Before the
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 SIRIUS XM RADIO INC.

I. INTRODUCTION AND OVERVIEW

The Copyright Office has issued a Notice of Inquiry addressing the desire of archivists and librarians to preserve historic sound recordings and inquiring whether granting federal copyright protection to pre-1972 sound recordings would aid preservation efforts. *See* 75 Fed. Reg. 67,777 (Nov. 3, 2010) (the "NOI"). Although focused on preservation issues, the NOI also seeks information on a range of other collateral topics, including the economic impact were pre-1972 recordings brought under the statutory license provisions of Section 114 of the Copyright Act, which govern certain digital transmissions of sound recordings. Sirius XM, as a satellite digital audio radio service operating under the Section 114 license, and as the largest single payor of statutory royalties under that license, offers the following reply comments in response to the comments filed by (1) The Recording Industry Association of America ("RIAA") and American Association of Independent Music ("A2IM)"; and (2) SoundExchange, Inc. ("SoundExchange").

The RIAA and A2IM – which together represent essentially the entire U.S. recording industry – correctly observe that granting federal protection to pre-1972 sound recordings would give rise to a host of practical, legal and even constitutional concerns. They accordingly oppose either "full" or so-called "partial" federalization of pre-1972 sound recordings as unwarranted. Sirus XM agrees with these positions.

Congress long ago determined that the federal sound recording right should apply only to recordings from 1972 forward, and should encompass only rights of reproduction and distribution. That policy decision was repeatedly reinforced in subsequent amendments to the Copyright Act. Even when Congress granted sound recording owners a narrow right of public performance by digital audio transmission in 1995's Digital Performance Right in Sound Recordings Act ("DPRSA"), it did so subject to the Section 114 statutory license, and only as to post-1971 recordings. Sirius XM and other Section 114 licensees built their businesses – and design their programming to this day – within the framework established by the DPRSA. Granting federal protection for pre-1972 recordings would reverse decades of settled law, upend this system, and disrupt the business expectations upon which it has been built. By imposing for the first time a royalty expense associated with performances of pre-1972 recordings, it would create new, unforeseen and potentially significant economic liabilities for Sirius XM and other Section 114 licensees (such as webcasters and broadcast simulcasters) without any showing of propriety or necessity.

Despite the stated opposition of the recording industry to such federalization, SoundExchange, ostensibly on behalf of the same recording industry members, argues in favor of partial federalization with respect to the Section 114 license, offering a proposal

whereby pre-1972 sound recordings would continue to be copyrighted under state rather than federal law, but Section 114 licensees nonetheless would be required to report and pay for their performances of such recordings under the (federal) Section 114 license, and subject to federal litigation (with SoundExchange as enforcer) for failure to do so.

Although putatively responsive to two of the twenty-six questions raised by the NOI, SoundExchange's proposal fails to respond to the concerns at the heart of the NOI (and Congress's stated reasons for ordering it) – namely, the preservation of historic sound recordings. Nor do SoundExchange's comments identify any underlying problem with the Section 114 license, or the performance of pre-1972 sound recordings by music services who operate under that license, that are in need of fixing, save for the fact that certain 114 licensees apparently are (mistakenly) including performances of pre-1972 recordings in their Section 114 license reports and payments. There is no justification for its proposal to adopt an entirely new and admittedly "sui generis" regulatory apparatus – modeled vaguely on the Audio Home Recording Act (AHRA) – to collect royalties to which the recording industry is not entitled in the first place under existing state laws. SoundExchange's proposal is a naked attempt to increase its Section 114 receipts.

The windfall SoundExchange seeks to realize by its ill-conceived proposal is not only unwarranted, economically or legally; it would, if it ever ripened into legislation, serve to undermine the worthy goal of the current NOI: increasing access to historic sound recordings. The economic burden its proposal threatens would instead diminish the performances of (and therefore decrease broad public access to) such recordings by Section 114 licensees.

II. GRANTING PERFORMANCE RIGHTS FOR PRE-1972 SOUND RECORDINGS WOULD NOT FURTHER THE STATED GOALS OF THE NOTICE OF INQUIRY

The principal problems motivating the Copyright Office NOI – confirmed by the preponderance of the initial comments – involve the concerns of archivists and librarians that pre-1972 sound recordings will not enter the public domain until 2067. Until that time, those groups face potential liability for their archival activities under an inconsistent patchwork of state causes of action forbidding the unlicensed copying and reproduction of such recordings – recordings which, under federal law, would either already be in the public domain or, if not, be subject to the various exceptions to protection embodied in Sections 107 and 108 of the Copyright Act, among others. That said, providing digital *performance* rights for pre-1972 sound recordings – whether through full federal copyright protection or by shoehorning purported state claims into the Section 114 license – does nothing to remedy that situation. Indeed, it fails to advance a single goal identified by Congress in ordering this Inquiry:

- *Preservation of pre-1972 sound recordings*: the first concern identified by Congress is how bringing pre-1972 recordings under federal protection will contribute to the preservation of such recordings. *See* NOI at 67779 (quoting H.R. 1105, Pub. L. 111-8 (Legislative Text and Explanatory Statement) at 1769). Granting a performance right for pre-1972 recordings (as opposed to the right of libraries and archivists to reproduce and share copies of those sound recordings) would have no impact whatsoever on the preservation of those recordings. Section 114 licensees (and music services that perform them more generally) are

simply not involved in the preservation of such recordings, and preservation is not achieved through, and does not implicate the right to, public performance.

- *Public access to pre-1972 sound recordings*: Congress also directed the Copyright Office to consider whether bringing pre-1972 recordings under federal protection will improve public access to such recordings. *Id.* Granting a performance right for pre-1972 recordings (or enforcing a purported state right under the Section 114 license, as SoundExchange suggests) would actually have the opposite effect: if anything, 114 licensees will play *fewer* such recordings if suddenly required to pay for them under the statutory license.
- *Economic Impact*: Finally, Congress directed the Copyright Office to inquire as to the economic impact on rightsholders of creating federal coverage. *Id.* This inquiry presumably reflects the concern that rightsholders would be harmed if their works, previously protected under state law until 2067, were to enter the public domain more quickly under federal law. Granting a first-ever performance right for pre-1972 recordings (or otherwise making them subject to the Section 114 statutory license) will not harm copyright owners, who never had such a right to begin with. It would, rather, provide them with an undeserved windfall in statutory performance royalties for recordings created and paid for 40 or more years ago, a windfall that will come at the expense of services like Sirius XM, for-profit and not-for-profit webcasters, and broadcast simulcasters.

III. SOUNDEXCHANGE'S PARTIAL FEDERALIZATION PROPOSAL HAS NO INDEPENDENT JUSTIFICATION

A. SoundExchange's Proposal Does Not Remedy Any Identified Problem with the Section 114 License or Licensee's Performance of Pre-1972 Sound Recordings

The concerns motivating the NOI, however meritorious, have absolutely nothing whatsoever to do with the Section 114 statutory license and/or performances of pre-1972 sound recordings by services such as Sirius XM, webcasters, radio simulcasters, and others that utilize the statutory license. SoundExchange fails to offer any alternate justification for its "sui generis" proposal.

SoundExchange first points out that pre-1972 recordings are "economically important" both for rights owners and music services – basically, that Section 114 licensees are playing pre-1972 sound recordings as part of their services. This fact does not explain why those performances should be reported and paid for under the federal statutory license – which applies only to federally copyrighted, post-1971 recordings – or, for that matter, why Section 114 licensees alone should be singled out for payment for their performances of pre-1972 recordings, but not broadcast radio stations or others who do the same (as would be the case were pre-1972 recordings fully federalized).

Second, SoundExchange argues that certain Section 114 licensees are currently reporting and paying for their performances of pre-1972 sound recordings. If they are doing so, it is a mistake, and if SoundExchange is accepting and distributing the royalties, that too is a mistake, and beyond SoundExchange's authority. In any event, that some services mistakenly report and pay for non-copyrighted pre-1972 sound recordings cannot justify forcing that same mistake onto other services that properly exclude such

performances from their Section 114 payments, just because SoundExchange would like to capture that value for its members.

SoundExchange suggests that such reporting is "appropriate" because pre-1972 recordings enjoy a public performance right under state law comparable to federal rights granted under 17 U.S.C. 106(6). Even accepting that as true (which, as explained below, it is not), it does not justify reporting and paying for performances of those recordings under a *federal* statutory license (which, again, applies only to works copyrighted under federal law) simply because the purported state rights may be similar to the federal rights. To even begin to justify its proposal, SoundExchange would need to show, at a minimum, that copyright owners or services were experiencing difficulty licensing pre-1972 recordings directly, and that including the Section 114 license would offer compelling transactional efficiencies – a prospect that seems unlikely given that music services of all kinds routinely enter into direct licenses with record companies. SoundExchange would also need to show that its members (the owners of the purported state performances rights) would submit their pre-72 recordings to the statutory license (which is compulsory) and accept the federal statutory rate set by the CRB as payment. Again, this seems unlikely, given that in other venues (such as CRB proceedings) SoundExchange's member companies repeatedly bemoan the statutory license as resulting in rates that are artificially low relative to what they claim to be able to command in the open market.[1] In any event, SoundExchange has made no such showing.

[1] *See, e.g.*, Proposed Findings of Fact of SoundExchange, Inc., CRB Docket No. 2009-1 (CRB Webcasting III) at p. 68, ¶ 226 (Sept. 10, 2010) (testimony of Warner Music executive) *available at* http://www.loc.gov/crb/proceedings/2009-1/pffcol/soundexchange_pff_and_col.pdf.

Its comments fail to establish that any record companies have even attempted to license performance rights for pre-1972 recordings, much less actually done so, and much less run into difficulties that might warrant statutory licensing of those recordings.

B. SoundExchange Is Wrong that State Laws Grant a Right of Public Performance in Sound Recordings

SoundExchange's argument also fails insofar as there is no state law performance right for SoundExchange's members to license. The Notice of Inquiry itself acknowledges that common-law copyright claims require "unauthorized reproduction" as opposed to performance (citing the New York *Naxos* decision) (emphasis added), while unfair competition requires "unauthorized copying and distribution" plus competition. NOI at 67778. SoundExchange is simply wrong – or engaging in wishful thinking – when it writes that "All pre-1972 sound recordings are subject to protection under state law, including a state law performance right" and "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)."

SoundExchange's lone citation in support of the first contention, 17 U.S.C. 301(c), merely explains that whatever state law rights as may exist regarding pre-1972 sound recordings are not preempted by federal law until 2067; it does not actually identify or validate the existence of any such rights. The cases cited by SoundExchange in support of the latter contention, *see* p. 5 n.3, are equally unsupportive of its position. The *Ettore* case, from 1956, involved a televised boxing match rather than a sound recording. The two *Waring* cases, each dating back to the 1930s, involved a radio station playing a recording of an orchestra in direct competition with other stations' licensed live

broadcasts of that same orchestra, and doing so in violation of an express restriction against such performance printed on the records. The *BlueBeat* case, although more recent, is a cursory summary judgment order from a federal district court interpreting California law that found unfair competition against a service that offered downloads as well as on-demand streams – but conducted no analysis of legal liability under California law for performances separate and apart from the download functionality. SoundExchange has provided not a single citation to any authority demonstrating a state right of public performance in pre-1972 recordings that would apply to the type of public performances made by Section 114 licensees, much less one that is comparable to the public performance right found in Section 106(6) – this despite the fact that radio stations have been making precisely those sorts of performances for 70 or 80 years.[2]

The legislative history of the federal sound recording right – much of it detailed in the RIAA/A2IM filing – confirms this widely shared understanding. The Sound Recording Amendment Act of 1971, *see* Pub. L. 92-140, 85 Stat. 391 (1971), clearly embodied a deliberate policy choice by Congress that only recordings from 1972 forward would be subject to federal protection. What is left out of the RIAA recounting, however, is the fact that the 1971 law – and its subsequent incorporation in the 1976 overhaul of the Copyright Act – reflected a corresponding policy choice to *refrain* from granting a right of public performance, even as to post-1971 recordings that were

[2] SoundExchange's claim that judicial decisions in various states "recognize a property interest in *recorded performances*, and that violation of that right by an unauthorized transmission can be addressed as unfair competition" (p. 5) (emphasis added) is an exercise in semantics that serves only to confirm the fact that not a single state law – statutory or common – provides for an exclusive right of public performance in pre-1972 sound recordings comparable to Section 106(6).

otherwise granted protection under the act. *See* 17 U.S.C. 114 (confirming that sound recordings "do not include any right of performance under section 106 (4)").

The deliberate decision to grant only new federal rights of reproduction and distribution stemmed in part from the fact that the Act was meant to address the problem of record piracy. *See* H. Rep. 92-487 at 2 (explaining that the Act was intended to combat the problem of "record pirates" and the "widespread unauthorized reproduction of phonograph records and tapes"); *see also* H. Rep. 104-274 at 11 (explaining that sound recordings "were not granted the rights of public performance, on the presumption that the rights granted would suffice to protect against record piracy"). Congress also avoided adding a performance right, however, because doing so was (unlike the reproduction right) novel and tremendously controversial. *See* Second Supplementary Register's Report on the General Revision of the U.S. Copyright Law, at 218-221 (1975) (identifying the performance right in sound recordings as the "most controversial feature of the revision bill during Senate debates" and detailing its opposition by various groups, the inclusion of the right in intermediate versions of the bill between 1971 and 1973, and its ultimate removal because of the concern that it would "impose severe financial burdens on broadcasters"); Supplementary Register's Report on the General Revision of the U.S. Copyright Law, at 51 (1965) (House Committee Print) (calling the addition of public performance rights for sound recordings "explosively controversial" and noting its opposition by both "users who would have to pay additional royalties" and composers who "would probably get a smaller slice of the pie"); *id.* ("We cannot close our eyes to the tremendous impact a performing right in sound recordings would have throughout the entire entertainment industry.")

Consistent with these comments, the Radio industry won the day by arguing that adding a federal performance right would add a huge new financial burden, an argument that continues to this day, and one that would have made no sense if stations were already paying performance royalties pursuant to state law. It is impossible to read the legislative history, with its references to the "new" right of performance and the "additional" royalties it would entail, and conclude that any party believed a performance right in sound recordings already existed under state law.[3]

IV. FULL OR PARTIAL FEDERALIZATION OF PRE-1972 SOUND RECORDINGS WOULD HARM SIRIUS XM AND OTHER SERVICES THAT RELY ON THE SECTION 114 LICENSE

For reasons explained above and in the RIAA/A2IM comments, expanding the performance right to sweep in several decades of additional sound recordings would reverse decades of settled practice as to pre-1972 recordings. It would also interfere with the settled expectations of services that rely on the Section 114 license. Even when Congress added a limited sound recording performance right in digital audio

[3] SoundExchange's claim that the AHRA serves as an independent model for its proposal because it "imposes an obligation independent of federal copyright protection" (p. 7) is true only in the sense that manufacturers of digital audio recording devices pay the prescribed royalty even if the covered device or media is not ultimately used by a particular customer to copy federally copyright materials. But royalty payments from the Sound Recording fund are distributed only to "interested copyright parties," 17 U.S.C. 1006, defined as the "owner of an exclusive right under 106(1) of this title to reproduce a sound recording." And the legislative history makes clear the Act was designed to address the capability of digital recorders to copy *federally* copyrighted materials, not to vindicate alleged state law rights. *See* S. Rep. 102-294 at 30 (describing purpose of legislation as ensuring the right of consumers to make private copies of "copyrighted music" and noting that "sound recordings became copyrightable for the first time in February 1972"); H. Rep. 102-873 at 11 (describing legislation as addressing "*federal* copyright liability for home taping of audio recordings" and noting that the issue arose "when Congress first extended protection to sound recordings" in the early 1970's) (emphasis added).

transmissions in the Digital Performance Right in Sound Recordings Act of 1995, and then amended that provision in the Digital Millennium Copyright Act ("DMCA") in 1998, it left intact its earlier determination to exempt pre-1972 sound recordings from federal protection or coverage under the new licensing scheme. In the wake of the DPRSA and DMCA, Sirius XM (and undoubtedly thousands of webcasters) launched businesses reliant upon the Section 114 license and offering programming modeled around the detailed requirements of the Section 114 statutory license. Sirius and XM each invested (prior to their 2008 merger) billions of dollars developing and launching the satellite radio industry, and hundreds of millions more developing programming and litigating before the CRB, all based on their understanding of what the Section 114 license requires. Absent demonstration of compelling problem specifically related to the performance of pre-1972 sound recordings by Section 114 licensees – a showing that has not been made here – there is simply no reason to interfere with a carefully crafted Congressional scheme on which so many licensees have come to rely.

Conclusion

For reasons set forth above, Sirius XM urges the Copyright Office to reject the proposal to grant full federal copyright protection to all pre-1972 recordings and to instead consider other, less drastic, legislative solutions to the real problems facing libraries and archivists. Sirius XM urges the Register to reject suggestions of "partial federalization," an impractical step that would create unnecessary adverse economic impact on 114 licensees without addressing the concerns of librarians and archivists driving this Inquiry.

Respectfully submitted,

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__/s/_R. Bruce Rich_____
R. Bruce Rich
Todd D. Larson
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8000

Counsel for Sirius XM Radio Inc.

Of Counsel:

Cynthia Greer
Sirius XM Radio Inc.
1221 Avenue of the Americas
New York, NY 10020
Ph. (212) 584-5100
Fax (212) 584-5200