

Before the
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Washington, D.C.

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_____)
In the Matter of)
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)
Digital Performance Right in Sound)
Recordings and Ephemeral Recordings) Docket No. 2004-1 (CARP DTRA4)
for Noncommercial Webcasters)
for 2005 and 2006 pursuant to Sections 112)
and 114 of the Copyright Act.)
_____)

**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,

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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

