

**Before the
U.S. Copyright Office
Library of Congress**

In the Matter of:

Music Licensing Study: Notice and
Request for Public Comment

Docket No. 2014-03

COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. (“SoundExchange”) is pleased to provide these Comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) concerning music licensing, *see* Music Licensing Study: Notice and Request for Public Comment, 79 Fed. Reg. 14,739 (Mar. 17, 2014).

SoundExchange was formed to help the artists and record companies that create sound recordings thrive in the digital age by simplifying the royalty collection and payment process under the statutory licenses provided by Sections 112(e) and 114 of the Copyright Act. *See* 17 U.S.C. §§ 112(e), 114. SoundExchange is the sole collective designated by the U.S. Copyright Royalty Judges to collect and distribute sound recording royalties under those statutory licenses. SoundExchange also provides other benefits to its members, including international royalty collections in 22 other countries and music business and government policy advocacy. An independent nonprofit organization, SoundExchange represents more than 90,000 artist and 28,000 rights owner accounts and administers payments from more than 2,500 different services operating under the U.S. statutory licenses. In the decade since its formation, SoundExchange has distributed more than \$2 billion to artists and copyright owners.

SoundExchange appreciates the Copyright Office’s attention to the important issues raised by the NOI. The sound recording licensing issues raised in the NOI are fundamental to

SoundExchange's business. Moreover, as the business of creating and disseminating recorded music continues to shift from one almost entirely dependent on the sale of copies to one based increasingly on licensing of streaming services, those issues are critical to SoundExchange's members, and U.S. creativity and culture as well. Music is a powerful medium, and performances of music have become ubiquitous in American society. Performances of music are frequently what attracts listeners to services, to stores and so forth. Businesses using music for commercial advantage should pay for the privilege, and such payments are what makes possible the creation of new music. Accordingly, the lack of a terrestrial radio performance right is a glaring iniquity in U.S. law that should be addressed. Where rights exist, music licensing provides a framework for channeling payments to creators to enable more creativity. Accordingly, SoundExchange applauds the Office for its attention to improving the music licensing marketplace. In these Comments, we address each of the Office's specific areas of inquiry relating to sound recording licensing.

8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.

SoundExchange believes that the Section 112/114 statutory license system generally works well. While some aspects of the system could be improved, its structure is fundamentally sound, and it serves as an efficient means of providing payments to artists and record companies for use of their recordings by the numerous services relying on the statutory licenses.

Unlike the complicated musical work licensing system, the Section 112/114 licenses were purpose-built to ensure fair payment to artists and record companies and to provide for an efficient licensing mechanism.¹ These goals have been realized to a significant extent. In the

¹ H.R. Conf. Rep. No. 105-796, at 79-80 (1998).

nearly 20 years since the creation of the sound recording performance right and the statutory licenses, a multi-billion dollar industry has developed around the statutory licenses, and statutory services have become a vital part of the music business. SoundExchange collected royalties in 2013 from 2,500 services,² a more than five-fold increase over the last decade. In 2013, SoundExchange collected approximately \$650 million in statutory royalties (a 29% increase over 2012).³ SoundExchange distributions constituted more than 8% of total U.S. recording industry revenues.⁴ That percentage is growing rapidly as consumer preferences increasingly shift from ownership of copies to accessing performances of music online and through mobile devices, and as consumers demonstrate an increasing preference for the functionality and breadth of repertoire that is common in digital radio. Because the statutory licenses anchor a multi-billion dollar industry, there is broad support for the statutory licenses among licensees, artists and record companies.

An important feature of the Section 114 statutory license is that artists directly and immediately participate in the royalty stream. See 17 U.S.C. § 114(g)(2). Specifically, 45% of the royalties are paid directly to the featured artist, and 5% goes to the AFM/SAG-AFTRA Intellectual Property Rights Fund for non-featured musicians and non-featured vocalists. In total, SoundExchange pays artists directly 50% of all royalties distributed.

² Services that Have Paid SoundExchange through Q4 2013, *available at* <http://www.soundexchange.com/wp-content/uploads/2014/05/2013-Q4-Licensee-Count-04-30-14.xlsx>.

³ See SoundExchange Draft Annual Report for 2013 Provided Pursuant to 37 C.F.R. § 370.5(c), *available at* <http://www.soundexchange.com/wp-content/uploads/2014/03/2013-Fiscal-Report-PRE-AUDIT.pdf>.

⁴ See RIAA 2013 Year-End Industry Shipment and Revenue Statistics, *available at* <http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf>.

SoundExchange also pays promptly. In addition to paying artists directly, SoundExchange recently began making monthly distributions to payees owed at least \$250 in accrued royalties. These features speed the flow of performance royalties to artists and labels, helping their cash flow and making it easier for them to focus on creating music.

SoundExchange also provides an efficient mechanism for collecting and distributing statutory royalties. For 2013, its pre-audit administrative rate (the expenses deducted from the distributable royalty pool pursuant to Section 114(g)(3) expressed as a percentage) was only 4.5%.⁵ This is the lowest administrative fee of any major performance rights organization in the world. SoundExchange has always placed a priority on operating with the utmost efficiency, to ensure the highest possible payments to artists and record companies.

The statutory licenses have other desirable features as well. Among other things, the statutory license is a blanket license, meaning that digital music services can be confident that the statutory license gives them permission to use all commercially-released federally-protected recordings. This is in contrast to many other performance rights licenses that are constrained by a collecting society's repertoire and for which it may be difficult to tell what works are covered. The statutory licenses are also transparent. Royalty rates and terms are published in the Code of Federal Regulations and in the Federal Register. SoundExchange provides payees detailed statements so they can see the basis for their payments. SoundExchange also audits services for the benefit of all artists and copyright owners, and is itself subject to audit.

However, with a few changes, the statutory licenses could be even more effective. We discuss most of these in our responses to other questions posed in the NOI. Because it is not addressed by any of the Office's other questions, we note here that consideration should be given

⁵ SoundExchange's audit for 2013 will be completed later this year.

to additional mechanisms for promoting compliance with the statutory licenses. Noncompliance with statutory license requirements is commonplace. For 2013, approximately a quarter of royalty payments were not made on time; two-thirds of licensees required to deliver reports of the recordings they used have not delivered at least one required report; and at least one quarter of such licensees have not delivered any such reports at all. SoundExchange has a specific program for working with licensees collaboratively to try to improve their compliance. As just one example, SoundExchange has been working with a particular licensee as part of that program since 2009. SoundExchange has expended ample time and effort to help that service understand its obligations and implement business processes consistent with statutory license requirements. Despite these efforts, that service still sends payments irregularly and for amounts that seem inconsistent with the applicable statutory rate structure, and either does not submit required reporting on time or provides reporting with missing signatures. SoundExchange regularly contends with other licensees who simply do not make compliance a priority. In a voluntary license system, a copyright owner might decide to cease doing business with such a service or demand substantial up-front payments as a condition of doing business. However, the statutory licenses do not currently provide a clear mechanism short of litigation for promoting compliance.

At a minimum, we believe that there should be a clear mechanism for termination of statutory licenses for services that repeatedly fail to act in compliance with applicable requirements. Section 115 permits termination of a compulsory license, with retroactive effect as to unpaid uses. 17 U.S.C. § 115(c)(6). Default termination is also routinely provided for in commercial contracts, and the ASCAP consent decree permits ASCAP to withhold a license from a user that is in material breach of payment obligations under a license. Second Amended

Final Judgment at VI, *U.S. v. ASCAP*, No. 41-1395 (S.D.N.Y. June 11, 2001). The Section 112/114 statutory licenses should similarly protect the interests of creators from widespread noncompliance by licensees, and explicitly provide that services who abuse the statutory license by failing to comply with its terms risk losing the right to use the license at all.

9. Please assess the effectiveness of the royalty rate setting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

In general, the Section 112/114 royalty rate-setting process is effective, subject to two important caveats:

First, all statutory licenses should be governed by the principle that creators should receive fair market value for their work, but that is not currently the case. While the statutory licenses are designed to achieve that principle for most users of the Section 112/114 licenses, Sirius XM, Music Choice and Muzak (the services offering “grandfathered” satellite and cable music services) are the beneficiaries of royalty rates that are consciously set below-market pursuant to the Section 801(b)(1) standard. Almost 20 years after the creation of the statutory licenses, and more than 15 years after the willing buyer/willing seller standard was introduced for other licensees, these services neither need nor deserve to have their rates subsidized by artists and record companies, and they should no longer enjoy an unfair competitive advantage over other services.

The absurdity of the two-tiered rate standard is revealed clearly by the fact that the Copyright Royalty Judges set two completely different rates, in two completely different proceedings governed by the different rate standards, for one relatively small category of service provided by only a handful of companies: music channels delivered as part of cable and satellite

television services.⁶ And the effects of that bifurcation are very pronounced: Music Choice and Muzak pay 8.5% of their “Gross Revenues,”⁷ while their competitors that do the same thing but launched after 1998 pay the greater of 15% of their “Revenue” or certain per-subscriber minimums.⁸ It is equally unfair that Sirius XM – which generates nearly \$4 billion a year in revenue (an amount approximately equal to 55% of the estimated retail revenue of the entire U.S. recording industry) – is subsidized by creators. It pays 9.5% of its “Gross Revenues” as a royalty,⁹ which is, as described in our response to the Office’s question number 12, the historical legacy of repeated decisions purposefully to set a below-market rate.

The special status of Sirius XM, Music Choice and Muzak cannot be justified on a public policy basis. Those three services – uniquely among the 2,500 services relying on the statutory licenses – enjoy their special subsidy only because they existed in 1998. Insulating them from the marketplace simply because they are old runs counter to the usual operation of markets. While the Section 801(b)(1) standard seeks to avoid disruption, innovation is based on disruption. And capitalism usually rewards disruption. Sirius XM, Music Choice and Muzak should be subject to the same marketplace forces as their competitors, artists and record companies, and have their rates set pursuant to the willing-buyer/willing-seller rate standard.

Fairness alone would be a sufficient reason to eliminate the subsidy received by Sirius XM, Music Choice and Muzak. But the Section 801(b)(1) standard also complicates litigation and therefore deters settlements because of its unpredictability. While the parties to litigated rate

⁶ This is the type of service provided by preexisting subscription services Music Choice and Muzak, which pay royalties pursuant to 37 C.F.R. Part 382 Subpart A, and the type of service provided by new subscription services described in 37 C.F.R. § 383.2(h), which pay royalties pursuant to 37 C.F.R. Part 383.

⁷ 37 C.F.R. § 382.3(a).

⁸ 37 C.F.R. § 383.3(a).

⁹ 37 C.F.R. § 382.12(a).

proceedings may never agree on what a fair market value royalty would be, fair market value is at least an objective economic concept that is widely applied in other contexts. Thus, litigation under a willing buyer/willing seller involves a relatively focused inquiry into what marketplace benchmarks are most relevant and how to translate them into a statutory rate. Such an inquiry can be litigated efficiently, and the parties reasonably can make predictions about the outcome to guide their decisions about settlement. By contrast, Section 801(b)(1) invites the parties to place every aspect of their businesses at issue, and it is less predictable how the Judges will exercise their discretion in setting a rate. When small differences in a percentage rate can mean millions of dollars of difference in the resulting royalty payments, the Section 801(b)(1) standard encourages the parties to litigate aggressively in the hope that the Judges will sympathize with something they hear.

Beyond the rate standard, we believe the Office should consider other refinements to the rate setting process to further encourage settlement. When Congress enacted the Copyright Royalty and Distribution Reform Act (“CRDRA”), an important goal was “facilitating and encouraging settlement agreements.”¹⁰ However, settlement of rate proceedings has proven more difficult than Congress ever could have intended. Twice since the CRDRA, Congress has had to give SoundExchange special negotiating authority to narrow the issues presented in webcasting proceedings.¹¹ Even when settlements have been achieved, it has sometimes been

¹⁰ H.R. Rep. No. 108-408, at 24 (2004).

¹¹ Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926; Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974.

necessary to litigate the settled subject matter.¹² To achieve Congress’s original goal to promote settlement and “reduce[] the need to conduct full-fledged rate-setting . . . proceedings,”¹³ we propose consideration of the following changes to settlement procedures:

- Require the Judges to act promptly on settlements proposed for adoption by the Judges. Section 801(b)(7) contemplates an early decision by the Judges concerning adoption of a settlement. That should happen even if a settlement would not fully resolve a case.¹⁴
- Grant the collective designated to administer the statutory licenses standing authority to enter into opt-in settlement agreements that do not require adoption by the Judges as statutory rates. The various Webcaster Settlement Acts all provided special authority (in Section 114(f)(5)) during limited times for SoundExchange to negotiate

¹² Most notably, in the *Webcasting III* proceeding, SoundExchange reached settlements with both commercial broadcasters and noncommercial educational webcasters at the outset of the proceeding, and the Judges took no action on them until the end of the proceeding. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026 (Mar. 9, 2011). While the parties avoided litigating issues relating to commercial broadcasters, SoundExchange was forced to litigate noncommercial rates with a non-settling party purporting to represent noncommercial educational webcasters. In the end, the Judges ended up adopting both the noncommercial educational webcaster settlement and separate noncommercial rates that differ only slightly. *Compare* 37 C.F.R. § 380.3(a)(2) *with* 37 C.F.R. § 380.22. After a successful appeal of the noncommercial webcaster minimum fee, the Judges determined that they should review the whole original determination on remand. Over three years into the rate period and almost five years after reaching the settlements, the settled rates again seem to be final, although the separate noncommercial rates are again potentially appealable. *See* Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, 79 Fed. Reg. 23,102, 23,102-03 (Apr. 25, 2014).

¹³ H.R. Rep. No. 108-408, at 24 (2004).

¹⁴ SoundExchange applauds the current Copyright Royalty Judges for issuing a scheduling Order in the pending *Webcasting IV* proceeding that specifically addresses settlement procedures and contemplates early action on settlements. Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order in Docket No. 14-CRB-0001-WR (Feb. 19, 2014). The purpose of a more enduring change in procedures would be to ensure similar action in future proceedings.

- industry-wide settlements that served as alternatives to the statutory rate and did not require adoption by the Judges. That enabled agreements with targeted constituencies and significantly narrowed the range of litigated issues. Consideration should be given to making a similar structure a permanent feature of the statutory licenses.
- Allow the parties to a settlement to designate it as non-precedential for purposes of proceedings before the Copyright Royalty Judges. Congress favored settlements of rate proceedings, and specifically contemplated settlements affecting only some of the participants in a proceeding, because settlements simplify proceedings and permit the parties flexibly to tailor a rate structure to the needs of certain groups. However, while it would be economically inappropriate to use a settlement as a benchmark,¹⁵ the fear that a settled rate will affect litigated rate determinations discourages settlement. Allowing parties to a settlement to elect the same non-precedential treatment as applied under the Webcaster Settlement Acts (*see* 17 U.S.C. § 114(f)(5)(C)) would make settlements easier to achieve.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

Pre-1972 sound recordings should be incorporated into the statutory licenses. While SoundExchange takes no position concerning further federalization of pre-1972 recordings, the

¹⁵ Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,058 (Apr. 17, 2013) (settled rate “was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate”).

Office has observed that further federalization would raise a number of complicated issues.¹⁶ Importantly, however, it is not necessary to resolve those issues to address the greatest practical problem and most significant source of controversy with respect to pre-1972 recordings – use of pre-1972 recordings by services relying on the statutory licenses.

Pre-1972 recordings include beloved rock & roll and “pop” recordings from the 1950s and 1960s, ground-breaking jazz, classical and rhythm and blues recordings, and many others. Recordings by legendary artists such as Johnny Cash, Elvis, Led Zeppelin and the Doors are a critical part of the repertoire of any digital music service, and remain significant commercially. Legacy recordings represent 5% to 15% of the performances made by major digital radio services, and there are entire channels on major music services dedicated to recordings made before 1972. Pre-1972 recordings are protected by state law and, outside the scope of the statutory licenses, pre-1972 sound recordings are routinely licensed to streaming services in voluntary transactions on the same basis as federally-protected recordings. Yet, some services relying on the statutory licenses for their activity have made a conscious decision not to obtain any license for pre-1972 sound recordings at all and to avoid any payment whatsoever – making hundreds of millions of dollars in part off these recordings and sharing nothing with creators.

That is simply wrong. All recording artists and copyright owners deserve to be paid for the use of their works, whether they were recorded in the 1960s or just last month, and legacy artists, just like current ones, should participate in the success of the services building businesses on their recordings. Indeed, the artists who created pre-1972 recordings are especially dependent

¹⁶ U.S. Copyright Office, *Federal Protection for Pre-1972 Sound Recordings* 139-78 (Dec. 2011).

on digital revenue streams, because they are often less likely than more current artists to be able to generate significant income from touring, product sales and other sources.

This is not *just* a matter of fairness. Streaming clearly implicates state law rights,¹⁷ and copyright owners have begun to take legal action to enforce their rights against services operating under the statutory licenses that are refusing to license and pay for pre-1972 recordings. Flo & Eddie, of the classic rock band The Turtles, have filed class action lawsuits in three states on behalf of copyright owners of pre-1972 sound recordings whose works are played by Sirius XM. Capitol Records, Warner Music Group, Sony Music Entertainment, UMG Recordings, and ABKCO Music & Records have likewise filed a lawsuit against Sirius XM in a California state court. Most recently, a group of record companies filed a case against Pandora in a New York state court.

Although the litigation addresses the fundamental unfairness of the present situation, it will not lead to a sensible regime for licensing of services operating within the scope of the statutory licenses. The various regimes for protecting pre-1972 recordings across the U.S. do not provide the simplicity and efficiency that Congress contemplated when enacting the statutory licenses. The point of the statutory licenses is to provide a one-stop-shop for services that want to operate within its four corners. Nobody wants a statutory license that covers 90% of usage but requires individualized negotiations for the last 10% – and, we respectfully submit, that is not the regime that Congress had in mind when it created the Section 114 license in 1995.

The simplest way to rectify this situation is to bring pre-1972 recordings within the scope of the statutory licenses. This could be accomplished by requiring a statutory service to satisfy

¹⁷ *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198 (C.D. Cal. 2010) (unauthorized streaming pre-1972 sound recordings constituted misappropriation, unfair competition and conversion under California law).

the Section 112/114 notice and payment requirements with respect to pre-1972 recordings on the same basis as later recordings. This approach would not involve any of the complications raised by broader “federalization” of pre-1972 recordings, and would simply codify the practice intended by Congress and adopted by many digital streaming services that appear to take the position that the statutory license *does* cover pre-1972 sound recordings. We believe that the market would be well served by making all recordings accessible under the statutory license process for services operating within the scope of the statutory license.

11. Is the distinction between interactive and non-interactive services adequately defined for purposes of eligibility for the Section 114 license?

This is not a matter within the scope of SoundExchange’s responsibilities as the collective designated to collect and distribute statutory license royalties. Under applicable regulations, SoundExchange is charged with distributing royalty receipts in accordance with the reports of use it receives, and SoundExchange does not – and could not – assess whether each of the 2,500 services purporting to rely on the statutory licenses is entitled to do so.

We are aware that copyright owners and services often discuss privately the scope of the statutory license, although we are aware of only one case meaningfully construing the definition of an interactive service in Section 114(j)(7). *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009). It is our sense that many services relying on the statutory licenses have been offering increasing amounts of personalization functionality since the *Launch* decision. It is important that this phenomenon be recognized, at least in proceedings before the Copyright Royalty Judges. As consumer preferences continue to shift toward streaming services, it has become clear that personalized services substitute for the purchase of copies and limit consumer demand for on-demand services. In effect, interactive and noninteractive services are increasingly occupying the same consumer landscape. This reality should be taken into account

by the Copyright Royalty Judges – and other policy makers – when assessing the market for noninteractive digital streaming.

12. What is the impact of the varying rate setting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms? Do these differences make sense?

As we explained in our response to the Office’s question number 9, having two different rate standards under Sections 112 and 114 does not make sense. All uses subject to the Section 112/114 licenses should be subject to the same rate standard, and that standard should be a fair market value standard, such as the willing buyer/willing seller standard.

The willing buyer/willing seller rate standard is the best way to fairly compensate creators because it is a standard that ensures that the Copyright Royalty Judges will base their decisions on actual marketplace evidence. In practice, of course, there is no actual market for noninteractive digital radio because the “market” is distorted by the existence of the statutory license itself. Instead, the CRB has considered evidence of market value derived from other parts of the digital music industry that are not subject to a statutory license. In these other areas, there are sophisticated and willing buyers engaged in arms-length negotiations with sophisticated and willing sellers. This is exactly the type of marketplace evidence on which the rates for the statutory services should be based.

The purpose of the statutory licenses is to provide a “fair and efficient licensing mechanism[],”¹⁸ not to force creators that have already given up their right of exclusion in the interest of efficiency to also accept royalty rates lower than what they would receive in a free market. However, Sirius XM, Music Choice and Muzak have explicitly been granted royalty rates that were purposefully set below-market pursuant to the Section 801(b)(1) standard:

¹⁸ H.R. Conf. Rep. No. 105-796, at 79-80 (1998).

- In the case of Music Choice and Muzak, their rate was originally set low because of an absence of marketplace benchmarks and a concern about their risk exposure and financial condition.¹⁹ Most recently, the Copyright Royalty Judges rejected a marketplace benchmark for setting their rates because it was “so far from the current rate.” Instead, the Judges based their decision on the continuation of the old pattern of below-market royalties.²⁰
- In the case of Sirius XM, the Judges initially selected a rate for its predecessor companies that was approximately half the rate “most strongly indicated by marketplace data” because of concerns about their profitability and cash flow, and that having to pay a market rate would be disruptive to their businesses.²¹ While those concerns ultimately proved to be grossly overstated, the Judges most recently continued the same pattern by setting an SDARS rate that was intentionally low in view of Sirius XM’s cost structure.²²

There is no principled basis for continuing to give these three services the unique advantage of rates that are purposefully below market. These services were originally grandfathered under the Section 801(b)(1) standard to preserve the business expectations of nascent industries. However, they are no longer nascent. After more than 15 years since the willing buyer/willing seller standard was introduced for other licensees, these services do not

¹⁹ See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25,394, 25,399-25,400, 25,405-09 (May 8, 1998).

²⁰ Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,058 (Apr. 17, 2013).

²¹ See Determination of rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4087, 4097 (Jan. 24, 2008).

²² 78 Fed. Reg. at 23,069.

need to have their businesses perpetually subsidized by artists and record companies. Creators should be paid fairly, and these services should compete on a level playing field.

Of course, Section 114 can actually be thought of as having three royalty rate standards. Terrestrial broadcasters enjoy the most favorable rate standard of all – they don't have to pay anything. As we explain in our response to question number 13, true platform parity would require a terrestrial performance right for sound recordings.

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

The loophole that allows terrestrial radio (*i.e.*, over-the-air broadcast channels on AM/FM/HD) to use copyrighted sound recordings without paying continues to be the most glaring inequity in music licensing. Terrestrial radio is a significant way that consumers listen to music – and yet it does not pay anything to the performers that brought the music to life and the copyright owners that financed and own those recordings. Any discussion of platform parity must recognize that terrestrial radio's exemption is the key respect in which there is a lack of parity.

The rationale for requiring terrestrial radio services to pay royalties to artists and copyright owners is the same as for all other platforms: if any person or company makes money from exploitation of another's creative work, they should pay for the right to do so. Instead, terrestrial radio generates tens of billions of dollars each year in advertising revenues without sharing a cent with the performers and copyright owners that create the music that attracts the listeners that makes the ad sales possible.

It is sometimes argued that the broadcaster exemption is justified because radio airplay promotes record sales. However, that does not describe most radio use of music today – if it ever did. Moreover, classic artists like The Beach Boys, The Temptations, Led Zeppelin and Billy

Idol do not need radio to promote them, yet radio stations play their music all the time. In the last fifteen years, the radio industry has grown, but retail music sales in the U.S. have dropped by about 53%. If radio play was as promotional as claimed, sales should be rising, not falling. Radio stations play music for one reason and one reason only – to create an audience that can then be sold to advertisers.

The free ride given to terrestrial radio also makes the U.S. an outlier internationally. At least 75 nations recognize some form of performance right for terrestrial radio, and the U.S. is the only western industrialized nation that does not.²³ This places the U.S. in the company of countries like North Korea, China and Iran that likewise fail to provide fair compensation for performers.

The international landscape is significant not only because it reflects the obvious fact that radio services should pay royalties to the artists whose works make those services possible, but also because the lack of a performance right in the U.S. has prevented U.S. artists and copyright owners from collecting performance royalties earned in other countries. As much as half of the music played by foreign broadcasters is American music. However, due to the lack of protection in the U.S., many millions of dollars that could be brought into the U.S. economy must be left abroad. This problem is particularly acute for artists who own their own masters and independent labels, which lack the infrastructure in foreign countries to collect these royalties.

²³ See D. Page Kelley III, *Terrestrial Radio Performance Royalties for Labels and Artists: Wait for It or Go for It?*, Milom Horsnell Crow Rose Kelley PLC (Jan. 3, 2013), available at <http://milomlaw.com/news/terrestrial-radio-performance-royalties-for-labels-and-artists-wait-for-it-or-go-for-it>; Future of Music Coalition, *Public Performance Right for Sound Recordings: Fact Sheet* (Nov. 5, 2013), available at <https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings>; Statement of Michael Huppe before the House Committee on the Judiciary Subcommittee on Intellectual Property, Competition and the Internet at 15 (Nov. 28, 2012), available at <http://www.soundexchange.com/wp-content/uploads/2013/04/Huppe-Testimony-11-12.pdf>.

Instead of being permitted to freeload on the backs of American artists and rights holders, terrestrial radio services should – like other music services – be required to fairly compensate those creators for the recordings they use. We need not belabor this point in these Comments, since the Office understands the issues well and has repeatedly advocated the creation of a sound recording performance right in terrestrial radio.²⁴ However, SoundExchange believes that one of the most important things the Office could do in its present study to improve the music licensing environment and promote innovative new types of services would be to once again advocate elimination of the broadcast radio exemption.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

Yes, the government should encourage new licensing initiatives. Experience under the Section 112/114 licenses indicates that there is demand for licenses for small-scale uses of music, and that when that demand can be satisfied efficiently, artists and record companies can realize revenues from licensing such uses. Approximately 60% of the services relying on the statutory licenses pay only the \$500 minimum fee. While this is only a nominal amount, providing an efficient licensing mechanism encourages low-volume users to license their use of sound recordings, and licensing these uses produces statutory royalties that, in the aggregate, contribute meaningfully to the overall statutory license ecosystem. This experience indicates

²⁴ E.g., Statement of Marybeth Peters, Hearing before the S. Comm. on the Judiciary, 111th Cong. (Aug. 4, 2009), *available at* <http://www.copyright.gov/docs/regstat070509.html>; Statement of David O. Carson, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. (July 15, 2004), *available at* <http://www.copyright.gov/docs/carson071504.pdf>; U.S. Copyright Office, *Copyright Implications of Digital Audio Transmission Services* (Oct. 1991); Register of Copyrights, *Report on Performance Right in Sound Recordings* (1978).

that there may be other small uses that usefully could be legitimized through an efficient licensing model for small-scale uses.²⁵

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

SoundExchange is itself an innovation developed to make the process of music licensing more effective. Shortly after the creation of the statutory licenses, services realized that implementation of the statutory licenses only would be practicable if a collective could provide them a one-stop shop for administering sound recording performance rights. They called upon the recording industry to create such a collective, and it did so. Later, in 2003, SoundExchange became an independent nonprofit organization governed by a board of directors that equally represents artists and record companies. Today, SoundExchange represents more than 90,000 artists and 28,000 copyright owner accounts in administering the collection and distribution of royalties from 2,500 digital radio services that rely on the statutory license for the rights to the sound recordings that make their businesses possible.

Services have thrived under this arrangement. Today, the licenses administered by SoundExchange cover usage that reaches over 100 million Internet radio listeners,²⁶ 25 million satellite radio subscribers²⁷, and tens of millions of cable and satellite television subscribers. In fiscal year 2004, the year immediately following SoundExchange's formation, SoundExchange

²⁵ Some efforts are being made in that regard. See, e.g., Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock 'Millions' in New Revenue* (June 13, 2013), <http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could>.

²⁶ Statement of Michael Huppe before the House Committee on the Judiciary Subcommittee on Intellectual Property, Competition and the Internet, at 2 (Nov. 28, 2012), available at <http://www.soundexchange.com/wp-content/uploads/2013/04/Huppe-Testimony-11-12.pdf>.

²⁷ Sirius XM Radio, Press Release, *Sirius XM Surpasses 25 Million Subscribers* (July 9, 2013), <http://investor.siriusxm.com/releasedetail.cfm?ReleaseID=775739>.

distributed approximately \$9 million in royalties. This past year, the amount of royalties distributed was more than \$590 million – a 6400% increase in the span of ten years. In total, SoundExchange has distributed more than \$2 billion in performance royalties to artists and copyright owners since its inception.

SoundExchange has achieved these results using an open and transparent process, and it has done so while maintaining the lowest administrative rates in the industry. Every month, digital radio services report – and SoundExchange processes – tens of millions of lines of data using state-of-the-art systems that are continually evolving. SoundExchange’s administrative fees – which include personnel, operating expenses, legal costs and outreach to artists with unclaimed royalties – were only 4.5% in 2013. By providing an effective, flexible and efficient platform for the collection and distribution of performance royalties (including both statutory and other performance royalties), SoundExchange has played an essential role in music licensing.

Through SoundExchange and otherwise, the recording industry continues to contribute to effective music licensing. For example, as the number of new recordings explodes, and music becomes ever more accessible on different platforms and in different countries, management of rights owner information and other sound recording metadata has become an essential component of the music licensing ecosystem. To meet this need, SoundExchange, record companies and various international partners have worked together to develop unique identifiers, standards and databases to facilitate the accurate identification and transmission of data concerning music.

One key identifier is the International Standard Recording Code or “ISRC” (ISO 3901). Record labels use ISRCs to identify their recordings and incorporate them into the metadata of the recordings that they provide to their digital partners, and SoundExchange collects ISRCs

from sound recording copyright owners. Use of ISRCs by services in their reporting to SoundExchange is the best way to ensure rapid and accurate distribution of sound recording royalties. Because the benefits of ISRC use can only be fully realized when those identifiers are available to (and effectively utilized by) all participants in the music licensing value chain, SoundExchange has undertaken a number of initiatives intended to aid their dissemination and use, including building and populating a comprehensive database of sound recording metadata based on submissions by rights owners.

SoundExchange has also adopted industry-leading methods for transmitting metadata between parties. Foremost among these are the suite of DDEX messaging standards, which are formats for capturing and representing data in XML messages, as well as the choreography by which these messages are exchanged between business partners. These standards have been developed by a consortium of record companies, digital service providers and music rights societies. Its adoption of DDEX standards has enabled SoundExchange's integration with a large number of copyright owners and content providers, while reducing the cost and technical overhead of these integrations.

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

As we described in our response to the Office's question number 10, the statutory licenses should be extended to cover pre-1972 sound recordings by services otherwise eligible for the Section 112/114 statutory licenses. In addition, as we described in our response to question number 13, terrestrial broadcast radio's exemption from the sound recording performance right should be repealed.

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

The music marketplace changed rapidly from one long dominated by the sale of physical products, to one in which digital downloads are the primary means of acquiring ownership of copies. Now, it is changing again, and obtaining access to music through streaming services is ascendant. Rather than purchasing hundreds of albums or downloading individual tracks, consumers are using digital music services that give them access to tens of millions of tracks. These services include subscription, on-demand, and digital radio services, and currently account for almost 15% of the industry's total U.S. revenues.²⁸

The changes have been positive in many respects, and SoundExchange's growth is emblematic of them. Consumers now have many choices for accessing music, at various price points – including the free-to-the user services most common under the statutory licenses, and everyone in the music value chain has access to new revenue streams as a result. Because the statutory licenses have lowered barriers to entry for digital music services and facilitated an immense variety of new services playing a broad range of music from all genres, those new revenue streams are spread diffusely across a wide community of recording artists and copyright owners.

Direct payment of royalties to artists through SoundExchange is an important piece of this picture. As a result of the specified statutory split as well as SoundExchange policy, artists participate directly and immediately in the performance revenues generated by statutory services.

²⁸ See Joshua P. Friedlander, News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics, *available at* <http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf>.

However, as the marketplace changes in these respects, so too must traditional thinking about the role of broadcast radio and streaming services in the music ecosystem. In the new music marketplace, no type of use can be thought of as exclusively, or even primarily, promotional of any other type of use. If creators are going to be able to continue to create new music, all uses of music must pay their fair share of the very substantial costs of producing, marketing and distributing it. We are pleased that the royalties collected and distributed by SoundExchange are an important and rapidly growing part of artists' and record companies' total income. Now that that is the case, nobody should view statutory license royalties as collateral or unimportant. Statutory services are a key piece of the future of music, and royalty rates must reflect that.

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

While most users of the statutory licenses pay royalties that are set under the willing buyer/willing seller standard, and only Sirius XM, Music Choice and Muzak are the beneficiaries of royalty rates that explicitly were set below-market, SoundExchange believes that revenues from the performance of sound recordings have generally not been fairly divided between the creators of recordings and the services that use them.

Streaming services – including the radio-like services entitled to rely on the statutory licenses – are in effect retailers of music. Their primary business is distributing music created by others to listeners who want to hear it. Across the whole economy, companies whose business is redistributing products made by others routinely pay 50% or more of their revenues to acquire

the products they redistribute.²⁹ Not surprisingly, marketplace negotiations outside the scope of the compulsory licenses require services whose business is redistributing music to pay anywhere from 43% to 70% of their revenues for sound recording rights, with most uses toward the higher end of that range, and solidly within the range of retailers generally.³⁰ At 8.5%, the preexisting subscription services rate is dramatically below market. However, it should be recognized that even services that complain vigorously about paying 50% of their revenues in statutory royalties are paying a percentage of their revenues that puts them toward the lower end of what marketplace experience suggests they would pay in the absence of the statutory licenses.

20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?

As described in our response to the Office's question number 18, in today's music marketplace, it is critical that every use of music contribute its fair share to the very substantial investments that are required to discover and develop new talent and produce new album projects.

21. How do licensing concerns impact the ability to invest in new distribution models?

The ability to obtain and administer licenses with a level of overhead commensurate with the business opportunity is clearly important to entrepreneurs contemplating new music businesses. Of course, the statutory licenses are easy to obtain – a service need only file a notice of intention in the Copyright Office. 37 C.F.R. § 370.2. Collective administration of the

²⁹ Jeffrey A. Eisenach, *Understanding Webcaster Royalties* 2-4 (June 2013), available at <http://memberdata.s3.amazonaws.com/mu/musicfirst/files/DrJeffreyEisenachPandoraStudy.pdf> (reporting cost of goods sold across various major retail sectors between 50% and 78%).

³⁰ See 78 Fed. Reg. at 23,057 (describing analysis of royalty rates in over 2000 music license agreements, and finding sound recording royalty rates below 50% of revenues only for the dwindling ringtone/ringback configurations).

statutory licenses through SoundExchange is also easy and efficient for services – a service can pay and account for all its usage to SoundExchange. The statutory licenses were created to provide these kinds of efficiencies, and they have achieved that goal well – a fact demonstrated by the growth in the number and size of digital radio services over the past decade.

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

SoundExchange applauds the Office’s attention to the role of standard identifiers in the modern music marketplace. What might commonly be thought of as the key identifiers of a recording – featured artist name, track title, album title and label name – simply are not sufficient to distinguish unambiguously among the tens of millions of recordings actively being commercialized today. When services have catalogs of millions (or tens of millions) of recordings, including different versions of the same recordings and different recordings of a single song by the same featured artist, sometimes with different background performers and rights owners, standard identifiers are the only practicable way to identify and accurately account for usage of all those recordings.

SoundExchange has addressed these issues at length in other contexts.³¹ Briefly stated, this is a unique moment in time, with the Office focused on these issues and reengineering its systems just as the digital music market is maturing and relevant standards are being embraced quickly by the private sector. The Office has an opportunity to ensure that its registration and

³¹ Comments of SoundExchange, Inc. in Docket No. 2013–2 (May 21, 2013), *available at* http://www.copyright.gov/docs/technical_upgrades/comments/SoundExchange.pdf; *see also* Comments of SoundExchange, Inc. in Docket No. 2014–1, at 4-5 (Mar. 15, 2014), *available at* <http://www.copyright.gov/docs/recording/comments/79fr2696/SoundExchange.pdf>; Comments of SoundExchange, Inc. in Docket No. 130927852-3852-01, at 3-7 (Nov. 13, 2013), *available at* http://www.uspto.gov/ip/global/copyrights/comments/SoundExchange_Comments.pdf.

recording systems play an important role in supporting the digital music ecosystem. Specifically, we believe that the Office could encourage the adoption of standards for the identification of musical works and sound recordings by (1) collecting standard identifiers such as ISRCs, International Standard Musical Work Codes or “ISWCs” (ISO 15707), and International Standard Name Identifiers or “ISNIs” (ISO 27729) on a voluntary basis through the copyright registration and recording processes; (2) reflecting that information in the Copyright Office Catalog where available; and (3) designing its databases and systems to be interoperable with private databases by providing interfaces (such as application programming interfaces or “APIs”) consistent with standard industry data messaging formats such as those promulgated by DDEX to facilitate the automated flow of data between the Copyright Office and external users.³² By doing so, the Office would also make its own systems more useful to, and therefore a more central part of, the overall music industry ecosystem.

Apart from standards, the Office may be able to enhance its role as a definitive source of information about authorship and ownership of copyrighted works in a couple of ways:

- By collecting, on a voluntary basis, certain additional data elements for sound recordings as part of the registration process. In particular, while registration records regularly identify the featured artists on sound recordings and year of creation, those records would be a more valuable resource if they also reflected the names and country of residence of other performers and producers involved in the creation of the recordings, and the territory of creation for each recording.

Greater availability of this information would help (1) identify the recording and

³² As an example of what might be possible, the SEC provides both a public web-based interface and automated feeds from its EDGAR system. The latter enable a free flow of SEC registration information to many downstream users.

the parties to the recording; (2) facilitate the flow of royalties among content users, collecting societies, and artists and copyright owners, both domestically and abroad; and (3) promote protection of sound recordings, particularly abroad.

- By linking document records to registration records. Because SoundExchange distributes royalties to copyright owners (as well as artists), a significant part of what we do is ascertaining who is the current copyright owner of recordings. Linking recordation documents to registration records would help identify the current owner of copyrighted works to assist users in obtaining licenses or assist SoundExchange in paying royalties to the correct owner.

Of course, the Copyright Office cannot make any improvements without the resources to do so, and SoundExchange supports the Copyright Office's request for Congress to provide the appropriations the Copyright Office needs to update its systems for the 21st century digital economy.

CONCLUSION

SoundExchange appreciates the opportunity to provide these Comments and looks forward to participating further in discussions concerning the important issues raised by the NOI.

May 23, 2014

Respectfully submitted,

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