American Association of Independent Music

UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

Docket No. 2014-03

Music Licensing Study: Response to Second Request for Comments by the American Association of Independent Music ("A2IM") **– September 12, 2014**

The American Association of Independent Music ("A2IM") thanks the Copyright Office for the additional opportunity to share comments related to the Music Licensing Study.

A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of over 340 Independently owned U.S. music labels. *Billboard* Magazine, using Nielsen SoundScan data, identified the Independent music label sector as 34.6 percent of the music industry's U.S. recorded music sales market in 2013.[1] Independent music labels release over 90 percent of all music released by music labels in the U.S. A2IM's Independent community includes music labels of varying sizes and staffing levels across the United States, representing musical genres as diverse as our membership. Independent doesn't mean just small artists. For example, A2IM member labels have issued music releases by artists including Taylor Swift, Mumford & Sons, the Lumineers, Vampire Weekend, Adele, Paul McCartney and many others over the last few years. A2IM members also share the core conviction that the Independent music community plays a vital role in the continued advancement of cultural diversity and innovation in music, both at home and abroad.

In preparing our comments, the A2IM staff held discussions with the A2IM board of directors and other A2IM member companies of varying sizes with varying levels of staffing and business models, so as to properly represent our diverse community. Our views presented herein are based upon a consensus of a majority of our members.

Question # 1: Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works

[1] See http://a2im.org/2014/01/15/indies-still-1-billboard-indie-label-market-share-increases-2-0-percent-to-34-6-percent-in-2013/

and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data:

Sound Recordings and Musical Works copyright ownership information can be improved, including enacting measures to make data more accurate and more widely available. A2IM supports the need for a sound recording rights public database under the stipulation that it is independently administered and not administered by industry players with vested interests that may not represent the best interests of the overall music industry as they potentially represent only one segment of the music industry. We recommend that the Copyright Office oversee this governance as this will ensure standards are created and maintained on an impartial basis.

Currently, §411 and §412, title 17, of the *United States Code* require timely registration with the Copyright Office as a prerequisite for infringement suits and statutory damages. The current requirement is a less desirable means to ensure a complete public record as the filing (currently set at $55 for a standard electronic application[2]) and employee labor costs associated with registering sound recordings with the Copyright office are a hardship for our members that run Small and Medium Enterprises (SMEs) and the many prolific label and artist creators that need legal protection for their full body of work.

As an alternative, we suggest a self-populated database with a user I.D. registration requirement to input data. A simple standardized format for which digital interfaces can be created, including ISRC or ISWC identifiers, should be a requirement for all submissions. This will make the management of copyrights more efficient, reduce administrative costs, and provide a means to track bad actors seeking to profit from illegitimate registration claims. We also believe digital retailers should be required to use ISRC/ISWC identifiers as the basis for their reporting and payment, and we elaborate on that issue in our response to question #2 below.

Question # 2: What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

As included in A2IM's filing with the Copyright Royalty Board dated June 30, 2014, in our role as SoundExchange board members and in serving on SoundExchange committees, we have found that some of the data reported by digital services using the SoundExchange compulsory statutory license is not complete. As representatives on both the SoundExchange data committee and licensing committee we note that the matching process between the reports of use ("ROU"), statements of account ("SOA") and payment data often do not match up with each other and are often incomplete resulting in either the wrong sound recording owner and artists or no sound recording owner and artists getting paid. This is especially problematic for the independent label community which collectively release and own the largest group of sound recordings. Most know who Bruce Springsteen is and many know he records for Columbia Records. Not everyone knows who all of our members artists are and, as artists move from one music label to another music label, which labels own which songs rights for each artist. Even for artists who remain on one music label for their entire career, the release of compilations and

[2] Rates for electronic registration via the electronic Copyright Office (eCo) effective as of May 1, 2014.

soundtracks and who owns those digital rights for each different release of a single recording used in various albums complicates reporting and payments to the proper parties.

The volume of repertoire available and the variety of means by which consumers access and consume music digitally have made proper management of copyright ownership paramount. To ensure accurate accounting and royalty payments, the rights holders and the Collective Rights Organizations domestically and internationally recognize the need for sophisticated unique identifiers and uniform standards. The domestic and international music communities collectively developed the best practices standards that are currently in place, namely the ISO-certified key identifiers: the International Standard Name Identifier "ISNI" (ISO 27729), the International Standard Recording Code "ISRC" (ISO 3901) for sound recordings, and the International Standard Works Code "ISWC" (ISO 14707) for musical works.

The primary solution to getting the correct copyright attribution for all digital tracks (including tracks for which no payments are being made so they can be researched) is to require all digital distribution services using sound recordings to report ISRC identifiers (or ISNI when ISRC is not available) for every track a service uses and have this unique identifier included on every SOA, ROU, and statement of payment.

Currently, most digital services, other than preexisting subscription services, ("PSS") are allowed to report either the ISRC or the album title and marketing label for a recording. This is in contrast to the PSS, which are required to report all three data elements where available and feasible. Because these alternatives are available to services other than PSS, SoundExchange often receives a bare minimum of information for matching even when all the required elements are reported, which is frequently insufficient to report and pay the correct party. In addition, many services often omit or make errors in one or more of the required data elements. A2IM believes the change that has the potential for the greatest positive effect and is the easiest for services to implement would be to require all digital services to report the ISRC where available (the ISNI where it is not), as well as, corresponding album title, copyright ownership label and marketing label as the PSS are required to do. We add the ownership label requirement, in addition to the marketing label because, depending on the music label-artist contract, certain digital rights sometimes belong to the copyright ownership label and not the marketing label. Additionally, sometimes a third-party distributor may be designated as the recipient of royalties.

It must be understood that while ISRC and album/label are positioned in the current regulations as equivalent alternatives, they are by no means equally desirable. ISRC is a unique identifier for sound recordings. When an ISRC is reported accurately, it clearly identifies the relevant recording in a way that no other single data element can. By contrast, use of album/label alone is especially a problem for compilations, as we note above, as well as, for multiple recordings of the same song by an artist. Requiring both is the optimal solution, since the identical song with the same ISRC can be used in numerous album releases with different ownership/licensing rights for each.

ISRCs are widely available to digital services. ISRCs are currently used by record companies and most digital distribution companies for the purposes of rights administration, including reporting purposes in direct license arrangements between record companies and webcasting and on-demand services. Larger services that receive electronic copies of recordings from record companies and digital distribution companies typically receive ISRCs as part of the accompanying metadata. To the extent services obtain recordings from commercial products, the ISRC generally should be encoded therein, and, when present, can easily be extracted with widely-available software tools.

Mandatory use of the ISRC will significantly reduce the number of tracks that remain unidentified. Non-attributable works create an undesirable situation where certain funds received from digital services need to be allocated via a proxy process that we believe short changes the independent music label community. We believe a larger proportion of those funds belong to our constituents than to the "so called" major labels.

Question # 3: Please address possible methods for embracing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non usage-based forms of compensation (e.g. advances against future royalty payments and equity shares):

Transparency in reporting based upon music usage, including disclosure of all types (usage and non-usage forms) of compensation related to direct digital licenses is of the utmost importance to preserve fair market treatment for all creators. We are extremely concerned that the American businesses we represent, along with their artists, are not getting the appropriate pro rata share of revenue based on actual copyright ownership and associated royalties. In response to this issue, in January of 2013,[3] the Worldwide Independent Network (WIN), of which A2IM is a member, released the Worldwide Independent Network Manifesto, followed, a year later, by the Fair Digital Deals Declaration,[4] with the goal of exposing egregious disparities and advocating fair treatment of artists in direct digital content licensing. More than 900 labels and counting[5] have voluntarily signed the declaration which calls for an end to practices that lead to anti-competitive conduct, unequal terms and grossly imbalanced compensation, a lack of transparency, and unauthorized commercial uses of music content.

Our concerns stem from the reality that today three major recording companies (Universal, Sony, Warner) estimate and report (via the RIAA and in regulatory filings) that approximately 85% of all legitimately recorded music sold in the US is manufactured or distributed by the majors.[6] This claim distorts their market share as it includes musical content that is distributed, but not owned by these companies, and also includes content that the independent music labels have directly licensed to Digital Service Providers (e.g. iTunes, Amazon), as well as, the interactive services (e.g. Spotify, Rdio) that are directly licensed by Merlin, a global rights agency for the independent label sector.

This point was recently highlighted in Merlin's CEO, Charles Caldas', keynote speech at the Association of Independent Music ("AIM")'s 2014 Connected conference:

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[3] Revised April 2014. View the current document here: http://winformusic.org/about/manifesto/

[4] *The Fair Digital Deals Declaration*, released on July 16, 2014, is available at: http://winformusic.org/files/Labels'%20Fair%20Digital%20Deals%20Declaration%20(Final%2013052014).pdf

[5] For the full list of labels that have signed the declaration, see: http://winformusic.org/fair-digital-deals-pledge/fair-digital-deals-signatories/

[6] *e.g.* http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa and http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Recording_Industry_Association_of_America_MLS_2014.pdf

Nielsen doesn't include streaming data in its calculations, so the part of the market where we perform the best is not actually included in the way the market's measured. And they don't calculate the shares by ownership, they calculate it by distribution… and it ignores the fact that in the US some large [indie] labels do their physical distribution through major label channels but their [digital] distribution in-house. Yet it's the bigger physical number that's used.

As a result, the "so called" majors have obtained equity shares and/or large lump-sum payments (in the form of guarantees or advances) from the digital services that are in excess of what they would expect to receive via royalty rates based upon true copyright ownership. As independent music label market share increased to 34.6% in 2013,[7] "so called" major label market share declined. During this downturn, however, the "so called" major labels replaced music-usage compensation with guarantees based on distorted market share models. Additionally, these guarantees or advances were so large that digital services needed to heavily discount the compensation offered to independent rights holders in order for these services to preserve a sustainable business model.

This blatant abuse of misstated market clout and repertoire ownership that the major recording companies claim to exclusively control are currently being used to pre-negotiate large guarantees and advances before new digital services launch, leaving crumbs for the independent sector and their artists. We believe the recent non-negotiable terms offered to independent labels by the world's largest online streaming destination, YouTube, in advance of their planned subscription service, undercuts existing rates received from other interactive services (e.g. Spotify, Rdio, etc.) and creates a second-tier classification of content falling outside the repertoire controlled by the three "so called" majors. *The Wall Street Journal* recently reported that the Warner Music Group received an advance from YouTube of over $400 million dollars.[8] At the same time, as negotiations have stalled with independent labels that have been unwilling to agree to grossly inequitable terms, YouTube has threatened to block content and stop advertising revenue generation for these labels' official YouTube channels and user-generated content using their music. [9] Denying independent labels and their artists access to one of the primary ways people are consuming music, including a majority of teenagers,[10] puts these businesses and their artists at a significant promotional and commerce competitive disadvantage. The devil's bargain is to accept grossly unfair terms, or be denied access to the fans carefully cultivated by the direct marketing efforts of artists and their independent labels within the YouTube platform.

The practice of requiring guarantees or advances have also resulted in "breakage" – excess revenue that cannot be attributed to specific recordings or performances and, therefore, is not required to be shared

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[7] Our post discussing *Billboard*'s findings based on 2013 Nielson Soundscan figures can be accessed at: http://a2im.org/2014/01/15/indies-still-1-billboard-indie-label-market-share-increases-2-0-percent-to-34-6-percent-in-2013/

[8] See Hannah Karp, "Artists Press for Their Share" *The Wall Street Journal*, July 21, 2014. http://online.wsj.com/news/articles/SB10001424052702303833804580023700490515416

[9] See Ben Sisario, "Independent Music Labels Are in a Battle With YouTube" *New York Times*, May 23, 2014. http://www.nytimes.com/2014/05/24/business/media/independent-music-labels-are-in-a-battle-with-youtube.html

[10] From Nielson's 2012 in-depth music study. http://www.nielsen.com/content/corporate/us/en/press-room/2012/music-discovery-still-dominated-by-radio--says-nielsen-music-360.html

with artists, songwriters or the actual sound recording copyright owner (as is the case of independent labels that are distributed by the majors). This practice is a windfall for the major recording companies that use their overstated market share to bargain for an inflated guarantee while simultaneously lowering the royalty rate to increase the potential for unrecouped income at the direct expense of content creators and copyright holders [11]. Only a handful of the most powerful and established artists are able to contractually stipulate that breakage must be shared; other artists aren't so lucky. In addition, artists and content creators generally do not share in the equity stakes that are being offered by these services in exchange for lower royalty rates.

Breakage revenues are not just earned by major recording companies, they can also be earned by independent labels. This is precisely how our sector became aware of this practice. The international rights agency Merlin, of which many A2IM members are members, occasionally negotiates revenue guarantees and/or equity stakes with digital services. Merlin recently reported they would be paying their members over $1,000,000 from breakage derived from unrecouped revenue guarantees.

To illustrate how breakage heavily distorts compensation, in one deal, breakage revenues were over half of attributable royalties on the service. In a second deal, breakage was almost five times what was earned.[12] As a not-for-profit entity, Merlin distributes these revenues so as to reflect the usage of repertoire represented by its member labels, and so that it can be paid to the artists whose recordings are included in Merlin's deals. While labels and distributors receiving this type of digital-service income are currently not required to share these funds with the artists themselves, many leading independent labels do so voluntarily and have signed WIN's Fair Digital Deals Declaration.

Voluntarily sharing this income is insufficient to protect the artist communities and independent labels against the egregious abuses and inequalities caused by breakage. Although our members have benefited from this practice, disproportionate benefits are received by the major recording companies. This system threatens to undermine the intent of copyright in ensuring copyright owners receive fair return for their creative works. [13] Revisions to Copyright Law must be enacted to protect against blatant diversion of monies rightfully belonging to true copyright holders and the artist community.

Darius Van Arman, Co-Founder of the Secretly Group and former A2IM Board Member, eloquently described a solution to this issue in his testimony before the U.S. House of Representatives Judiciary Subcommittee on Courts, Intellectual Property, and the Internet:

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[11] For a discussion of how the structure of these types of deals for interactive services denies artists proper compensation, see Paul Resnikoff, "How Streaming Services Are Screwing Lady Gaga (and Every Other Artist)" *DigitalMusicNews.com,* June 10, 2014, http://www.digitalmusicnews.com/permalink/2014/06/10/streaming-services-screwing-lady-gaga-every-artist

[12] As reported in Merlin board observer and former A2IM board member, Darius Van Arman's, testimony before the U.S. House of Representatives Judiciary Subcommittee on Courts, Intellectual Property and the Internet, June 25, 2014. The full testimony can be found at: http://judiciary.house.gov/_cache/files/0f007c39-4b39-4604-8c62-79e58af436a8/final-a2imdariusvanarman0621.pdf

[13] 17 U.S.C. § 801(b)(1) "Subject to the provisions of this chapter, the functions of the Copyright Royalty Judges shall be as follows… (B) to afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions."

When a digital service such as Pandora earns revenue by either charging a subscription fee or by selling advertising, it ends up with a fixed revenue pie from which it shares revenue with all rights holders. This revenue pie is the same value, regardless of which specific recordings on the service are played, whether Led Zeppelin is played 100 times or 100,000 times. So the most equitable way for a service like Pandora to divvy up its revenue with rights holders is to do so in direct proportion to the number of streams that actually occur for each rights holder. This is what Congress clearly intended when they enacted the Digital Performance Right in Sound Recordings Act in 1995 (the "DPRA") and the Digital Millennium Copyright Act in 1998 (the "DMCA")…

The level playing field for compensation as described above is a central aspect of the compulsory statutory licensing provisions established in sections 114 and 115 of the Copyright Act, and it is why the compulsory statutory license on both the recorded side and the publishing side is so important to the independent sector. But the compulsory statutory license also protects against the practice previously discussed of major recording companies abusing their market clout to get a disproportionate share of fixed revenues. Remember, with music sales through CDs or MP3s, if a price is raised on one recording, it has no deleterious effect on the income prospects of another recording. In contrast, in the new world of access model digital services where revenue to rights holders comes from fixed revenue pools, if a major recording company finds a way to make an extra dollar for its copyrights, it's one less dollar that the digital service can afford for everyone else's copyrights. The compulsory statutory license protects against this inequity by creating a value floor for all copyright owners and removing the incentive for digital services to trade guarantees and advances for lower royalty rates (which only lowers the value of music and artist compensation). The compulsory statutory license assures that all compensation stemming from the exploitation of copyrights is attributable to specific performances, such that compensation is shared fully with all rights holders including creators and songwriters.

The three individual "so called" major record labels are also circumventing the intended use of the 17 U.S. Code § 114 statutory license by adding minor interactive functionality and demanding that services move to a directly negotiated license. These larger creator companies, represented by the Recording Industry of America ("RIAA"), operate in a fashion whereby they tweak music services functionalities so that, in their opinion, these services no longer qualify for the compulsory statutory license. The goal of the "so called" major record labels is to exclude as many licenses from compulsory statutory licensing as possible and negotiate their own direct licenses from their position of overstated market share.

The Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") and The Digital Millennium Copyright Act of 1998 ("DMCA") were enacted over 15 years ago. Since then, both technology and consumer consumption methods and desires have drastically changed. We are in urgent need of more precise eligibility requirements in the classification of digital services as "interactive" vs. "non-interactive." Perhaps it is appropriate to call for the creation of a "semi-interactive" category to include digital services such as iTunes Radio under compulsory statutory licenses.

We believe all content creators should receive fair market value for their work and believe in the fair market concept. We believe all digital services that fall under a compulsory statutory license with rates set under the Copyright Royalty Board rate setting process should be based upon a willing buyer/willing seller standard. Where feasible and appropriate, Collective Licensing and a further simplification of the licensing process can reduce administrative costs.

Questions #4 thru #7- Musical Works:

Currently, we do not have any comments that were not already included in our answers to questions 1-7 in our original response to the Music Licensing Study NOI dated May 23, 2014 [14] with the notable addition that if the publishers withdraw from the PROs, there would need to be an easily searchable database of withdrawn titles publically available to ensure that copyright law isn't violated.

Question # 8: Are there ways in which Section 112 and 114 (or other) CRB ratesetting proceedings could be streamlined from a procedural standpoint:

A2IM and its members are represented on the SoundExchange board, and we agree with the recommendations they outlined in their May 23, 2014 filing before the U.S. Copyright Office Library of Congress in response to the original Music Licensing Study NOI on this issue. [15] We believe the resources devoted to the time-consuming and costly rate tribunal process are better spent invested in the creation and promotion of music. The current process significantly increases SoundExchange's administrative costs which are then reflected in the royalty distributions that are available and distributed to our members and their artists.

Our membership is made up of Small and Medium Enterprises (SMEs) that depend on a fair competitive landscape in creating jobs and exports that improve the U.S.'s balance of trade. Our members' businesses, via the investment in and creation of musical intellectual property, are actively fueling commerce here and abroad. The proper safeguarding of intellectual property rights are a significant part of our culture and heritage, and are a powerful engine fueling growth in the U.S. economy. For our community of small businesses, a key issue is getting the proper compensation for ourselves and our artists. We are optimistic that revisions to existing copyright law can be enacted to protect artist content creators and the small and medium-sized music enterprises that make up independent label community, while at the same time providing digital service providers content on terms that make music available to a wide community of consumers.

The American Association of Independent Music ("A2IM") again thanks the Library of Congress United States Copyright Office for the additional opportunity to provide comments related to the study of Music Licensing.

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[14] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf

[15] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SoundExchange_Inc_MLS_2014.pdf

Respectfully,

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