MUSIC REPORTS
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VIA ELECTRONIC SUBMISSION
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General Counsel and Associate Register of Copyrights
U.S. Copyright Office, Library of Congress
101 Independence Avenue SE
Washington, DC 20559-6001

Re: Music Licensing Notice of Inquiry/Comments of Music Reports, Inc.

Dear Jacqueline,

Music Reports appreciates the opportunity to submit these comments in response to the Copyright Office's Notice of Inquiry regarding music licensing (the "NOI").

As the Office is aware, Music Reports is an independent music rights administration company and technology platform. The company, which is majority owned by the private equity firm ABRY Partners, is based in Woodland Hills, California, and employs approximately 130 employees. The company's core services include strategic consulting, music licensing, royalty reporting, and copyright data management services.

From its inception in 1995, Music Reports has taken a technology-centric approach to music rights administration, leading it to develop innovative systems and applications which facilitate accuracy, transparency, and accountability in all aspects of music licensing and royalty reporting. Historically, the company's clients have primarily been music users, such as television, cable, radio and satellite radio broadcasters, digital music and video services, wireless carriers, and consumer products companies. However, the company's position as a leading technology platform—coupled with the unique administrative challenges associated with digital music distribution—has led music rights owners, in addition to users, to engage Music Reports to support their administrative needs. As such, the company's clients now include major record labels, music publishers, and digital music aggregators.

Music Reports' experience providing administrative services to both music users and owners, for both sound recordings and musical works, across all right types, on a worldwide basis, as an independent, commercial enterprise provides the company with a unique perspective on many of the questions posed by the Copyright Office in the NOI. Accordingly, the company submits the following responses to many of those questions, as follows:

Musical Works

Question 1. *Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works*.

Generally speaking, Music Reports believes that if a legal and regulatory environment exists in which independent, private enterprises are afforded both the opportunity and commercial incentive to solve music licensing problems, private enterprises will inevitably step in to solve those problems. Perhaps there is no better support for this proposition than Music Reports' experience as an administrator of the Section 115 statutory license for digital music services.[1] Due to Music Reports' willingness to administer the Section 115 license for services in innovative ways, the license has become a primary means of licensing the mechanical reproduction right in musical works by digital music services.

As the Office is aware, the Section 115 statutory license has not been widely used by record companies involved in distribution of physical records or digital downloads. However, since 2001, Music Reports has served tens of millions of Section 115 Notices of Intention to Obtain a Compulsory License for Making and Distributing Phonorecords ("NOI(s)") on music publishers on behalf of many digital music service clients. All of the major U.S. music publishers, and virtually all of the largest independent publishers, have by now affirmatively "opted-in" to receive licensing notifications (in the style of NOIs) from Music Reports in an electronic spreadsheet format. These electronic licensing notifications are posted by Music Reports to over 35,000 password-protected Web portals, which the company hosts for the music publishers. Since the first industry settlement on Section 115 royalty rates for interactive digital music services went into effect in 2008, Music Reports has posted millions of Monthly Statements of Account to these Web portals (frequently in a customized format), so that the music publishers may download them into their accounting systems. And since 2008, Music Reports has also paid music publishers tens of millions of dollars under Section 115 licenses.

Given the now widespread reliance on the Section 115 mechanical license by digital music services, the "need" for the license is manifestly apparent. As to the "effectiveness" of the license: critics of it as it currently exists tend to focus on two purported "problems", insofar as digital music services are concerned: (i) the cost of administering the license; and (ii) the resulting licensing coverage it provides in terms of the musical works used by digital music services.

Regarding the cost of using the Section 115 license: it is true that Music Reports' current practice is to charge digital music services which utilize its Section 115 administration platform recurring service fees. However, musical work distributors have always borne the cost of administration of mechanical reproduction rights. For example, the major record labels in the U.S., which have only a few million recordings in active distribution, dedicate millions of dollars in annual overhead to mechanical license administration. The typical interactive digital music service, on the other hand, maintains a catalog of tens of millions recordings and incurs exponentially less cost to utilize the Music Reports Section 115 platform. Stated differently, transaction costs on the Music Reports platform have been dramatically reduced, despite the tremendous increase in the number of licenses administered. On occasion, it is noted that digital music services sometimes pay more in administrative expense to manage mechanical reproduction rights than they do in mechanical royalties, but this says more about the ability of the services to monetize their offerings with consumers than it does about the cost of administration. Indeed, given the still-growing state of the digital music service business, it is undoubtedly true that many other service overhead expenses--

[1] Music Reports limits its answer to this question to the need for and effectiveness of the Section 115 license for interactive music streaming services and other new media formats (as opposed to record labels and other distributors). As of the date of this writing, the U.S. music services on the Music Reports platform for Section 115 administration include, among others: Amazon, Apple, Guvera, Microsoft Xbox, Muve Music, Myspace, Omnifone, Rdio, and Slacker. (Music Reports' answer to this question, and all others in the NOI, reflect Music Reports' own views and not necessarily those of its clients).

unrelated to mechanical rights administration—exceed the amount of mechanical royalties paid by the services.

Regarding the licensing coverage of the Section 115 license: it is true, as critics have pointed out, that it is not possible to license all of the tens of millions of musical works in the typical digital music service catalog using the Section 115 statutory license. This is because of the substantial number of works for which copyright ownership information cannot be determined. However, the vast majority of works in the typical digital music service catalog are dormant and are not used by consumers. In Music Reports broad experience, the majority of digital music service usage centers on approximately 300,000 works. Through internal testing, Music Reports has determined that it can license well over 90% of the typical digital music service sound recording usage (as opposed to sound recording catalog, including dormant catalog), through use of the Section 115 license. Moreover, ownership information for works which are commercially significant tends to become known to Music Reports and other administrators, as those works are acquired by publishers to whom Music Reports provides accountings on a regular basis.

Additionally, as the Office is aware, traditional record label distributors have not been able to identify and license a substantial percentage of the musical works that they have distributed in records, through traditional mechanical licensing methods. This has resulted in large amounts of undistributed royalty income.[2] Music Reports believes that in comparison, the percentage of commercially significant works in the typical digital music service catalog that it is unable to license under the Section 115 license is small. As such, Music Reports' use of the Section 115 license has actually increased licensing coverage, on a percentage basis.

As Music Reports has suggested to the Office in the past, the problem of unidentified works could be solved by making it possible and cost-effective to license unidentified works through electronic NOIs which are filed with the Office in bulk. The company has appreciated the steps that the Office has taken to reduce the cost of filing NOIs with the Office in bulk, but the cost is still prohibitive, and of course, electronic filing is not yet possible. Music Reports looks forward to further engagement with the Office with respect to affordable, electronic filing, which has the potential to eliminate the problem of unidentified works.

Question 3. *Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?*

As a general principal, Music Reports believes that direct privity of license between music copyright owners and music users ultimately is better for both sides than "blanket" licensing through collective licensing entities. As such, Music Reports believes that it is preferable to preserve song-by-song licensing through the Section 115 license.

The benefits of song-by-song licensing for music publishers are obvious: the licensing privity which exists currently in the Section 115 license empowers copyright owners to enforce reporting and royalty payment obligations directly. History has proven that when collective licensing entities license on behalf of music owners, royalties frequently are not distributed to the ultimate copyright owner and remain in reserve at the collective. Thereafter, perverse incentives can develop whereby the collective, which funds itself through pre-distribution deductions on royalties (as well as

[2] As the Office is aware, in 2009, the major U.S. record labels and music publishers agreed to a settlement over distribution of undistributed mechanical royalties which provided insight into the enormous amount of undistributed royalties up to that date.

interest on held money) loses the incentive to devote resources to identifying the copyright owners in reports of use which are received from music users. Rather than distribute royalties on a census basis, collectives frequently resort to proxies for distribution, which necessarily favor the larger, known copyright owners (controlling the boards of directors of the collectives) at the expense of the smaller, unknown copyright owners. On the other hand, when a copyright owner enjoys direct privity of license with a music user, it is not subject to the vagaries of the collective's distribution system (to say nothing of the deductions from royalties). The diligent copyright owner can directly enforce reporting and payment obligations, which ensures that it receives the royalties that are due and makes them easier to distribute to composers.

The benefits of song-by-song licensing for music users are admittedly less obvious, but Music Reports still believes that in the long run, it is better for music users than collective licensing through one or more entities.[3] While collective licensing would be more convenient and presumably less costly to music users, and it could eliminate exposure to liability for unlicensed works, the most likely entities to be ordained as collectives would either be the existing collectives (such as HFA), or the major music publishers.[4] Effectively, in such a scenario, control over licensing would be ceded to the music owners, even if licensing were ostensibly compulsory. For example, in Music Reports' experience, music owner collectives take a restrictive view of the scope of compulsory licenses—particularly with regard to new media formats that have not yet been licensed under the compulsory license.[5]

Moreover, an analysis of the desirability of collective licensing for mechanical rights cannot be divorced from consideration of public performance rights, since many users need both rights. And the performing rights market in the U.S. is fracturing at an incredibly rapid pace. As the Office is aware, certain music publishers affiliated with leading artist managers have already withdrawn their catalogs from the largest PROs ASCAP and BMI, and it is possible—if not likely—that major music publishers will also withdraw from those PROs in the near future. And SESAC, a much smaller PRO, has of course already become an additional source of performing rights for users. Licensing directly from copyright owners—either on a song-by-song or blanket basis—provides the only mechanism currently available to music users to obtain both sets of rights. By licensing on a song-by-song basis, music users (or agents on their behalf)[6] develop, over time, business relationships directly with the owners which can be leveraged as they need new licenses for previously unlicensed activity. Importantly, through song-by-song licensing, music users (or their agents) develop databases reflecting the songs controlled by the various music publishers. This development of music copyright databases by users (or their agents) not only empowers users to license music directly from owners, it also enables them to *avoid* music controlled by certain owners, if for example they are unable to reach agreement with the owners over rates and terms of licenses. In the absence of such databases, music users are reliant on music owners (or their

[3] It should be noted that currently, it is common for music publishers to grant blanket, voluntary mechanical licenses to their own catalogs to music users including digital music services. In fact, with only a few hundred of such blanket licenses, a digital music service can license most music usage. There is a definite modern trend in favor of this kind of licensing by the major music publishers and largest independents, as opposed to collective licensing through HFA.

[4] For example, previous versions of the SIRA legislation would have made it practically impossible for any entity other than HFA and the major music publishers to qualify as a collective, due to the percentage catalog representation thresholds.

[5] A good example is the aggressive negative position which HFA took with respect to the application of the Section 115 license to ringtones. It was obvious to any unbiased reader of the applicable law and regulation at the time that the license did in fact apply to ringtones, and this was confirmed in Copyright Office proceedings and the courts, after expensive and time-consuming litigation.

[6] Of course, Section 115 currently authorizes agents of both owners and users to negotiate, agree to, pay, and receive royalty payments, and Music Reports believes that it is critically important to users to maintain the ability to appoint agents to act on their behalf in this manner.

collectives) to disclose their catalogs, in the event that they want to avoid using music which they control, something which they are frequently unable, or unwilling, to do. If, as Music Reports believes, the trend toward fragmentation of rights will both continue and expand, leading to a truly open and competitive marketplace for music rights, then music user access to music copyright databases will be necessary, and song-by-song licensing enables that result.

Question 4. *For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?*

It is already possible, and increasingly it is common, for music users to license reproduction rights (licensable under Section 115) and public performance rights in a contemporaneous manner, if not necessarily in a unified manner. Most commercially significant U.S. music can quickly be licensed in this manner, through a two-pronged approach: users may: (i) invoke the compulsory Section 115 license on a wide-scale basis—something which Music Reports has made practically possible[7]; and (ii) invoke the automatic licensing provisions of both the ASCAP and BMI consent decrees with the Department of Justice.[8] Moreover, users may avail themselves of the "adjustable fee blanket license" ("AFBL") option, which has been determined to be available to *any* music user in federal rate court litigation involving the background music service DMX.[9] By availing itself of an AFBL, the user can ensure that if it licenses public performing rights from publishers which have withdrawn from the PROs (or from SESAC), then it will not have to "double-pay" for performing rights. Given the fact that music users are just now beginning to experiment successfully with the foregoing approach to music licensing, Music Reports believes that experimentation should be allowed to continue.

Question 5. *Please assess the effectiveness of the current process for licensing the public performances of musical works*.

Music Reports believes that the current processes for licensing public performing rights are generally effective, and they are rapidly evolving. As noted above, users are only now beginning to avail themselves of a variety of different licenses which are available from the PROs, including the AFBL. With a few exceptions, the catalogs of "splinter" groups such as SESAC and publishers which are currently withdrawn from the PROs can be avoided with little negative impact on user offerings. For the most part, avoidance can be accomplished either by hiring an administrative entity such as Music Reports to "flag" the unlicensed splinter group songs, before they go into programming, or by asking the group concerned to disclose its catalog repertoire.

Question 7. *Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?*

[7] It should be noted that following Music Reports' innovation with the wide-scale use of the Section 115 license, other administrative entities followed suit, including HFA and Google/Rightsflow.

[8] When a user invokes the automatic licensing provisions of both decrees, the result is blanket licensing coverage on rates and terms which are to be negotiated; if no agreement is reached, then either the user or the PRO concerned may apply to the Federal rate court with jurisdiction over the affairs of the PRO concerned to establish the applicable royalty rate.

[9] SESAC of course is not currently subject to a DOJ consent decree, and therefore an AFBL is not automatically available from it. However, as the Office is aware, SESAC is currently subject to antitrust litigation with both the television and radio industries, in no small part due to its unwillingness to grant both industries viable alternatives to a blanket license.

Leaving aside any consideration of the royalty rates and terms that have resulted from the federal rate courts which oversee the PROs, the consent decrees and the judicial interpretations of them have played, and continue to play, an important role in the development of blanket license alternatives, such as the AFBL. These alternative licensing structures a critical component of an efficiently functioning marketplace for performing rights.

It is important to remember that the decrees were designed not only to put restraints on the PROs vis a vis music users, but to restrain the PROs from discriminating against their own members as well. Just one example is the requirement that the membership agreements between publishers and the PROs must be non-exclusive (so as to enable publisher members to directly license). However, for complex historical reasons, many of the membership provisions in ASCAP's decree relating to transparency in distributions have not become effective, which has enabled the PROs to use member distribution policies to discourage direct licensing, something which Music Reports believes persists today.

Sound Recordings

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

Music Reports believes that the Section 112 and 114 statutory licensing processes are necessary, and they are effective for license users. However, because: (i) the licenses are single notice licenses—as opposed to direct licenses between record label and digital music service; and (ii) the licenses are administered by the sole collective SoundExchange, which currently faces little meaningful competition, hundreds of millions of dollars in royalties remain in reserve and undistributed at SoundExchange. Of course, the Copyright Act mandates that SoundExchange's authority to license on behalf of its record label members is non-exclusive, so that labels maintain the right to directly license digital music users, should they choose to do so. Labels are just now beginning to directly license digital music services, and this will introduce an important element of competition into the licensing marketplace for sound recording performing- and related reproduction rights.[10]

Changes in Music Licensing Practices

Question 14. *How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?*

Direct licensing is increasingly prevalent both for musical work rights and for sound recording rights. For its part, Music Reports, with increasing frequency, acts as a common agent on behalf of music users, as opposed to music owners, facilitating direct licenses between users and owners (i.e., the licensing parties are the user and the owner, not Music Reports). In other cases, Music Reports itself enters into the license and the sublicenses rights to the user. Users and owners are utilizing Music Reports to directly license in the television, radio, satellite radio, webcasting, and commercial background music service industries.

[10] SoundExchange is currently a party to an antitrust action by Sirius XM ("SXM") Radio for interfering with direct licensing between SXM and record labels. Music Reports believes that the result of that litigation will have a direct impact the development of a functional marketplace for performing rights in sound recordings, including royalty distributions to artists and labels. If SoundExchange is allowed to discourage direct licensing—either through coordinated negative publicity campaigns or otherwise--then the pro-competitive effects of direct licensing on SoundExchange's performance as a collective will be eviscerated.

For music owners, direct licensing affords an opportunity to transfer the cost of administration to music users and to avoid the deductions and other vagaries of collective distribution systems. It also puts owners in privity of license with users, thereby enabling them to directly enforce reporting and payment obligations, as well as to directly audit. Music users also frequently pay royalty advances to owners under direct licenses, something that is less common through collectives.

For music users, direct licensing from the copyright owner is frequently the only way to obtain all of the rights that the user needs from a single source. It is also frequently the only way in which to obtain worldwide rights, something that is increasingly important in a global marketplace. In Music Reports experience, direct licensing enables users to pay more competitive "top-line" royalty rates than those that are available through collectives, while at the same time increasing the ultimate royalty distribution to the copyright owner. This is because inefficiencies in the collective distribution systems and methodologies, as well as deductions by collectives, reduce the ultimate payments to owners through collectives. Direct licensing royalties, on the other hand, are almost always paid without deductions.

Direct licensing is sometimes criticized because royalties are paid to the copyright owner, instead of being divided between owners and creators, as is common at collectives. These criticisms are largely misplaced. Copyright owners necessarily maintain royalty distribution systems to pay royalties to creators for licenses which are not usually administered by collectives, such as synchronization licenses. Copyright owners are more likely to be in contact with creators and to have current address and payment information for them than collectives. Because a pattern of payment already exists between owners and creators, creators need not take affirmative steps to "register" with the copyright owner, as a condition of payment under a direct license, as they must with collectives. Admittedly, direct licensing royalties are sometimes used by owners to recoup advances that were previously made to creators, in accordance with pre-existing contracts that were entered into by the owner and the creator. However, owners will not provide these advances to creators if they cannot recoup them, and these advances provide important sources of capital to creators, in support of the making and marketing of the creators' music. Finally, it is undeniable that more and more music creators are choosing to self-publish and self-administer their rights, as opposed to assigning them to a record label and/or music publisher. Indeed, the payment paradigms on which collectives are usually based—with a distinction between owner and creator—are increasingly obsolete.

Advances in technology have the potential to eliminate the need for collectives at all, something that the Department of Justice expressly recognized in the last modification of the ASCAP consent decree in June, 2001. Music owners and users continue to show a preference for direct licensing, and independent administrators, such as Music Reports (and others), continue to support it. The federal government can encourage the job-creating innovation which is blooming in this area simply by allowing private enterprise to operate, without imposing premature regulation on it.

Data Standards

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*?

Music Reports believes that private industry is better positioned than the federal government to facilitate identification of music in support of music licensing. As noted above, it is already possible in the marketplace to identify, match, and properly license the vast majority of commercial music

usage.[11] Identifiers, while useful, will never provide a complete solution for music licensing purposes. Industry initiatives, such as the Global Repertoire Database initiative, have for the most part failed, in no small part because databases are only a part—albeit an important part—of the solution to music licensing problems. Databases must be maintained and updated[12] by organizations that must be staffed, funded, owned, and governed. Standards, such as the DDEX standard, while useful to lower the transaction costs of the large copyright owners behind them, only add an insurmountable level of transaction cost and friction to licensing for the vast majority of copyright owners, who are independent. The rapidly evolving music licensing marketplace simply moves too fast for government, and Music Reports believes that government should allow the marketplace to create its own solutions for the identification of musical works and sound recordings.

Respectfully submitted,

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LW/cm

cc: Ronald Gertz
Douglas Brainin
Bill Colitre

[11] In support of these functions, Music Reports has developed Songdex, which it believes is the largest database of music copyright information in the world. Music Reports has assigned Songdex IDs to the musical works in its datbases and frequently provides these to music publishers, along with publisher song identifiers and sound recording identifiers such as ISRC.

[12] Music copyright information of course is highly dynamic, which dramatically increases the complexity of keeping music copyright databases current.