

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

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In the Matter of	)	
	)	Docket No. 2014-03
Music Licensing Study	)	
	)	

**COMMENTS OF  
SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS  
and  
AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA**

The Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”) and the American Federation of Musicians of the United States and Canada (“AFM”) submit these comments in response to the Copyright Office’s Notice of Inquiry dated March 17, 2014 (“NOI”), in which the Copyright Office announced the initiation of a study to evaluate the effectiveness of existing methods of licensing music.

*Interests of SAG-AFTRA and AFM*

SAG-AFTRA is a national labor union representing more than 165,000 actors, announcers, broadcasters, recording artists, background vocalists, and other media professionals. SAG-AFTRA exists to secure the strongest protections for media artists in motion pictures, television, sound recordings and most other forms of media, including all forms of digital media.

AFM is the largest union in the world representing professional musicians, with over 70,000 members in the United States and Canada. Musicians represented by the AFM record music for sound recordings, movie sound tracks, commercials and television and radio programming. AFM works to protect the economic interests of musicians and to give them a voice in cultural and policy debates that affect them at home and abroad.

Together, SAG-AFTRA and AFM (“Artists’ Unions”) represent the sound recording performers – including royalty artists, session vocalists and session musicians (“Artists”) – whose creative work brings American music to life. Without their recorded performances, there would be no sound recording industry, no digital musical services and no radio industry as we know it.

Sound recordings have great cultural value and tremendous economic value in the United States, and the heart of that value comes from the talent and hard work of Artists.

The Artists' Unions work to ensure not only that Artists are fairly compensated when their performances are recorded in the first instance, but also that they benefit fairly from the continued exploitation of their recorded work. To that end, the Artists' Unions have long advocated for the amendment of the Copyright Act to provide a performance right in sound recordings, so that Artists will receive some share of the enormous profit generated from the broadcast of their recordings by the terrestrial radio industry. The Artists' Unions were at the forefront of the legislative effort to enact the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), and most particularly, they played a key role in ensuring that the Section 114 statutory license for non-interactive digital performances delivered crucial benefits to Artists, including an inalienable 50% share in the licensing proceeds, and direct payment to them of the Artists' share by the collective licensing agent, SoundExchange.<sup>1</sup>

While the Artists represented by the Artists' Unions are often songwriters, our comments are focused on the benefits that the Section 114 statutory license has provided to Artists as sound recording performers. Any evaluation of the effectiveness of existing licensing models must take important note of the extremely positive impact the Section 114 statutory license has had on recording artists, session musicians and session vocalists.

#### *The Effectiveness of the Section 114 Statutory License – Question 8*

At the outset, we note that when it comes to sound recordings, the Copyright Act has a major deficiency – the lack of a performance right applicable to terrestrial radio. As a result, the Section 114 statutory license contains a "radio loophole" that allows over-the-air radio to continue to profit – to the tune of billions of dollars annually – from the work of Artists, without paying them a dime. That is not only an injustice to Artists, but also gives over-the-air radio an indefensible competitive advantage over its digital competitors. Any comprehensive review of the Copyright Act and music licensing should prioritize the closure of the radio loophole.

Within the new, digital realm, the Section 114 statutory license has delivered extraordinary benefits to music creators, music investors, digital music services and music listeners. The ease of licensing has fostered phenomenal growth in digital radio: in 2013 alone, 226 new music services launched, and both the number of listeners and the total listener hours continued to grow.<sup>2</sup> The dollars distributed by SoundExchange – the agent designated to administer the statutory license, collect license fees and distribute them – is testimony to the explosive growth stimulated by the statutory license. SoundExchange distributions grew from

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<sup>1</sup> In particular, the Artists' Unions conditioned their indispensable legislative support for the DPRA on the inclusion of the statutory license which mandated a 50% share for Artists, and on an agreement with the major recording companies that the Artists' statutory license share would be inalienable.

<sup>2</sup> SoundExchange Year End Recap 2013 at <http://www.soundexchange.com/wp-content/uploads/2014/02/year-end-recap-2013.pdf>.

\$3 million in 2003 to \$590.4 million in 2013, and by the end of 2013, SoundExchange had distributed nearly \$2 billion in cumulative statutory license proceeds to copyright owners and Artists.<sup>3</sup>

No analysis of the effectiveness of the Section 114 statutory license would be complete without a focus on specific benefits it has provided to the Artists whose creative work is at the core of the sound recording industry.

First, the Section 114 statutory license provides as a matter of law that Artists will receive 50% of the license proceeds distributed by the collective agent that administers the license.<sup>4</sup> This mandatory 50% share is a direct result of the legislative advocacy of the Artists' Unions in 1993 and 1994, and it guarantees that the creators derive a benefit from the statutory license that is equal to the benefit derived by the sound recording copyright owners.

Second, the Artists' share enjoys beneficial treatment in the Artist-label relationship, in that it is not subject to recoupment against advances paid as part of any record deal. Like the mandatory 50% share, this beneficial treatment is a result of the advocacy of the Artists' Unions, who conditioned their support for the DPRA on an agreement with the major recording companies that the Artists' share of statutory license proceeds would be "inalienable" and not subject to recoupment. The implementation of this agreement went through several stages, and ultimately led to the statutory provision enacted in 2002 that requires SoundExchange to pay the featured artists' 45% share to each featured artist directly, in all cases.<sup>5</sup>

The importance to Artists of direct payment cannot be overstated. Not only does it mean that Artists are guaranteed to share equally with copyright owners in the benefits flowing from the statutory license, without regard to their individual bargaining power, it also means that they have the very substantial benefit of transparent administration by the designated collective agent, SoundExchange. With this process in place, Artists are not dependent upon complex, slow and expensive audits to ensure the accuracy of their payments, as they are for checking the payments due them pursuant to individual royalty contracts.

Moreover, the collective administration of the Section 114 statutory license has delivered additional benefits to Artists in particular and to the sound recording industry in general. Since 2003, SoundExchange has been an independent non-profit organization

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<sup>3</sup> *Id.*

<sup>4</sup> Specifically, Section 114(g)(2)(D) mandates that SoundExchange distribute 45% of license receipts to featured artists; Section 114(g)(2)(B)&(C) mandates a 2-1/2% share each for non-featured musicians and vocalists, paid to them directly by an administrator (currently the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund ("AFM & SAG-AFTRA Fund")); and Section 114(g)(2)(A) requires SoundExchange to distribute the remaining 50% to copyright owners.

<sup>5</sup> Section 114(g)(2)(D) requires direct payment of the featured artist share. The non-featured artist share is also non-recoupable; it flows to the non-featured artists through the AFM & SAG-AFTRA Fund, the administrator designated pursuant to Section 114(g)(2)(B)&(C).

governed by a Board of Directors equally composed of copyright owner and Artist representatives (including the Artists' Unions). Artist involvement in the governance of SoundExchange has helped to ensure that SoundExchange maintains its commitment to the direct payment of Artists, that it invests resources into finding and paying even those Artists who have not stepped forward to provide payment information, and that its policies are balanced with Artists in mind. The joint ownership and management of SoundExchange is unique in the often fractious relationships in the sound recording industry, and as a platform for the mutual resolution of issues, it benefits all parties, including copyright owners, Artists, music services and the listening public.

In short, the Section 114 statutory license has been the predicate for the development of a healthy and thriving business ecosystem that has delivered enormous value to large and small recording companies and to the Artists who create the sound recordings. Statutory license royalties have been a growth area for major and independent copyright owners. Independent companies – which often are headed by owner-artists including Artists' Unions' members – have been able to participate fairly in this business despite their smaller resources. Artists have received direct payment of many millions of dollars of digital performance royalties, a benefit of incredible importance to them as sales drop and the industry retracts. Together, we have built SoundExchange to work cooperatively to administer the license. And music services have had ready access to licensing, which has allowed them to grow their own businesses.

*Needed Improvements in the Section 114 Statutory License – Questions 9, 10, 11, 12*

Although we submit these comments in large measure to explain just how important the Section 114 statutory license has become to the well-being of Artists, and the unique ways in which it works to Artists' benefit (as well as the ways in which it benefits the sound recording and digital music service industries as a whole), that does not mean that the statutory license should not be improved.

*The Need for a Uniform Willing Buyer/Willing Seller Rate Standard (Questions 9 & 12):* Historically and in various contexts, copyright owners have sometimes cast a dim eye on statutory license schemes, on the grounds that they may devalue the subject rights and reduce licensing revenue.<sup>6</sup> As we have explained above, we believe that the Section 114 statutory license has nurtured the new digital radio industry and “grown the pie” for all. Moreover, we have explained that the benefits for Artists of a guaranteed, non-recoupable 50% share of license proceeds paid to them directly and transparently by SoundExchange, and the benefits of

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<sup>6</sup> By that general observation, we do not mean to suggest that the sound recording copyright owners do not value the benefits of the Section 114 statutory license. To the contrary, representatives of the major recording companies and the independent recording companies have agreed with the artist community that our joint legislative campaigns to extend the sound recording performance right to terrestrial radio should take the form of eliminating the “radio loophole” in Section 114 and bringing terrestrial radio within the Section 114 statutory license. This was the structure of both H.R. 4789 and S. 2500, which were introduced in the House and Senate on December 18, 2007.

the joint ownership and governance of SoundExchange, in which collective management has created an extremely fruitful new creator-owner partnership in the sound recording industry, can hardly be overstated.

But within the context of a statutory license, the royalties paid to copyright owners and creators should not be artificially lowered below a fair market value that represents the license fee that would be agreed to by a willing buyer and a willing seller. As the Copyright Office notes in the NOI, the willing buyer – willing seller standard applies to internet radio and other new digital music services. However, it is not the standard that applies to satellite radio and services that existed before July 31, 1998. Those services are well-established, and neither they, nor any other business, should have the benefit of a rate standard designed to lower rates beyond the fair market value that will fairly reward struggling Artists for their creative work. The rate standard for all services subject to the Section 114 statutory license should be harmonized at the “willing buyer – willing seller” standard.

Licensees reap very substantial benefits from statutory licenses. They gain the right to use every work just by meeting the license conditions. They are relieved of the substantial burden and expense of individual negotiations with copyright owners. They enjoy the ease of making one payment rather than paying many licensors, and they benefit from shifting many of the costs of license administration to the licensors (because the collective management agent bears the cost of properly allocating license fees to entitled copyright owners and creators). Lower-than-market rates should *not* be added to these other, very significant, benefits to licensees. Rather, in all the statutory license regimes under the Copyright Act, creators (and their investors) should be entitled to license fees set at a willing buyer – willing seller standard.

*The Need to be Compensated for the Use of Pre-72 Recordings (Question 10):* As we said at the outset of our Comments, Artists should benefit fairly from the continued exploitation of their recorded work. A large body of culturally and economically valuable works was recorded by Artists prior to 1972, and it should go without saying that the Artists whose creativity is embodied in pre-72 works should benefit from the exploitation of those works today. We have limited our comments in response to this Music Licensing NOI to the effectiveness of the Section 114 statutory license; in keeping with that focus we note that whether or not pre-72 works are ever accorded full federal copyright protection, they should, at a minimum, be brought within the purview of the Section 114 statutory license. The failure to protect our older Artists, whose work has brought decades of pleasure to listeners and decades of economic benefit to businesses, is a deep unfairness that must be fixed.

*The Interactive/Non-Interactive Distinction (Question 11):* The line between non-interactive services that qualify for the Section 114 statutory license, and interactive services that do not, is far from clear, as was made manifest in the litigation of *Arista Records, LLC v. Launch Media, Inc.*<sup>7</sup> In between the plainly non-interactive, non-customized internet radio services that work just like traditional over-the-air radio, and the plainly on-demand services

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<sup>7</sup> 578 F.3d 148, 157 (2<sup>nd</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 1290 (2010).

that allow the listener to choose and play a specific recording at will, there now exist a variety of “customized” digital music services with a myriad of gradations of functionality – from basic services that customize channels based on listener preferences fed to the service’s algorithm, to the addition of varying abilities to skip, repeat and cache recordings. As to the variety of customized services along the continuum between “no customization” and “on demand,” there is uncertainty at present as to which are entitled to use the statutory license and as to whether similar services are being treated equally.

The Artists’ Unions believe that most customized services belong within the scope of the Section 114 statutory license, where they will best contribute to the robust growth of the digital music industry, and where Artists will continue to benefit most fairly from them through receiving an equal share of the proceeds, paid to them directly and transparently by SoundExchange, the collective management agency which they co-own and in which they share control. The greater functionality of the customized services should be accounted for in the rate-setting proceedings under the statutory license, so that the customized services pay an enhanced or “bumped up” rate for the increased value of greater functionality.

### *Platform Parity*

The single most fundamental platform parity issue facing Artists today is the absence from U.S. law of a full public performance right in sound recordings. While all other music platforms compensate Artists and copyright owners for the public performance of their sound recordings, broadcast radio continues to enjoy an unfair competitive advantage under federal law. Moreover, for more than seventy years, this loophole in our laws has deprived Artists of fair compensation for the exploitation of their sound recordings on terrestrial radio in the United States. And, as the Copyright Office has frequently pointed out (most recently in footnote 14 of the NOI), the absence of the terrestrial public performance right in the U.S. prevents Artists from collecting millions of dollars of foreign public performance royalties, and puts the United States in the unlikely company of China, North Korea and Iran. The Artists’ Unions have been at the forefront of efforts to amend the law to provide a full public performance right in sound recordings ever since sound recordings were granted federal copyright protection. Radio has built a \$15 billion industry based primarily on the exploitation of the creative work of Artists, and should finally be required to fairly compensate those Artists.

Within the scope of the Section 114 statutory license as it exists today, we have described above the importance of applying a uniform willing buyer – willing seller rate standard to all music service platforms taking advantage of the license.

### *Changes in Music Licensing Practices*

The NOI asks explicitly about the direct licensing of musical works (Question 14); we assume that the questions in this section and the following section regarding *Revenues and Investment* implicitly inquire about direct licensing of sound recordings, as well.

As we said at the outset, the goal of our Comments is to make clear the extremely positive impact that the Section 114 statutory license has had on recording artists, session musicians and session vocalists, by providing them with an equal share of licensing proceeds that is paid to them directly and transparently. These benefits are further enhanced by the fact that the collective management structure developed under the statutory license – SoundExchange – is equally owned and controlled by Artists and copyright owners. The value of any direct license of sound recordings outside the statutory license must be measured against the high value to Artists of the statutory licensing scheme, and most if not all will be found severely lacking.

In the past few years, we have seen efforts by music services to enter into direct licenses with independent record labels that not only aimed to reduce the applicable statutory license rate, but also to mask the rate reduction by paying the Artists' share to the label-licensor. Without the statutory license requirement for direct pay, these services offered to pay the total license fee exclusively to the labels. Labels who signed such direct licenses were free to share the license revenues with their Artists only pursuant to the Artists' royalty contracts or other contracts – which meant that (1) the featured artist share might be less than 45%; (2) the label could recoup artist advances from the featured artist share so that the featured artist might not see any payment at all, no matter what their nominal share was; (3) the non-featured artists would receive nothing (because only the major labels, and not the independent labels, have a contract that obligates them to share any digital direct license revenue with non-featured artists). Such direct licenses are bad for the industry and bad for Artists.

We are aware that increasingly, there are different kinds of direct license deals in the works, in which copyright owners enter into direct licenses with customized music services at rates that may be higher than the statutory license rate. The Artists' Unions believe that the value of such deals to the industry cannot be measured only by the rates embodied in them, but instead must also be evaluated against the specific benefits that the statutory license provides to Artists. Unless the license proceeds are shared equally, transparently and efficiently with Artists via direct and non-recoupable payments, they are highly unlikely to be more beneficial to the Artists who create the work than the Section 114 statutory license.

In short, the Artists' Unions have concerns about the detrimental effect of direct licensing on Artists.

#### *Data Standards (Question 22)*

Question 22 asks whether there are ways that 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. We respond to this question merely to note that private efforts to develop universal standards for the creation and sharing of metadata, and public efforts to encourage and coordinate those efforts, should be mindful of the need to

collect, store and share Artist information, including information identifying the session musicians and session vocalists whose performances are embodied in a sound recordings.

Session musicians and vocalists are entitled to a distinct share of the Section 114 statutory license proceeds. As described in note 3 above, their share is administered by the AFM & SAG-AFTRA Fund, which is designated as the administrator for that purpose pursuant to the terms of Section 114(g)(2)(B)&(C). The AFM & SAG-AFTRA Fund distributes millions of dollars in DPRA royalties to non-featured performers each year, but the administrative task of doing so is extraordinarily daunting, because the non-featured performer information is not embodied in sound recording metadata, not maintained in any central way by sound recording companies, and not reported by music services. The AFM & SAG-AFTRA Fund therefore must research the identity and contact information of non-featured performers who may be entitled to royalties, and it is the only entity building a central database that links non-featured performers to sound recording titles on which they performed. The needs of these Artists should not be ignored in discussions regarding data standards.

### *Conclusion*

We appreciate that the Section 114 statutory license, and the collective management system that copyright owners and Artists have developed around it, contain some unique features. Our comments are directed at the importance and value that the Section 114 statutory license, as administered by SoundExchange, has for Artists.

We thank the Copyright Office for initiating its study of music licensing, and look forward to continued participation in the discussion.

Respectfully submitted:

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