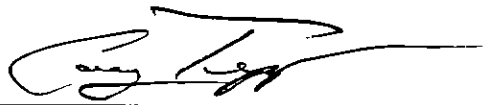
should extend to each stream originating from the same program material and only differs in electronic structure and transfer rates. This would ease an undue burden on the EC stations regarding fees and reporting requirements. Thus, the fees and reporting requirements for temporary 'buffer copies' should be eliminated.

Conclusion

Educational and Community stations are non-profit, non-commercial operations operating solely for the benefit of their audiences, educational benefit of the students and volunteers, and educational programs at Universities. These stations have extremely limited resources in comparison to commercial broadcasters and CPB-funded stations. The reporting requirements, as proposed, are unmanageable for all but a select few stations. If the Copyright Office codifies these reporting requirements, without reconciling the effects on these stations and their audiences, it will have a chilling effect on creativity, learning, education, research and society. EC stations are often the only voices that offer significantly different cultural news and perspectives. The proposed reporting requirements will remove these alternative voices from the marketplace of ideas.

Respectfully submitted,

Collegiate Broadcasters, Inc.

By: 

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WUEV-FM
University of Evansville
Evansville, IN 47722

WXUT
University of Toledo
Toledo, OH 43606

KPNI Radio
Southern Methodist University
Dallas, TX 75275-0456

WBSU
SUNY Brockport
Brockport, NY 14420

KBVR FM & TV
Oregon State University
Corvallis, OR 97331

WSIA
College of Staten Island/CUNY
Staten Island, NY 10314

WICB and VIC 106
Ithaca College
Ithaca, NY 14850

KSYM-FM
San Antonio College Radio
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WVGS/FM 91.9
Georgia Southern University
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KDNE
Doane College
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WPTC-FM
Pennsylvania College of Technology
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89.9 FM KTSW
Southwest Texas State University
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WBCX
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