

COPY

RECEIVED

APR 5 2002

GENERAL COUNSEL  
OF COPYRIGHT

DOCKET NO.  
RM 2002.1  
COMMENT NO. 21

Before The  
COPYRIGHT OFFICE  
Library of Congress  
Washington, D.C.

In the Matter of Rulemaking )  
)  
)  
Notice and Recordkeeping for Use of )  
Sound Recordings Under Statutory )  
License )  
)  
)  
)

Docket No. RM 2002-1

**JOINT COMMENTS OF COLLEGE AND UNIVERSITY RADIO BROADCASTERS  
WEBCASTING UNDER STATUTORY LICENSE**

The undersigned college and university broadcasting stations (the "College Broadcasters"), by their attorneys, file these Comments in response to the Copyright Office's (the "Office") *Notice of Proposed Rulemaking*, published at 67 Fed. Reg. 5761 (Feb. 7, 2002) ("NPRM"). This proceeding concerns the requirements under the statutory licenses for webcasting in Sections 112(e) and 114(d)(2) of the Copyright Act, 17 U.S.C. §§ 112(e) and 114(d)(2). The Office has solicited public comment on the proposed changes to the interim regulations regarding (i) notice requirements and (ii) recordkeeping requirements. These Comments submitted by the College Broadcasters address both the proposed notice and recordkeeping requirements.

For the reasons set forth below, the College Broadcasters strongly urge the Office to create a special exemption from any additional fees for notice and from the proposed recordkeeping requirements set forth in the NPRM for a certain class of noncommercial educational radio stations or, alternatively, to reduce the recordkeeping requirements for eligible

webcasting activities under statutory licenses by noncommercial, student-operated educational broadcasters not funded by the Corporation for Public Broadcasting (“CPB”).

## INTRODUCTION

The College Broadcasters are a geographically diverse group of noncommercial, non-CPB-funded radio stations, licensed to various institutions of higher education throughout the United States.<sup>1</sup> These Comments relate exclusively to the statutory licenses for the simultaneous streaming via the Internet of the College Broadcasters’ over-the-air broadcast programming. It is important to understand the background of the College Broadcasters, and student-operated educational radio stations in general, to grasp fully the adverse impact of the notice and recordkeeping requirements proposed by the Office in the NPRM. Critical to the continuing viability of the streaming activities of the College Broadcasters is the actual ability of the College Broadcasters to assume the newly increased costs of such activities.

The College Broadcasters report annual operating budgets ranging from \$15,000 to \$195,000 per year.<sup>2</sup> Surprisingly, the stations participating in these Comments are among the most well-funded college radio stations in the nation. Financial resources available to student-operated educational radio stations such as the College Broadcasters are limited, based on the noncommercial nature of the licenses granted by the Federal Communications Commission (“FCC”) and restrictions in funding from parent institutions, many of which are state-supported colleges or universities.<sup>3</sup> Sources of funding for the College Broadcasters include student activity fees, program underwriting, and donations from fundraising activities.

---

<sup>1</sup> Please see Appendix A to these comments in which radio station KUOM attaches a letter of support for the College Broadcasters even though KUOM is a CPB-funded station.

<sup>2</sup> The average budget reported by a College Broadcaster for the purposes of these Comments is \$98,438.20. The median budget of the College Broadcasters is \$75,500.

<sup>3</sup> While there is little nationwide data describing the financial status of college stations, a recent study conducted of radio stations affiliated with thirteen institutions associated with the State System of Higher Education (SSHE) in

As with most student-operated educational radio stations, the College Broadcasters are staffed principally by student volunteers seeking creative outlets or developing the talents of their aspiring professional careers.<sup>4</sup> These student volunteers participate in the operation of college stations while at the same time maintaining their academic studies. As reported by the College Broadcasters in preparation of these Comments, the College Broadcasters employ from 0 to 2.75 full-time equivalent (“FTE”) paid professional staff.<sup>5</sup> For many of the College Broadcasters, the single professional employee is also the engineer responsible for maintaining the station’s technical facilities.

The diverse broadcast programming offered by the College Broadcasters typifies the broad range of programming available on most non CPB-funded college and university radio stations. Consistent with the roles of their parent educational institutions, the College Broadcasters strive to explore unique programming and to cater to underserved niches of the community at large. The College Broadcasters, like most student-operated educational radio stations, are less likely than their commercial counterparts to utilize pre-programmed playlists of musical selections. Natural academic attrition provides another distinguishing characteristic of college radio stations: a constantly changing staff, which naturally leads to constantly evolving content. The College Broadcasters report extensive libraries of anywhere from 10,000 to

---

Pennsylvania is indicative of the financial resources committed to such services. Eleven of the studied radio stations were licensed as broadcast stations and two operated non-broadcast services (such as carrier current stations). With respect to the licensed stations, the study reported that annual direct funding ranged from a low of \$5,000 to a high of \$50,000. Mean annual direct funding for such licensed stations was only \$17,227. The study thus confirms that the College Broadcasters benefit from financial resources atypically high in relation to their student station peers. K. Dudd and B. Wilson (Indiana University of Pennsylvania), *College Radios at Pennsylvania State Universities: A Status Report*, *College Media Rev.*, Winter 2001 (the “SSHE Study”).

<sup>4</sup> The SSHE Study reported that, of the eleven licensed stations, only two employed full-time personnel. In each of these two instances, a single full-time employee was assigned additional duties unrelated to the broadcast operation. The SSHE Study further indicated that the balance of the staffing was comprised of part-time faculty members (generally only one quarter-time faculty member each), students, and community volunteers from a variety of sources.

150,000 compact discs, tapes and phonorecords, consisting of a wide range of artists and musical genres -- a number that is often increased by the personal libraries of student programmers.<sup>6</sup>

These music libraries contain the sound recordings of nationally-recognized artists produced by national record labels as well as locally produced sound recordings of local performers and non-English language sound recordings of international artists. In addition, much of the programming offered by the College Broadcasters does not involve the performance of pre-recorded sound recordings. Rather, hundreds of hours annually of programming broadcast by the College Broadcasters is news, public affairs, interviews, live music, other live performances, sports reporting and sports play-by-play.

Finally, the technical facilities and resources of the College Broadcasters are, for the most part, extremely basic, as one might expect. In addition, the service areas of their broadcast transmissions are typically very limited, in keeping with their overall operational capabilities.<sup>7</sup>

Each of these characteristics of the College Broadcasters directly relates to the reasonableness of the proposed notice and recordkeeping requirements in the NPRM, as applied to student-operated noncommercial educational radio stations. The College Broadcasters engage in streaming services to provide their audiences with another convenient means to listen to their broadcast programs and to provide their students with an effective educational tool. The streaming activities of the College Broadcasters are not profit-making endeavors. For this

---

<sup>5</sup> The average number of FTE employees reported by the College Broadcasters for the purposes of these Comments is 1.46, with a median of 1.32.

<sup>6</sup> Some of the College Broadcasters report that they receive anywhere from 77 to 196 new compact discs and phonorecords each week from major labels, independent labels and artists themselves at no cost. All of these sources seek to increase the amount of audience exposure and promotion provided by student-operated educational stations by providing complimentary copies of sound recordings to the stations.

<sup>7</sup> A 1995 study found that 56% of responding college radio stations operated in the 100 to 3,000 watt range. Only 29.8% operated above 3,000 watts. S. Sauls, *1995 College Radio Surveys*, National Association of College Broadcasters (1995). By comparison, commercial radio stations operate with as much as 100,000 watts of power, sometimes more.

reason, the College Broadcasters would have to find funding to cover the costs of streaming (bandwidth, streaming service provider fees, maintenance service provider fees, transactional costs for recordkeeping and performance license fees) in existing budgets or new sources of funding. As further explained below, due to the relatively low operating budgets, lean staff, and low technical capabilities of radio stations like the College Broadcasters, the adoption of the proposed notice and recordkeeping requirements clearly would prove to be insurmountably burdensome for the College Broadcasters, as well as all other noncommercial educational radio stations licensed to colleges, universities and other non-profit educational institutions not funded by the CPB.

## **DISCUSSION**

### **I. Notice Requirements.**

#### **A. The Proposed Notice Requirements are Overly Burdensome for the College Broadcasters.**

##### **1. The Proposed Standard Form is Confusing and Should be Simplified.**

Although the College Broadcasters do not object to the Office's implementation of a standard form for all statutory licensees to notify copyright owners of use of their sound recordings under both Sections 114(d) and 112(e) ("Notice of Use"), the presentation and information requested in the proposed standard form is too confusing. The average user would not be able to complete the proposed form without assistance from a legal professional well-versed in the copyright laws. Because the College Broadcasters have limited resources, the College Broadcasters have minimal, if any, access to legal counsel. As a result, the confusion resulting from unfamiliar statutory references and technical terminology used throughout the form inevitably will lead to inaccurate, inconsistent Notices of Use. The College Broadcasters respectfully suggest that the terminology used in the form should be simplified and accompanied

by clear and concise plain English explanations of the meaning of each item of information requested on the form so that the average employee, student, or volunteer at a student-operated educational radio station, like the College Broadcasters, would be able to complete the form. For example, the Office should provide clear and concise instructions regarding the item "Nature of License and Category of Service." References to the statute should be explained by defining "Statutory license for digital transmissions, 17 U.S.C. § 114(d)(2)" in the vernacular, e.g., "performance license for webcasting of sound recordings." In addition, simple definitions should be provided for "Pre-existing subscription service," "Non-subscription transmission service," "Pre-existing digital audio radio service," and "New subscription service." The Office should take a similar simplification approach to the rest of the form.

**2. The Office Should Continue to Collect All Notices of Use.**

The College Broadcasters believe that it would be inappropriate and ineffective to require statutory licensees to submit Notices of Use to privately-owned designated collectives rather than to the Office. The College Broadcasters acknowledge the importance of maintaining one central location for the collection of all Notices of Use for ease of administration. The College Broadcasters submit that the Office should be the one entity to control the filing process of Notices of Use. As a public entity, the Office's continued control over the process would better serve the interests of all parties to the statutory licenses. Designated collectives exist to serve the private interests of others (i.e., the record labels) to which they report and would not be inclined to act in the interests of all categories of copyright owners and statutory licensees. Moreover, designated collectives would not be held to the same degree of accountability for their policies, procedures, or acts as would the Office. If copyright owners designate a new collective(s) to distribute copyright fees to copyright owners or if SoundExchange ceases operations, the notice

procedure would not be disrupted and notice records would not be jeopardized if the Office maintains control over the collection and maintenance of Notices of Use. For these reasons, the College Broadcasters recommend that the Office retain the collection function for Notices of Use in order to avoid potential abuse.

**3. Periodic Filings of Notices of Use Should Coincide with Filing Dates for Corresponding Licenses.**

The College Broadcasters do not object to the concept of periodic filings of Notices of Use to maintain current and accurate files. Nevertheless, such periodic filings (1) should not subject statutory licensees to additional filing fees and (2) the dates for renewal filings should coincide with the required FCC license renewal dates of radio broadcast licensees,<sup>8</sup> or with the dates license renewal applications are due.<sup>9</sup> Changes in ownership and cessation of streaming service would also constitute appropriate events to submit amended Notices of Use. Limiting periodic filings to coincide with the aforementioned events would relieve the Office from the significant burden of receiving thousands of notice submissions at one time. By spreading the dates out on a federally-mandated license-holder renewal date basis, the Office, its staff and facilities would be better equipped to manage the new data.

**4. Additional Fees Should Not be Imposed for Filing Revised Notices of Use.**

While the College Broadcasters do not dispute the need for an initial, one-time reasonable filing fee, the College Broadcasters suggest that filing fees be waived for services that have previously filed a general Notice of Use. Requiring additional filing fees for each new and periodic Notice of Use would place another financial burden on the already financially strapped

---

<sup>8</sup> FCC broadcast license renewal dates are staggered based on the U.S. state or territory in which a broadcast station is located. Currently, broadcast licenses are renewed for an eight-year period. *See* 47 C.F.R. § 73.1020 (2001).

<sup>9</sup> A broadcast station's renewal application is due at the FCC four months prior to its corresponding license renewal date.

College Broadcasters and their peers. Because the College Broadcasters and other student-operated educational radio stations operate on extremely limited budgets with minimal funding, it would be unreasonable to expect them to pay additional fees to cover the filing of a new Notice of Use and periodic updates.

**B. The Office Should Develop an Online Submission Process for Notices of Use.**

To ease the administration process, the College Broadcasters urge the Office to develop an Internet form for Notice of Use, i.e., a standardized form that is not only available online, but may be completed and submitted via the Internet as well. An online form and submission process would provide an efficient, straightforward method for statutory licensees to provide proper notice to copyright owners and significantly reduce administrative burdens the Office currently faces. Moreover, the Office would be able to continue its practice of posting notices on its website, a feature the College Broadcasters implore the Office to retain to ensure an easily-accessible public record. Automated online notice submissions and postings would streamline access to copyright holders, as well as provide confirmation to a statutory licensee that a Notice has been processed as required. If the Office adopts an online database system, as suggested above, its proposal that licensees submit their Notices of Use directly to designated collectives would no longer be relevant.

**II. Recordkeeping Requirements.**

**A. The Majority of the Requested Information is Not Readily Available to the College Broadcasters.**

The proposed regulations would require statutory licensees to provide an "Intended Playlist," a "Listener's Log" and an "Ephemeral Phonorecord Log" for uses of sound recordings under Section 112(e). The Intended Playlist has been expanded from the requirements under the interim regulations to require eighteen (18) fields of information for each sound recording



scheduled to be performed or actually performed. The Listener's Log, which did not exist under the interim regulations, requires seven (7) separate fields of information with respect to each individual user that connects to the webcasting service of the licensee. The Ephemeral Phonorecord Log, also new to the reporting requirements, requires thirteen (13) separate fields of information with respect to each phonorecord made of a sound recording under Section 112(e) and the same thirteen (13) fields for each phonorecord destroyed.<sup>10</sup> Out of more than 50 fields of information requested, the College Broadcasters find that only the following fields of requested information would be readily available: name of the service or entity; channel, program or station identifier; the sound recording title; and, the featured recording artist.

Much of the requested information with respect to the Intended Playlist is not consistently available to the College Broadcasters. For example, the College Broadcasters routinely perform sound recordings, including special broadcast singles and compilations, that are provided by the record labels themselves in advance of retail release. As a result, a substantial percentage of the sound recordings and compilations distributed to the College Broadcasters and other student-operated educational radio stations display no catalog number, Universal Product Code or retail album title. In addition, the College Broadcasters, like most other educational radio stations, make extensive use of libraries comprising archived historical sound recordings that were created before the advent of the International Standard Recording Code (ISRC) or Universal Product Code (UPC). The College Broadcasters, as with many other student-operated educational radio stations, feature self-produced sound recordings made by the featured artists themselves; these sound recordings do not contain any of the retail information requested in the NPRM. Furthermore, historical and self-produced sound recordings typically do

---

<sup>10</sup> The ambiguous language of the proposed regulations seems to suggest that the thirteen (13) separate data fields would be required with respect to both each ephemeral phonorecord made AND destroyed. NPRM, 67 Fed. Reg.

not provide complete copyright management information that is requested in the NPRM. Indeed, the Berne Convention for the Protection of Literary and Artistic Works does not even require such copyright management information to be listed on sound recordings.<sup>11</sup>

Due to the ad-hoc nature of their programming, the College Broadcasters generally do not have pre-scheduled playlists and many do not keep logs of music actually played. For those stations that do keep such logs, the playlists are predominantly handwritten and only include the name of the artist, album and song title. As a result, the College Broadcasters are unable readily to provide the fields of requested information regarding date and time of transmission, duration of transmission, and information regarding archived programs. Moreover, because the College Broadcasters' programming represents diverse ranges of musical genres, it is difficult for the College Broadcasters to identify their programs with one musical genre as required under the Intended Playlist.

With respect to the proposed Listener's Log, the College Broadcasters also report that the requested information is not typically available. Three (3) of the seven (7) proposed requirements refer to local time at the location of the user connecting to the Internet streams of the College Broadcasters. This information is currently not provided by contemporary Internet audio streaming systems. Moreover, the current schemes that are available do not assign unique identifiers for users or listening sessions; one Internet Protocol (IP) address could conceivably represent more than one listener because of the use of proxy servers. Logs generated by present-day audio streaming software record a connection's IP address, which might be used to

---

5761, 5766 (Feb. 7, 2002).

<sup>11</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised in Paris, July 24, 1971, 828 U.N.T.S. 221. The United States became a party to the Berne Convention effective March 1, 1989. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

approximate the listener's country of origin. This information could be potentially misleading, however, depending on the nature of the listener's Internet service (e.g., an America Online (AOL) user logging in from any state in the United States may be reported as a connection logging in from Virginia where AOL has its headquarters).

The College Broadcasters generally report an inability to provide the information requested with respect to the Ephemeral Phonorecord Log. Ephemeral copies of sound recordings made to facilitate Internet transmissions of broadcast programming consist simply of buffer copies created in the temporary memory of the computer equipment used to encode and serve such programming. The software currently used by the College Broadcasters in conjunction with this process makes no discrete record of such files as they are created and destroyed. Technicians for the College Broadcasters uniformly report that present technology makes the collection of such information impossible. These ephemeral copies exist only momentarily and are each destroyed immediately after use. Given the Office's own recommendation "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," the requirements for the Ephemeral Phonorecord Log are clearly beyond what is reasonable.<sup>12</sup>

The proposed recordkeeping requirements also require reporting of any system failures resulting in the actual performance of sound recordings that differs from the Intended Playlist. Because many of the College Broadcasters do not prepare pre-scheduled playlists and would report only actual performances, the system failure report would have no useful purpose and

---

<sup>12</sup> U.S. Copyright Office, *Digital Millennium Copyright Act Section 104 Study* at 142-143 (Aug. 2001).

would constitute an unreasonable burden for the College Broadcasters. Moreover, system failures that cause such deviations in actual programming may be caused by a variety of factors, such as the failure of the station's radio studio equipment used to playback sound recordings or the failure of the streaming system itself. The College Broadcasters universally report that their streaming systems do not automatically report failures, nor do they generate an easily-accessible record of when a failure occurred. In fact, in most cases, station personnel do not learn of system failures until after a significant passage of time. In cases where a third party provides streaming service to a College Broadcaster, access to system failure records can be even more difficult, or even impossible, to obtain. As a result, the College Broadcasters would not be able to comply with the proposed requirement to report system failures.

Finally, the proposed recordkeeping rules contain very specific requirements for the format of reports, to be submitted in an electronic form. The range of computer utilization by the College Broadcasters varies widely. The computer systems that are presently in use at the facilities of the College Broadcasters are already fully utilized to support existing operations. Requiring electronic recordkeeping would increase the burden on the College Broadcasters because the College Broadcasters would incur additional expenses for the acquisition of new computer hardware and software necessary to permit the College Broadcasters to comply with the electronic reporting requirements. Because the proposed format for reporting does not conform to the capabilities of any computer software presently available, the projected costs of acquiring any such software and the hardware to host and run such software are indeterminate at the present time. Regardless of the projected amount of costs, the College Broadcasters do not have the flexibility in their budgets to cover such additional infrastructure costs simply to comply with reporting obligations for their streaming activities.

**B. The Majority of the Requested Information Does Not Fulfill the Stated Purpose of the Recordkeeping Requirements.**

As indicated in the NPRM, both the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") and the Digital Millennium Copyright Act ("DMCA") instruct the Librarian of Congress to establish regulations that would require statutory licensees to give copyright owners *reasonable* notice (emphasis added) of the use of their sound recordings and to create and maintain records of use and make such records available to copyright owners.<sup>13</sup> The NPRM indicates that the purpose of the recordkeeping requirements is (i) to allow copyright owners to monitor the use of their sound recordings and compliance with the terms of the licenses and (ii) to permit the copyright owners to receive their royalties as expeditiously as possible. In the NPRM, the Office proposes to adopt the recommendations submitted by the Recording Industry Association of America ("RIAA") with respect to the recordkeeping requirements for both licenses because the requirements recommended by the RIAA "seem[] designed to accomplish the basic reporting objective of providing information with which copyright owners can generally monitor compliance with the terms of the licenses." The Office gives credence to the argument of the RIAA that the requested information is "easily provided, [] not burdensome...." Contrary to the assertions of the RIAA, however, the majority of the information requested under the proposed recordkeeping requirements is not readily available and, moreover, is wholly unreasonable. The College Broadcasters are not aware of any proof or explanation from the RIAA that supports its need for the information requested and that relates to the primary purposes of the recordkeeping requirements: ease of administration.

---

<sup>13</sup> The Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995), 17 U.S.C. §§ 106(c), 114 and 115. The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), 17 U.S.C. §§ 112(e), 114 and 1201, et seq.

The College Broadcasters acknowledge that the following fields of information are necessary to facilitate administration of the licenses, including collection of royalties and expedited distribution of royalties to copyright owners: sound recording title and featured artist. The remaining information requested does not relate to the primary purpose of the notice and recordkeeping requirements. Moreover, as detailed above, the remaining data are not consistently available to the College Broadcasters for each sound recording performed.

Even if all of the information were readily available, many of the fields of requested information are duplicative. For Internet retransmissions, the additional field of the station identifier is redundant with respect to the name of the service or entity. In addition, with respect to simultaneous streaming of broadcast signals, the concept of a "channel" is inapplicable. The ISRC, catalog number, and UPC corresponding to a retail album essentially describe the same product.

Lastly, much of the requested information under the Ephemeral Phonorecord Log, were it feasible to record such data, would correspond perfectly with the information already required under the Intended Playlist. The College Broadcasters also object to providing the detailed information requested under the Ephemeral Phonorecord Log because such information would have no relation to administration of the license fees collected on ephemeral copies. The ephemeral recording license fee that has been proposed is a flat fee equal to a percentage of the performance fee proposed and does not correspond to the number of copies made and the time of their creation and destruction. For this reason, the requested information on ephemeral recordings is excessive and unreasonable.

All of the websites of the College Broadcasters are publicly available and can be readily monitored by copyright owners for compliance with the sound recording performance

complement and perhaps other license conditions. The College Broadcasters do not believe they have an affirmative obligation, by statute or otherwise, to provide copyright owners with the means to monitor compliance with the sound recording performance complement. In the same manner as for performance licenses for musical compositions under Section 118(d) of the Copyright Act, the College Broadcasters believe that the reporting requirements should be reduced to providing only the following data fields, on a sampling basis: the sound recording title, the featured artist and, where available, the record label.<sup>14</sup>

The College Broadcasters submit that the remaining fields of requested information have little or only tangential connection with the stated purposes of the recordkeeping requirements. The request of the RIAA for such information amounts to an inappropriate method of obtaining free market research on the backs of the pioneers of a fledgling industry. The Office should not allow the RIAA to abuse the recordkeeping process in such a manner, when the RIAA already has much of the information or would be able to obtain it from other sources that specialize in recording and reporting such information. It would be unfair to require the College Broadcasters and other not-for-profit noncommercial radio stations to subsidize the market research of profit-making and profitable record companies.

**C. The Costs of Obtaining the Requested Information Exceed the Financial Resources of the College Broadcasters.**

Each of the College Broadcasters has determined that existing finances would not allow them to cover the cost of complying with the proposed recordkeeping requirements. The College Broadcasters regularly struggle with fiscal difficulties and have restricted abilities to secure additional funding to support the increased royalty and recordkeeping costs tied to streaming

---

<sup>14</sup> 17 U.S.C. § 118(d). See Section II.F.2 for an explanation of this provision.

their broadcast signals on the Internet.<sup>15</sup> As the budgets of the already financially strapped College Broadcasters are finite, increased costs for copyright performance license fees and associated recordkeeping will siphon away funding for the established educational broadcasting endeavors of the College Broadcasters. Recall, moreover, that the College Broadcasters are among the most well-funded college radio stations in the nation, yet they will not be able to continue their Internet streaming activities should the Office implement the proposed requirements. The proposed requirements therefore also sound a death knell for the streaming of the broadcast signals by the remaining educational radio stations licensed to colleges, universities and other not-for-profit educational institutions not funded by the CPB, which have even more severely limited resources. Compliance with the proposed recordkeeping requirements would have an observable adverse impact on the operating budgets of the College Broadcasters as they would require the College Broadcasters to devote unknown amounts of their already limited financial resources towards (i) purchasing hardware and software to track, record and produce reports on the requested information; (ii) obtaining additional assistance for data entry of each field of information under the Intended Playlist and Ephemeral Phonorecord Log for each sound recording in a station's music library; (iii) providing technical support to maintain the servers and additional hardware required for compliance and to prevent loss of data; and (iv) ensuring overall compliance with the proposed regulations. Ironically, the College Broadcasters would be required to undertake all of these arduous compliance efforts in order to pay, in most instances, the minimum annual royalty fee under the statutory licenses.

---

<sup>15</sup> In a preceding Copyright Arbitration Royalty Panel convened in 1998, the panel observed that, while commercial broadcasters can pass along some portion of their costs to their advertisers, "[n]o comparable mechanism exists for Public [noncommercial] Broadcasters." RIAA Exhibit 220 DP-X at 24, U.S. Copyright Office, CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding at 89, 63 Fed. Reg. 49,823 (Sept. 18, 1998). Unlike commercial broadcasters, "programming costs [for noncommercial broadcasters] are not automatically accommodated through market forces." *Id.*



Compliance with the proposed recordkeeping requirements would require the use of computerized reporting systems that the College Broadcasters, like most other student-operated educational radio stations, do not have. With respect to the Listener's Log, the College Broadcasters do not currently use such log analysis software in connection with their streaming activities. As a result, the College Broadcasters would be required to obtain log analysis software systems compliant with the standards proposed in these regulations. After investigation, however, the College Broadcasters have discovered that there are not any off-the-shelf software solutions compliant with the NPRM recordkeeping requirements currently on the market and that the cost of developing a compliant software package would be prohibitive.<sup>16</sup>

The nature of the programming produced by the College Broadcasters in most cases makes real-time automated playback systems inappropriate, if not prohibitively expensive. As a result, until an automated system is developed, paid for and installed, the massive recordkeeping proposed in the NPRM would have to be generated manually by station personnel. Until such time, the College Broadcasters would have to track manually and report eighteen (18) data fields per sound recording performed, thirteen (13) data fields for ephemeral phonorecords made and destroyed and seven (7) data fields per listener for each of twelve to fifteen sound recordings performed per hour, or about 765 data fields per hour per listener of streaming.

---

<sup>16</sup> After contacting various vendors presently marketing software developed to study streaming server logs, the College Broadcasters have determined that no existing product will provide all of the information required by the proposed regulations. Moreover, it appears that no vendors are currently developing such applications. A representative from one software vendor opined that some of the requested information could not be derived from server reports because the requested information, particularly with regard to unique user and session identifiers and user time zone information, is not available from W3C compliant logs. This vendor estimated the cost of development of Listener Log compliant software at \$7,000 - \$10,000 per website. Another vendor reported that its software package was capable of providing information about listening duration, though not completely meeting the standards suggested in the NPRM, at a cost of approximately \$3,000.

In addition, because much of the requested information is not readily available, each College Broadcaster would have to devote valuable resources to researching the information requested with respect to each sound recording in its music library. Hours of data entry would then be required to create and maintain a database covering the requested information with respect to each sound recording title in the extensive music libraries of the College Broadcasters.<sup>17</sup> With staffs composed of student volunteers and one or two full-time professionals at best, the College Broadcasters do not have the basic manpower to cover the leviathan task of managing the enormous volumes of data requested.<sup>18</sup> Requiring student volunteers to perform mind-numbing clerical tasks to comply with the recordkeeping requirements instead of performing music programming and announcing would have an adverse impact on the number of students willing to volunteer for student-operated educational radio stations and on their educational experience.

Because of the programming diversity and extensive collections of the College Broadcasters and their peers, the burden of compliance with the recordkeeping requirements, in terms of both finances and manpower, is measurably higher for the College Broadcasters and

---

<sup>17</sup> College Broadcaster KTRU estimates 30,000 hours of data entry to enter the readily available data for the existing music library of approximately 25,000 compact discs and phonorecords. Maintaining the database would require another 1,000 hours on an annual basis. College Broadcaster, KFJC, reports that it has been trying to create a music library database identifying the featured artist, album title, record label and sound recording titles on the album, four of the requested data fields from the proposed recordkeeping requirements, over the past ten years. To date, it has only entered approximately half of its music library. As a result of volunteer errors, system failures, power outages, software bugs and the lack of paid project oversight, there have been many losses of data as well as a significant amount of inaccurate and inconsistent information in the database. College Broadcaster KDVS reports that it currently takes fifteen hours a week to enter limited information regarding approximately 75 new sound recordings received each week. In order to enter the additional required information, approximately 50 more hours a week would be required. As its music library consists of more than 150,000 compact discs and phonorecords, KDVS estimates more than 99,000 hours to create and maintain a comprehensive database identifying all of the requested data fields.

<sup>18</sup> For example, College Broadcaster KDVS reports that the proposed recordkeeping requirements would triple the amount of work required to maintain the station. Currently, operating the station requires 320 hours of volunteer staff (which covers about 52% of the time required to maintain current operations) and 295 hours of stipended staff work per week. If KDVS were to pay minimum wage (\$6.50/hour) to its paid staff to cover the extra work

their peers than for tightly formatted commercial radio stations.<sup>19</sup> Musicians and recording companies, themselves the copyright owners, already derive the benefit of extended exposure through performances on noncommercial educational radio stations like the College Broadcasters.<sup>20</sup> Given that the College Broadcasters, like most other student-operated educational radio stations, have relatively few listeners tuned to their Internet stations and as a result are likely to be paying statutory license at or close to the minimum levels proposed by the recent Copyright Arbitration Royalty Panel (CARP), the administrative costs of complying with the proposed recordkeeping requirements are unmistakably disproportionate to the royalty fees to be assessed.<sup>21</sup> Moreover, as described above, these costs are clearly beyond the financial resources of the College Broadcaster and their peers.

---

generated by the proposed recordkeeping requirements, KDVS would need approximately \$650,000 to add to its operating budget (which is at least four times more than its current budget).

<sup>19</sup> The College Broadcasters base this conclusion on information and belief that commercial radio stations have active music libraries of only 500 to 2,000 sound recordings, the majority of which have been issued by a major record label (therefore are encoded with the relevant copyright management information and some of the other requested information), and create their music programming well in advance of play on automated systems.

<sup>20</sup> Also relevant to the position of the College Broadcasters is the guidance Congress provided the Librarian to consider "the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers." 17 U.S.C. Section 114(f)(2)(B). College radio stations feature up-and-coming artists and peripheral styles of music that otherwise would not receive public exposure; performances provided by college stations induce sales of the recordings of artists and musical genres that most need and desire to be introduced to the public. Student-operated radio stations also tend to program to an audience that is most likely to purchase music. The CARP determined that the promotional value associated with such performance is indeterminate, but that such a value exists cannot be denied. Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, CARP DTRA 1 & 2 (2002), p. 33 (the "CARP Report"). Copyright owners must consider the promotional value of the services provided by educational radio stations like the College Broadcasters.

<sup>21</sup> The College Broadcasters operating in California report that most of their programmers develop playlists live, as the show is airing. These College Broadcasters change their airtime schedules every academic term. One of these College Broadcasters deletes six shows and adds six new shows per month. Most of the sound recordings are aired only once by a particular programmer during the academic term during which s/he is an on-air programmer. If a selection is repeated by a particular programmer, it may be weeks or months between play dates. As a result, if a College Broadcaster is required to keep a record of the sound recordings covered by the statutory licenses, such College Broadcaster will still have to expend considerably more than the two-hundredths of a cent per performance due the copyright holder in order to develop such a record. The California College Broadcasters assert that an average of five (5) listeners per hour tune to their music programming on the Internet. The resulting royalty rate due on an annual basis, absent application of the minimum royalty fee, would be approximately \$105.00. Additionally, taking into account these low levels of online listening, requiring the payment of the CARP-recommended minimum annual royalty fee by the College Broadcasters would result in the College Broadcasters paying an effective per-performance fee that is substantially higher than the fee imposed on commercial retransmission services. A College

**D. Overly Burdensome Recordkeeping Requirements Will Lead to Unintended Consequences.**

Each of the College Broadcasters reports that the excruciatingly high costs of compliance with the recordkeeping requirements alone, without factoring in the cost of the related annual royalty payments, would likely require each of the College Broadcasters to cease operation of their streaming activities. In fact, College Broadcaster WSBF has already terminated its streaming operations as a result of its inability to meet the anticipated costs associated with the proposed recordkeeping requirements and recently announced webcasting rates. Shutting down the webcasting initiatives of the College Broadcasters would have the undesirable and unintended effect of depriving listeners of alternative sources of listening pleasure as well as depriving artists of alternative sources of exposure and, therefore, potential revenues. Moreover, an important avenue for education would be shut down. Clearly, terminating the streaming operations of the College Broadcasters would serve neither the public interest nor the financial interest of the copyright holders.

Internet retransmissions originated in association with noncommercial student-operated educational radio stations are very much a part of the education of both the students participating in the creation of such broadcasts and of the audiences to the programs produced by these services. Early educational broadcast radio stations were developed as experimental stations. Today, many radio stations operated from college campuses continue to be innovators in experimenting with new uses of existing technologies, in developing inexpensive applications for new technologies, and in offering programming to otherwise underserved audiences with content

---

...Broadcaster averaging only five (5) simultaneous Internet listeners would pay a performance fee of .095 cents per performance of a licensed sound recording, if it were required to pay the CARP-recommended minimum annual royalty fee. This effective rate significantly exceeds the .07 cents fee for commercial retransmissions and amounts to 475% of the intended noncommercial rate. The transactional cost of recordkeeping would far outweigh the minimum annual royalty fee.

not typically provided by commercial counterparts. The further distribution of programming via the Internet is a natural extension of the historical service of student-operated educational radio stations. The near-universal availability of Internet resources on campuses allows such educational stations fairly easily and inexpensively to accomplish broadcast retransmissions. These stations' further use and development of the Internet is consistent with the educational spirit under which the Internet was originally formed. Indeed, educational institutions have been a crucial part of the Internet since its inception. As the Internet has evolved, it has become even more vital to the students' development.

The College Broadcasters respectfully submit that the Office should not take a position that has a substantial and adverse impact on the present and future ability of creators and copyright owners to license the performance right as new technologies emerge. The College Broadcasters express legitimate concerns that the proposed recordkeeping requirements will effectively force the closure of their streaming operations and the streaming operations of their fellow student-operated educational radio stations operating on even lower budgets. Indeed, as mentioned above, at least one of the College Broadcasters has already been forced to pull the plug on its streaming activities for these reasons. In addition to closing down avenues for exposure for musicians, such closures are certain to result in decreased revenues from Internet licensing for copyright owners. The enormous financial impact of the stringent and overly burdensome recordkeeping requirements proposed in the NPRM will have a chilling effect on the future of streaming activities in the educational radio broadcasting world and will ironically diminish the stream of royalties that would otherwise be forthcoming.

**E. The Office Should Create a Special Exemption from the Recordkeeping Requirements for Noncommercial, Non CPB-Funded Student-Operated Educational Radio Stations.**

**1. Similarly Situated Licensees Already Have an Exemption from Recordkeeping Requirements under the Statutory Licenses.**

In December 2001, the RIAA, the CPB and National Public Radio (“NPR”) concluded a private agreement setting the terms and rates for webcasting by CPB-funded stations.<sup>22</sup> While the terms of this agreement are confidential, according to the small amount of publicly available information about the agreement, the RIAA has apparently granted to CPB-funded educational radio stations with fewer than ten (10) full-time employees an exemption from the recordkeeping otherwise required from licensees streaming their over-the-air broadcast signals.<sup>23</sup>

In the February 20, 2002 decision of the CARP regarding the related proceeding for setting rates and terms for webcasting and statutory license, comparable agreements were determined to be the best benchmarks for determining fair rates for royalty payments: “The Panel believes that the quest to derive rates which would have been negotiated in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances.”<sup>24</sup> While the CARP proceeding is separate from the NPRM, the College Broadcasters argue that similar reasoning should apply in this instance. The agreement voluntarily concluded between the RIAA, the CPB and NPR provides insight, with relation to the proposed recordkeeping rules, to the concerns facing other noncommercial radio stations. That the RIAA has granted an

---

<sup>22</sup> *All CPB-Qualified Radio Stations Covered by ASCAP, RIAA Licenses* (24 Pub. Broadcasting Rep., Issue 1, Jan. 11, 2002), 2002 WL 9859342. See also the CPB website located at [www.cpb.org](http://www.cpb.org).

<sup>23</sup> Upon information and belief, confidentiality of the terms of the agreement is a condition of the agreement. The College Broadcasters argue that such a term is arguably contrary to the intent of Congress with respect to the present proceedings. At least for the purposes of this proceeding, the Office should have unrestricted access to this agreement. The College Broadcasters are not arguing that the agreement be made publicly available, but made available to the Copyright Office for this proceeding. The Office cannot reasonably determine the reasonability of requirements for recordkeeping under statutory license without inclusive knowledge of such negotiated agreements. In light of the fact that the RIAA justifies its proposed recordkeeping requirements with the argument that other licensees are providing such information under negotiated deals, the Office should examine deals for similarly situated licensees.

<sup>24</sup> The CARP Report, p. 43.

exemption from recordkeeping for certain noncommercial radio stations sets a precedent. If the RIAA recognized that the high transactional costs of compliance with the recordkeeping requirements were prohibitive for CPB-funded stations, the Office can equally recognize a similar state of affairs at non CPB-funded, noncommercial educational radio stations, like the College Broadcasters, which are in an even more precarious financial position. CPB already supports the normal broadcast operations of the stations exempted from recordkeeping requirements as well as provides for payment of the performance license fees negotiated under the CPB/NPR/RIAA agreement.<sup>25</sup> The College Broadcasters and similar noncommercial educational radio stations do not receive funding from the CPB and are responsible for *both* administrative costs of recordkeeping *and* payment for the statutory royalty rates set by the CARP.

Although this NPRM proceeding is not about setting the rates and terms of the statutory licenses, the College Broadcasters submit that a corresponding reduction in the license fees should be made to fees due from noncommercial, non-CPB-funded student-operated educational radio stations in the event that the Office grants the requested exemption from recordkeeping requirements. The CARP-recommended license fee for noncommercial broadcasters is one-third of the license fee for commercial broadcasters. In recognition of the reduced costs of administering an exempted or simplified noncommercial license, the College Broadcasters additionally request that the minimum license fee due under the statutory license be reduced by two-thirds (2/3) for noncommercial, non CPB-funded, student-operated educational radio stations.

---

<sup>25</sup> 24 Pub. Broadcasting Rep., Jan. 11, 2002.

In establishing a recommendation for a minimum license fee, the CARP notes that “one purpose of the minimum fee is 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.”<sup>26</sup> The CARP Panel adopted \$500 fee as the minimum annual fee due under statutory license -- the lowest fee negotiated by the RIAA under a previous voluntary agreement. This minimum fee is premised on a model designed to ensure the license administrator receives more in royalty fees than the cost of administering these licenses. A reduction in recordkeeping requirements that results in a proportionate reduction in administrative costs should in turn lead to a reduction in the amount of the minimum royalty fee. SoundExchange (the RIAA), as the designated agent to collect and distribute statutory royalties, will benefit from a reduction in the cost of administering these licenses. The College Broadcasters should likewise benefit from a reduction in the minimum royalty fee. The Office’s stated intention in seeking public comments on these proposed recordkeeping requirements is to “enable copyright owners to receive their royalty payments as expeditiously as possible.” Because the recordkeeping requirements are intended to enable the implementation of a fee structure in the process of being finalized, it is natural to accompany any proposal to waive the reporting requirements for a specific class of services with a corresponding proposal for a reduced royalty fee for the same class of services. Additionally, given the savings in administrative costs for both the noncommercial radio stations performing sound recordings and to copyright owners of those sound recordings, the College Broadcasters believe the application of the reduced minimum fee to these exempted services would be fair to all parties.

---

<sup>26</sup> The CARP Report, p. 95.



**2. Alternatively, the Office Should Establish Narrowly Tailored Recordkeeping Requirements for Noncommercial, Non CPB-Funded Student-Operated Educational Radio Stations.**

Congress and the Office have previously recognized that the unique characteristics and special circumstances of educational radio stations like the College Broadcasters merit special treatment. Section 118(d) of the Copyright Act, 17 U.S.C. § 118(d), allows for the performance of published nondramatic music compositions at special reduced rates by noncommercial radio stations which are licensed to colleges, universities and other nonprofit educational institutions and are not affiliated with NPR. In this manner, educational radio stations have obtained lower-fee blanket performance licenses from the performance rights organizations, ASCAP, BMI and SESAC. 37 C.F.R. § 253.5(c).<sup>27</sup> The recordkeeping requirements under this blanket license are equally reduced: "A public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports." 37 C.F.R. § 253.5(e). In contrast to the census approach of the proposed recordkeeping requirements under the NPRM, these existing regulations applying to performances of musical compositions by non-CPB-funded student-operated educational radio stations like the College Broadcasters limit recordkeeping to a sampling of performances from a small number of stations. Although the statute allows the performance rights organizations to request music use reports over an entire week, in actual practice, these organizations ask only for documentation covering a three-day period. If the performance rights organizations only need three (3) days of sampling to distribute royalties collected from student-operated educational radio stations, it is difficult to understand why the RIAA, or the designated collective for digital

performance rights, truly would need the massive volumes of data requested with respect to each and every sound recording performed and every listener, as proposed for these same services under the recordkeeping requirements in the NPRM.

### CONCLUSION

For the reasons set forth above, the College Broadcasters strongly urge the Office (1) to exempt the College Broadcasters and their peers from the payment of any additional fees related to filing revised or periodic Notices of Use and (2) to exempt the College Broadcasters and all noncommercial educational radio stations with fewer than ten (10) full-time employees that are licensed to colleges, universities and other nonprofit educational institutions not funded by the CPB from the recordkeeping requirements proposed in the NPRM or, alternatively, to reduce significantly their recordkeeping requirements under statutory license to sound recording title, featured artist, and, where available, record label, to be provided on a sampling basis.

Dated: April 5, 2002

Respectfully submitted,



---

Margaret L. Miller  
Mary Teresa Anastasia Doud

DOW, LOHNES & ALBERTSON, PLLC  
1200 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 776-2000  
Fax: (202) 776-2222

*On behalf Of:*

Radio Station KXUL

---

<sup>27</sup> For example, College Broadcasters from the University of California pay an annual fee of \$244 to ASCAP and BMI and \$66 to SESAC and are required to report to ASCAP and BMI the daily playlist of album, artist and sound recording title for up to three days per year during a random week selected by ASCAP or BMI.

University of Louisiana at Monroe  
Monroe, Louisiana

Radio Station KALX  
University of California, Berkeley  
Berkeley, California

Radio Station KDVS  
University of California, Davis  
Davis, California

Radio Station KUCI  
University of California, Irvine  
Irvine, California

Radio Station KUCR  
University of California, Riverside  
Riverside, California

Radio Station KCSB  
University of California, Santa Barbara  
Santa Barbara, California

Radio Station KZSC  
University of California, Santa Cruz  
Santa Cruz, California

Radio Station KFJC  
Foothill College  
Los Altos, California

Radio Station KSPC  
Pomona College  
Claremont, California

Radio Station KZSU  
Stanford University  
Stanford, California

Radio Station KTRU  
Rice University  
Houston, Texas

Radio Stations WFNP AM and FM  
SUNY, New Paltz  
New Paltz, New York

Radio Station WSBF  
Clemson University  
Clemson, South Carolina

## Appendix A

April 4, 2002

Mr. David O. Carson  
Office of General Counsel  
U.S. Copyright Office  
Library of Congress  
James Madison Building, Room LM-403  
101 Independence Ave. S.E.  
Washington, D.C. 20559-6000

Dear Mr. Carson:

Please accept this letter expressing AM Radio Station KUOM 770's ("KUOM") support of the Joint Comments of College and University Radio Broadcasters Webcasting Under Statutory License in response to the Notice of Proposed Rulemaking of the United States Copyright Office dated February 7, 20002.

KUOM is the University of Minnesota's student-operated radio station in Minneapolis, Minnesota. KUOM was an educational radio "pioneer," as it commenced operations in 1922 – predating the creation of the Federal Radio Commission (precursor to the Federal Communications Commission) and predating, by more than a decade, Congress's enactment of the Communications Act of 1934.

KUOM receives funds from Corporation for Public Broadcasting (CPB) and is therefore not directly affected by the proposed recordkeeping requirements under the NPRM because KUOM is eligible to participate in a specially negotiated license arrangement between CPB and RIAA. In solidarity with other college radio stations that are not eligible for the special license, such as the College Broadcasters, KUOM expresses its utmost support for the College Broadcasters' Comments and its concern about the adverse impact of the notice and recordkeeping requirements on college radio operations nationwide.

It is without reservation that KUOM wholeheartedly supports the College Broadcasters in their efforts to secure an exemption from Notice of Use fees and from the overly burdensome recordkeeping requirements proposed by the Copyright Office in the NPRM.

There is no question that if the Copyright Office were to implement its proposed recordkeeping requirements and impose additional fees for providing necessary notice to copyright holders, non-commercial, non-CPB-funded college radio stations would be forced to

cease their webcasting activities. This unintended result would fly in the face of the essence and value of college radio stations, and greatly disserve the public interest and the interests of copyright holders.

On behalf of KUOM and in support of the College Broadcasters, I strongly urge the Copyright Office to exempt the College Broadcasters and all non-commercial, non-CPB-funded college radio stations from the recordkeeping requirements. KUOM also supports an exemption from fees associated with periodic notice filings, as these fees would place a financial burden on the already meager budgets with which these radio stations survive.

Thank you for considering these comments and the plight of college radio stations.

Sincerely,



Andrew Marlow  
General Manager  
KUOM