

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

In the Matter of:

Federal Copyright Protection of Sound
Recordings Fixed Before February 15, 1972

Docket No. 2010–4

COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. (“SoundExchange”) submits these Comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) regarding federal copyright coverage of sound recordings originally fixed in a tangible medium of expression before February 15, 1972 (“pre-1972 recordings”). *See* 75 Fed. Reg. 67,777 (Nov. 3, 2010), 75 Fed. Reg. 74,749 (Dec. 1, 2010).

The NOI is principally focused on issues concerning archival preservation and access. Because those issues are outside the scope of SoundExchange’s activities, SoundExchange expresses no views concerning them. In two of its thirty questions, however, the NOI also asks about the statutory licenses set forth in Sections 112 and 114. Because SoundExchange has a strong interest in the scope and functioning of the statutory licenses, it submits these comments solely to respond to those questions.

Within the limited context of the statutory licenses, there would be a benefit to clearly requiring statutory services to pay under the statutory license for recordings presently protected as a matter of state law. Importantly, however, there is no need to “federalize” pre-1972

recordings to achieve this goal, and there are good reasons not to pursue such an approach.¹ Instead, the goal could be achieved on a targeted *sui generis* basis, in a manner similar to that used in the Audio Home Recording Act (“AHRA”), without disturbing the delicate balance that otherwise exists under the current law.

I. SoundExchange’s Interest in this Proceeding

SoundExchange was formed to facilitate the use of sound recordings within the scope of the Section 112/114 statutory licenses in a way that is practicable for services and will result in fair compensation to copyright owners and performers. SoundExchange is a 501(c)(6) nonprofit organization governed by an 18-member Board of Directors made up of equal numbers of artist and copyright owner representatives. It is the sole collective designated by the Copyright Royalty Judges to collect and distribute statutory sound recording royalties on behalf of copyright owners and recording artists. Services that rely on the statutory licenses pay for their use of recordings by writing a single check to SoundExchange, and providing detailed reports of use to SoundExchange identifying what they played, and SoundExchange in turn distributes the royalties according to those reports of use. SoundExchange currently maintains accounts for tens of thousands of recording artists and record labels, including members and nonmembers, and has distributed well over \$500 million dollars in performance royalties since it was formed.

¹ Reaching back to “federalize” pre-1972 recordings decades after their creation would raise numerous questions concerning matters such as ownership of new rights, effects on contracts, and application of the various formalities that are or have been part of federal copyright law. Resolving these issues would likely be complex and controversial, and any resolution would have the potential to unleash an array of unintended consequences.

Services relying on the Section 112/114 statutory licenses to obtain their sound recording repertoire have flourished.² For 2009, SoundExchange collected approximately \$200 million in Section 112/114 royalties, and even though final 2010 royalty payments are not yet due, SoundExchange's collections for 2010 have already exceeded collections for 2009. Thus, just as Congress intended, a large and growing industry has developed around these statutory licenses, and artists and rights owners now depend on the revenues that the licenses generate.

Because pre-1972 recordings are often used by services taking advantage of the Section 112/114 statutory license, and because those recordings are economically important, SoundExchange has an interest in the treatment of pre-1972 recordings under the statutory license.

II. Responses to Specific Questions

The NOI asks numerous specific questions concerning pre-1972 recordings. Most of those questions are addressed to archival preservation and access, which are outside the scope of SoundExchange's activities. SoundExchange expresses no views concerning those questions. However, two questions (numbers 13 and 26) are highly relevant to the functions performed by SoundExchange. We address each of those in turn.

A. Question No. 13 (regarding the economic impact of bringing pre-1972 recordings within the statutory licenses)

In its question number 13, the Office asked:

² See, e.g., Eric Savitz, *CES: Pandora Is Everywhere*, *Forbes* (Jan. 8, 2011), <http://blogs.forbes.com/ericsavitz/2011/01/08/ces-pandora-is-everywhere-you-want-to-be>; Don Reisinger, *Sirius XM, McCartney Celebrate 20 Million Subscribers*, *CNET News* (Dec. 13, 2010, 4:08 p.m.), http://news.cnet.com/8301-13506_3-20025534-17.html#ixzz1BQCDijmQ; *Media Vanguard Awards: Best iPad App to Make You Love Radio Again*, *Advertising Age* (Nov. 29, 2010), http://adage.com/mva2010/article?article_id=147323.

What would be the economic impact of bringing pre-1972 sound recordings into the section 114 statutory licensing mechanism applicable to certain digital transmissions of sound recordings? Would there be other advantages or disadvantages in bringing pre-1972 sound recordings within the scope of the section 114 statutory license?

There is no question that pre-1972 recordings are economically important, both under the statutory licenses and otherwise. A vast array of pre-1972 recordings are commercially important for rights owners and artists as well as users of sound recordings. Indeed, pre-1972 recordings are the backbone of many catalogs and playlists and include beloved rock & roll and “pop” recordings from the 1950s and 1960s, ground-breaking jazz, classical and rhythm and blues recordings, and many others. Thus, it is no surprise that these sound recordings are an important part of the repertoire used by many services that rely on the statutory licenses set forth in Sections 112 and 114 of the Copyright Act. Indeed, some licensees have numerous popular channels devoted exclusively to pre-1972 recordings.

Importantly, services *are* making statutory royalty payments under Section 112/114 for pre-1972 sound recordings. Although services relying on the statutory licenses are not required to report the fixation or release dates of the recordings they use, and SoundExchange therefore does not specifically track this information, SoundExchange’s payees include many artists whose entire careers spanned periods before 1972. SoundExchange strongly believes that payment for these recordings is appropriate. All pre-1972 sound recordings are subject to protection under state law, including a state law performance right. 17 U.S.C. § 301(c). As the NOI explains, state law protection for pre-1972 sound recordings is based upon a mix of different legal regimes (including common law copyright, civil and criminal statutes, unfair competition, misappropriation, and right of publicity). Nonetheless, there is a strong basis for concluding that various state laws create rights in pre-1972 recordings that are analogous to the digital

performance right established in 17 U.S.C. § 106(6). For example, judicial decisions in various states recognize a property interest in a recorded performance, and that violation of that right by an unauthorized transmission can be addressed as unfair competition.³ The case law suggests that similar concepts of unfair competition law may apply in other states as well.⁴ Federal protection also has been “restored” to certain pre-1972 recordings of foreign origin. 17 U.S.C. § 104A. In addition, in the case of certain pre-1972 recordings remixed or remastered after 1971, there is federal protection for the remixed or remastered versions.⁵

Although SoundExchange cannot quantify the impact of any change in the law in this area with precision, its best estimate is that pre-1972 sound recordings account for approximately 10-15% of usage by statutory services – a substantial amount given the extent to which usage and corresponding royalty payments have increased in recent years. To the extent that services

³ See *Capitol Records, LLC v. BlueBeat, Inc.*, No. CV 09-8030-JST (C.D. Cal. Dec. 8, 2010) (order granting partial summary judgment that unauthorized reproduction, sale and public performance of pre-1972 recordings is, among other things, unfair competition); *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 489-91 (3d Cir. 1956) (under Pennsylvania law, upholding damages award to boxer for unauthorized transmission of video recording); *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939) (recognizing property right in orchestral performance, and that owner has right to restrict the “dissemination” of recorded performance by forbidding unauthorized broadcast); *Waring v. WDAS Broad. Station, Inc.*, 194 A. 631 (Pa. 1937) (upholding injunction against unauthorized broadcasts prohibited by restrictive legend).

⁴ See, e.g., *CBS, Inc. v. Garrod*, 622 F. Supp. 532, 535-36 (M.D. Fla. 1985) (recognizing unfair competition claim for duplication of recordings); *Metropolitan Opera Ass’n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950) (recognizing property right in opera performance, giving rise to unfair competition action by various parties for sale of recordings made from radio broadcasts), *aff’d*, 107 N.Y.S.2d 795 (N.Y. App. Div. 1951) (*per curiam*).

⁵ As the Office has explained, reissued recordings may have federal protection as derivative works when “a minimum amount of original sound recording authorship” has been added, such as in the case of a “remix from multitrack sources” or a “remastering that involves multiple kinds of creative authorship, such as adjustments of equalization, sound editing, and channel assignment.” U.S. Copyright Office, Circular 56, Copyright Registration for Sound Recordings (May 2009). Consistent with these principles, the Office has regularly registered federal copyrights in recordings of performances by artists whose entire careers spanned periods before 1972.

are presently paying statutory royalties or obtaining direct licenses, the existing payment flows presumably would not change significantly if the statutory licenses required payment for pre-1972 sound recordings. To the extent that services are ignoring their obligations and making use of pre-1972 recordings *without* paying statutory royalties or obtaining direct licenses, however, the additional payment stream that would result would be consistent with existing state law rights and the important federal policy “to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used.” H.R. Conf. Rep. 105-796 (Oct. 8, 1998), at 79. This consideration is particularly important for artists of pre-1972 recordings, because these artists are often less likely than more current artists to be able to generate significant income from product sales, touring and other sources.

B. Question No. 26 (regarding so-called “partial federalization”)

In its question number 26, the Office asked:

The possibility of bringing pre-1972 sound recordings under Federal law only for limited purposes has been raised. For example, some stakeholders seek to ensure that whether or not pre-1972 sound recordings receive Federal copyright protection, they are in any event subject to the fair use doctrine and the library and archives exceptions found in sections 107 and 108, respectively, of the Copyright Act. Others would like to subject pre-1972 sound recordings to the section 114 statutory license, but otherwise keep them within the protection of State law rather than Federal copyright law.

Is it legally possible to bring sound recordings under Federal law for such limited purposes? For example, can (and should) there be a Federal exception (such as fair use) without an underlying Federal right? Can (and should) works that do not enjoy Federal statutory copyright protection nevertheless be subject to statutory licensing under the Federal copyright law? What would be the advantages or disadvantages of such proposals?

Many of the subparts of this question are directed to issues outside the scope of SoundExchange’s activities, and SoundExchange takes no position concerning matters apart

from the statutory licenses. Within the scope of the statutory licenses, as in the case of question 13, the logic and legality of bringing pre-1972 recordings into the federal system would depend on the way in which that is accomplished.

For the reasons discussed above, the Office may decide to recommend legislation clarifying that pre-1972 sound recordings are in fact subject to statutory licensing. The best means of accomplishing that goal would be on a very targeted *sui generis* basis and not by “federalization” of pre-1972 recordings.⁶ Specifically, the simplest approach would be to adopt provisions analogous to the AHRA. The AHRA imposes an obligation independent of federal copyright protection to make certain royalty payments and take certain other actions with respect to the importation, manufacture and distribution of certain recording devices and media. In the case of violations, the AHRA provides remedies distinct from copyright infringement liability, 17 U.S.C. § 1009, and in exchange, certain infringement actions are barred, 17 U.S.C. § 1008.

In a similar manner, the Copyright Act could be amended to simplify licensing under digital performance rights presently protected as a matter of state law by simply requiring a statutory service making an audio transmission or ephemeral recording of a pre-1972 recording to satisfy the Section 112/114 notice and payment requirements that would apply if the relevant recording was subject to federal copyright (unless the service had obtained separate authorization from the relevant rightsholder). If a service failed to do so, remedial provisions tailored to the statutory license would apply, including actual or statutory damages and injunctive relief, as well as costs and attorneys’ fees. Just as the AHRA permits an “interested copyright party,” including

⁶ It is not necessary to federalize pre-1972 sound recordings for uses by *non-statutory* services to protect the goal of ensuring fair compensation, because those services must rely on direct licensing whether the recordings are protected by federal *or* state law, and can obtain whatever rights they need from the rights owner.

a representative of artists and copyright owners, to bring a civil action, 17 U.S.C. §§ 1001(7), 1009(a), it would be most efficient if a collective such as SoundExchange had standing to bring an action for unpaid royalties on behalf of all potential recipients thereof. If a service complied with the requirements of the statutory license, state law actions challenging the relevant usage would be barred. Because pre-1972 recordings are presently protected under state law until February 15, 2067, such an arrangement should continue until that time.

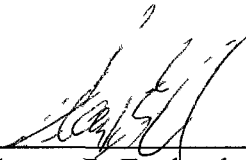
Importantly, this potential approach is different than what appears to be contemplated in question 26, because there would be no “federalization” in the sense of bringing them within the scope of Section 106. Instead, this would be a *sui generis* mechanism, modeled on the AHRA, to make state law rights to pre-1972 recordings available to digital music services upon compliance with notice and payment provisions of federal law. This approach is thus similar to other federal legislation that bars state claims in certain situations. *See, e.g.*, 15 U.S.C. § 7002 (permitting only limited state regulation inconsistent with federal electronic signatures legislation). In short, this model does not involve any of the complications or problems raised by potential “federalization” of pre-1972 recordings.

Conclusion

SoundExchange believes that artists and rights owners should be fairly compensated for the use of their works, whether their works are subject to protection under state or federal law. At the same time, SoundExchange does not believe that “federalization” of pre-1972 sound recordings is necessary to achieve that goal and, indeed, could create far more problems than it solves. Within the specific context of the statutory licenses, however, a *sui generis* mechanism could be adopted that would facilitate licensing of pre-1972 works under the statutory licenses.

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