

Before the
United States Copyright Office
Washington, D.C.

In the Matter of)
)
Music Licensing Study:) Docket No. 2014-3
Notice and Request for Public Comment)

Comments of National Public Radio, Inc.

NPR is a non-profit membership corporation that produces and distributes noncommercial educational programming through more than 900 public radio stations nationwide that reach a combined audience of 27.2 million listeners weekly. NPR files these comments on behalf of itself and its member stations. In addition to broadcasting award winning NPR-produced programming, such as *All Things Considered*® and *Morning Edition*®, NPR member stations are themselves significant producers of local, regional, and national news content as well as music and other specialized audience programming.

Congress has long recognized the educational and cultural value of public radio. NPR and its member stations strive to fulfill their public mission by producing and distributing high-quality programming, which appeals to a diverse American public, whether that be measured by ethnicity, age, income, education or other factors. To do so, it is essential for public radio to embrace emerging technology. In pursuing this goal, NPR and its member stations stream their broadcast music programming and create original music web content which is made available via API, mobile devices (including branded iPhone and Android applications), RSS feeds, and other technologies. In doing so, the quantity and quality of music programming available to the American public is greatly increased.

Through thoughtful curation, NPR and its member stations enrich the nation's culture and introduce non-mainstream artists and music genres to a new audience. Their efforts in this area have been successful, as now-mainstream musical genres—such Celtic, Folk, Bluegrass, and World—were introduced to new audiences by public radio. Likewise, public radio provides access to more traditional music genres, such as classical and jazz, that otherwise have very few commercial outlets. Indeed, classical music ranks highest among musical genres in public radio programming, accounting for 25% of total broadcast hours on NPR member stations.

As non-profit entities motivated solely by their public mission, NPR and its member stations must produce programming subject to financial restraints that are not applicable to commercial broadcasters and web services. NPR believes that the statutory exceptions and compulsory licenses embodied in the current music licensing regime should reflect the special educational goals and resource limitations of public broadcasters and should be broadened to cover all music elements necessary to distribute music programming across all platforms. The current music licensing system, while helpful to public broadcasters in some aspects, has flaws that make it inefficient and costly. It stifles public radio's ability to further its mission online due to time-consuming rights clearance and license negotiation with a number of individual rights holders. Public radio programmers require ready access to materials so programming decisions can be made quickly and efficiently and distributed across multiple platforms. The existing rights clearance process for a number of necessary music elements in formats beyond broadcasting is cumbersome and time consuming. As a result, program production can encounter long delays as rights are cleared and programming choices often must be revised due to rights issues. In addition, rights holders may not value educational programming sufficiently to provide less costly licenses or may limit the scope or duration of content use.

NPR is not asking for a subsidy from content creators and owners. It strongly believes they should be fairly compensated for the use of their works. Rather, we seek a reasonable and predictable collective licensing scheme that recognizes both the educational and cultural importance of the public mission and the economic realities of public broadcasting and the need for programming to be available across all platforms. While it continues to pursue marketplace solutions to licensing issues, NPR believes that there is a strong need for licensing reform that does not unfairly burden public broadcasting and that embodies a fair rate of return to rights holders which reflects the non-commercial nature of NPR's mission. Ultimately, it is the American public which benefits from these changes as better, free programming reaches bigger audiences.

I. The Current Licensing System Has Been Partially Helpful to Public Radio

In the enactment of the Copyright Act of 1976, Congress recognized the special role of educational public broadcasters in producing and distributing content that serves to educate and inform a broad audience. Public broadcasting entities have fully appreciated and utilized the grant of rights given to them in the Copyright Act. In many regards, the Act was successful in assisting educational public broadcasters in their mission to produce and broadcast high-quality educational programming through its grant of special exemptions and the creation of compulsory licensing schemes.

In 1976, public radio was primarily a broadcast medium and Section 118—which created a compulsory licensing scheme that allowed public broadcasters to negotiate with rights holders for use of “published nondramatic musical works and published pictorial, graphic, and sculptural works” for broadcast transmission—was useful. Section 118 also provided an exception to the

antitrust laws which allowed the parties to negotiate for licenses. Section 114(b) of the Copyright Act of 1976 granted public broadcasting entities the right to use sound recordings in educational television and radio programming, so long as the programs were not commercially distributed to the public. Both of these sections helped public broadcasters and the performing rights organizations avoid time-consuming and expensive license negotiations. The existence of the compulsory licensing scheme undoubtedly helped increase public broadcasting entities' leverage in blanket license negotiations, leading to cost-efficient agreements that benefited public broadcasting as a whole.

II. The Current Licensing Scheme Does Not Clearly Contemplate New Technologies and New Distribution Platforms

In fulfilling its mission to reach a diverse and broad audience, NPR and its member stations have embraced new technologies and new platforms for program distribution. The creation of new technologies has substantially transformed the ways in which large segments of the population consume media, making it is necessary for public radio to adapt and respond to these changes. As a result, public radio seeks to supply its music programs on multiple digital platforms and applications, including via online streaming (interactive as well as non-interactive programs), archives on NPR's and member stations' websites, mobile devices, podcasts, CD's, and other platforms.

Section 114(b) of the Copyright Act allows public broadcasters the right to use sound recordings in "educational television and radio programs" that are "distributed or transmitted by or through public broadcasting entities" without requiring them to obtain a license from the copyright holder. The term "educational television and radio programs" is not defined in the statute but acts as a clear limitation on the manner in which sound recordings may be used.

Further, the section was drafted over thirty years ago, when the principal means of program distribution and transmission was analog broadcasting and the variety of digital platforms currently used had not yet been invented. Although the language allows for “distribution and transmission” without any express limitations, newer technologies and program platforms may not have been contemplated at the time the Act was drafted. It is therefore ambiguous as to whether new methods of programming distribution are permissible under Section 114(b), creating legal uncertainty for public broadcasters.

Section 114(d)(2) offers public radio a limited statutory license for online streaming of sound recordings but, like other provisions within the Act that benefit public broadcasters, it is not as generous as it appears. The license is subject to numerous technical limitations that impede the ability of public radio to serve the musical needs of its audiences effectively. Musical programs created for radio broadcast may not be able to be streamed on the internet because of the limit imposed on the number of consecutive selections of sound recordings permitted to be streamed from a particular artist or album. For example, a public radio station that creates a tribute to a particular artist or album for broadcast cannot stream the program on its website if the musical selection exceeds the “sound recording performance complement” in Section 114(j)(13). This essentially forces public radio to create separate programming depending on the method by which it will be distributed which, due to the limited resources of public radio, is needlessly inefficient and does not further any important public policy goals. Furthermore, Section 114(d) does not cover digital downloads of programming or more interactive services, which severely limits public radio’s participation in these important technologies. Negotiations with individual rights holders are prohibitively expensive and time-consuming. As a result, they are largely foreclosed to us.

Section 118 of the Copyright Act creates a compulsory licensing scheme that allows public broadcasting entities and copyright owners to negotiate licenses for “published nondramatic musical works and published pictorial, graphic, and sculptural works.” Relevantly, this statutory license scheme only applies to “production of a transmission program, reproduction of copies or phonorecords of such a transmission program, and distribution of such copies or phonorecords where such production, reproduction, or distribution is made by a nonprofit institution or organization solely for the purpose” of a “transmission made by a noncommercial educational broadcast station.” The language is narrower than Section 114(b)’s language and only allows for the distribution of programming by the broadcaster, effectively foreclosing broadcasters from distributing content through third-party platforms. Like Section 114(b), the language is ambiguous as to its coverage of new technology. The license, therefore, might not include “transmissions” via internet streaming by public broadcasters.

The financial and logistical difficulties of licensing sound recordings and music compositions for certain platforms is often considered by NPR and its members when deciding what content to include in programs. Indeed, NPR must determine how use of certain content may impact future distribution in other formats. This can force NPR to make editorial sacrifices and omit content that otherwise would have been included. This jeopardizes public radio’s ability to create and distribute the highest-quality educational content to its audience. Similarly, the limitations of Sections 114 and 118 obstruct the distribution of existing archived programs. Licenses for sound recordings or musical compositions negotiated during the creation of past programs may not have contemplated future technology or digital platforms, and because NPR and member stations cannot rely on the statutory grant of rights within the Act, valuable existing programming is not distributed to the public. NPR instead must either negotiate with rights

holders for the right to distribute the programming through digital means, remove the unlicensed elements, or allow the unabridged program to remain archived and unseen. None of these options serves the public interest in having easy access to a wide array of educational programming.

III. Changes Need to be Made to the Copyright Act and Copyright Royalty Board Proceedings

NPR believes that the current compulsory licensing system should be substantially revised. NPR proposes that the current provisions of Section 118 be revised and expanded to include all music elements and encompass all known and yet to be created distribution methods and technologies (including the limited rights provided in Section 114(d)(2)). A revised Section 118 would include rights to use musical elements (sound recordings, compositions, recorded performances, etc.) in broadcasts, physical phonorecord deliveries, permanent digital downloads, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, locker services, and other new services.

If the parties are unable to reach voluntary agreements, the Copyright Royalty Board would conduct a rate setting proceeding between rights holders and all educational noncommercial stations and entities and those who produce programming for them. The current Section 118 standard should be revised to better reflect the limited resources and educational function of these entities while achieving a fair rate of return for rights holders. Copyright Royalty Board proceedings like those held under Section 114, which combine both commercial and non-commercial parties, are incredibly expensive for non-commercial entities and do not allow sufficient time for public broadcasters to present their special case and circumstances. All existing distribution platforms would be subject to compulsory licensing and would afford public

radio broadcasters a meaningful opportunity to reach the broadest possible audience and fulfill its obligations to the American people.

We look forward to working with the Copyright Office as it considers this matter.

Respectfully submitted,

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