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

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

COMMENTS OF SIRIUS XM RADIO INC.

I. SIRIUS XM AND ITS INTEREST IN THE COPYRIGHT OFFICE NOTICE OF INQUIRY

Sirius XM Radio Inc. ("Sirius XM") is uniquely positioned to comment on the Copyright Office's Notice of Inquiry ("NOI") in that it offers four different services subject to the various statutory licenses provided at 17 U.S.C. §§ 112 and 114: a satellite digital audio radio service; an Internet webcasting service; a business establishment service; and a service providing music channels to television subscribers via the DISH Network satellite television service. Sirius XM is also one of SoundExchange's two biggest payors: in 2013 alone, we paid over $240 million in royalties to SoundExchange and its artist and record-company members.

On the sound recording side, Sirius XM's satellite radio service is subject to the rate-setting standard set forth at 17 U.S.C. § 801(b)(1). We have litigated two full Copyright Royalty Board (CRB) proceedings through to trial (*PSS/Satellite I* and *II*), and have witnessed firsthand the unique procedures that govern the proceeding (including those that work and those that do not), the discovery burdens placed on the parties (some reasonable, some not), the importance of the governing rate-setting standard (801(b) versus "willing buyer-willing seller"), and the millions of dollars a service must expend to participate fully against SoundExchange, whose litigation efforts are funded out of the royalties resulting from those litigation efforts.

Sirius XM also is currently the defendant in five different lawsuits related to the legal and licensing status of pre-1972 sound recordings: four of which seek damages and license fees pursuant to state laws (California, New York, and Florida) under which the plaintiffs have never attempted to seek payment in the nearly 100-year history of radio, and one of which (*SoundExchange v. Sirius XM*, pending in the district court for the District of Columbia) seeks to force Sirius XM to pay for the same performances under federal law as well. Sirius XM submitted reply comments to the Copyright Office in April 2011 in response to a prior Notice of Inquiry on the topic of Pre-1972 Sound Recordings (*Federal Copyright Protection for Performance of Sound Recordings Fixed Prior to February 15, 1972*, Docket No. 2010-4).

With respect to musical works, Sirius XM operates under blanket public performance licenses from ASCAP, BMI and SESAC – again witnessing firsthand what works and what does not with respect to the governing consent decrees (or, in SESAC's case, the lack of one) and the licensing process that arises pursuant to those decrees.

The comments below respond only to certain questions in the NOI where Sirius XM has direct experience with the particular question raised by the NOI.

II. PLATFORM PARITY MUST BE THE GOAL

The existing patchwork of statutes, rules, and regulations that distinguishes audio entertainment services based simply upon the mechanism or medium of delivery is antiquated, results in inequities, and is bad policy. The licensing regime established by the Copyright Act, whether through statutory licenses, rate courts, or otherwise, should be based on three simple principles: parity, consistency, and transparency.

To start, similar services – regardless of the mechanism or medium through which they are delivered – should be treated similarly. Copyright law does not distinguish between AM and FM radio based on technology, and should not distinguish between terrestrial and satellite radio, or terrestrial and Internet radio, either. The playing field – that is to say, the requirement that performance royalties be paid, and the standard under which royalty rates are set – should be leveled for all participants in the radio market. In short, "radio is radio," regardless of whether it is AM/FM radio, HD radio, satellite radio, cable radio or internet radio. *See, e.g.*, *In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), at 14 (S.D.N.Y. Mar. 18, 2014) (Opinion & Order) (explaining that the "radio experience has remained constant through the years, regardless of whether radio programming is transmitted by broadcasting, through a cable, from a satellite, or over the internet").[1]

Continuing the distinctions between various forms of radio established in 17 U.S.C. § 114 – whereby AM/FM radio is exempted from any sound recording performance right obligation, while satellite, Internet, and other digital audio services (including simulcasts of those very same AM/FM broadcasts) are not – is bad and unjustified policy. Chiefly, it has the effect of subsidizing the largest entities in the industry – the $15 billion/year AM/FM radio station market – and is exactly the opposite of what the public would expect: subsidies to *new* entrants to encourage growth and entrepreneurship. Such a policy punishes digital pioneers with massive royalty obligations not borne by their more established and entrenched competitor. For example, Sirius XM, despite enjoying a subscriber base of nearly 25 million, went 18 years until it achieved profitability in 2010 – and then only after running up cumulative net operating losses of $8 billion, merging the two predecessor companies, and narrowly surviving two brushes with bankruptcy. At the same time, it paid roughly $1 billion in royalty payments to the recording

[1] We do not mean to suggest by this that all services should pay the exact same fees, but rather that similar services should have their fees set pursuant to the same rate-setting standard and process. As we discuss below, the 801(b) rate-setting standard provides the Copyright Royalty Judges with the necessary and appropriate latitude to account for variations between particular services or service categories in the rate-setting process.

industry, while AM/FM radio stations paid precisely *zero*. That sort of inequity hampers innovation and job creation. While Sirius XM survived, and while most AM/FM stations continue to offer some form of simulcast, one need only survey the graveyard of services that have tried and failed to establish viable standalone digital radio businesses (including major companies like Yahoo! and AOL) to see the depth of the problem. Winners and losers in the audio entertainment field should be selected by the market on the basis of innovation and the entertainment and other value they provide to consumers, not historical anomalies or cost-side inequities created by statute.

III. MUSICAL WORKS LICENSING

NOI Q. 5: Please assess the effectiveness of the current process for licensing the public performances of musical works.

A. The PRO Consent Decrees and Publisher Withdrawals

Sirius XM operates pursuant to blanket licenses from ASCAP, BMI, and SESAC covering the public performance of musical works. In our experience, the ASCAP and BMI consent decrees and the licensing process that they mandate work relatively well. As a result of the mandatory license requirement, Sirius XM is assured that it has license coverage for the full repertories without needing to contact and negotiate with every single songwriter and publisher featured on its service. Each side has the opportunity to pursue rate-court litigation if it feels the other side is being unreasonable. Despite that possibility (or likely because of it), Sirius XM has enjoyed relatively amicable negotiations with each of ASCAP and BMI over the past decade, and has not needed to litigate. The publishing community, for its part, has received hundreds of millions of dollars in royalty payments from Sirius XM.

The recent trends in this area, however, are disturbing. The first such trend is the publishers' increasingly strident suggestions, in the press and on Capitol Hill, that the consent decrees are a relic of the past that should simply be dispensed with. Changing times do not change the fact that ASCAP and BMI remain monopolies, coordinating otherwise rivalrous publishers to set a single price for licenses covering nearly 50% of the market each. What was true in the 1940s when the consent decrees were adopted, and reiterated throughout the decades, is just as true now: the PROs' blanket licensing practices are "inherently anti-competitive," reflecting their exercise of "disproportionate power over the market for music rights." *United States v. Broad. Music, Inc. (In re Application of Music Choice)*, 426 F.3d 91, 93, 96 (2d Cir. 2005); *see also United States v. ASCAP (In re Application of RealNetworks, Inc.*), 627 F.3d 64, 76 (2d Cir. 2010) (explaining that "ASCAP, as a monopolist, exercise[s] disproportionate power over the market for music rights") (alteration in original) (citation and internal quotation omitted).

While the efficiencies of the blanket licenses and one-stop shopping may justify the PROs' existence, the consent decrees are crucial to protecting against the inevitably non-competitive rate demands (and the ability to shut a service down that does not accede to those demands) that result when publishers are allowed to negotiate collectively in what would otherwise be a violation of the antitrust laws. Indeed, the existence of national digital music services playing tens of thousands of songs in reliance on blanket licenses makes the consent decrees all the *more* necessary. Given the practical impossibility of a service identifying and negotiating privately with every copyright owner featured in its programming – ASCAP alone purports to represent over 500,000 songwriters and publishers, while services such as Spotify (to give just one example) advertise libraries of millions of tracks – a music service could face dramatic exposure to infringement liability (and statutory damages) absent the compulsory licensing mechanism of the consent decrees.

Sirius XM's own experience with SESAC (which, unlike ASCAP and BMI, is not bound by a consent decree) drives home the importance of the consent decrees. In prior negotiations with Sirius XM, SESAC has demanded oversized fees unsupported by the scant information available regarding its catalogue, and always with the implicit threat of infringement liability. At the same time, it has refused to identify its catalogue of musical works, meaning that Sirius XM cannot (as it could with a single copyright holder) simply remove the tracks at issue from its service. This combination of concentrated ownership and either an unwillingness or inability to be transparent as to what works are actually in the repertory creates a completely untenable situation.[2]

Such anti-competitive concerns have been exacerbated by recent attempts by publishers to withdraw from ASCAP and BMI. As detailed by Judge Cote from the record of the ASCAP-Pandora litigation, publishers that control hundreds or thousands of smaller catalogues (and millions of songs) under one licensing umbrella – making them effectively private PROs five or ten times the size of SESAC – have (a) insisted on the ability to partially withdraw from ASCAP; (b) made exorbitant fee demands, under the threat of litigation, to force direct licenses on services who no longer have access to those publishers' works via the PROs; and (c) refused to provide catalog data that would allow the targeted service to diminish or stop performing the works of those publishers absent a more reasonable fee demand.

To the extent PRO withdrawals become a regular feature of the music licensing landscape, complete transparency with respect to copyright ownership – *i.e.*, what exactly is in the catalogues of each publisher – is an absolute must. To start, the Copyright Office should

[2] Judge Engelmayer recognized this exact problem in his recent summary judgment ruling in the television broadcasters' case against SESAC. *Meredith Corp., et al. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

insist on a comprehensive, up-to-date database of musical work and sound recording ownership information. Second, licensees should enjoy a safe harbor from statutory infringement exposure for copyright owners in such situations who fail properly to identify their works and allow sufficient time to remove them from the service's servers and playlists. It is a travesty that a company can assemble millions of copyrights under a single licensing umbrella, insist on an exorbitant fee, but then not tell the licensee which copyrights it is forcing the service to license or stop playing.

B. The Double-Dipping Problem

The division of rights across the different collectives, with one group (the PROs) licensing public performance rights, and another (Harry Fox) licensing reproduction rights, creates additional problems. The "double dip" problem is well known: each collective wants a bite at the apple even for activities that would appear clearly to constitute solely a public performance (requiring licensing from ASCAP and BMI), or one solely involving the reproduction and distribution of a copy (requiring a reproduction/mechanical license from the publisher). ASCAP, for example, litigated through the Second Circuit the question of whether it could collect performance rights royalties from download sellers, while on-demand streamers typically are required (by adopted regulations if not by law) to obtain reproduction licenses pursuant to Section 115.

A digital service that offers solely public performances to its users (a Section 114 webcaster, for example), nonetheless must make at least some server and perhaps other intermediate copies to facilitate its transmissions. This creates a situation ripe for abuse. Publishers may seek to hold up services for licenses for reproductions which are not distributed to the public, the sole value of which is to facilitate public performances the publishers are already being paid for via their respective PROs. Although such copies have no independent value and cause no discernible harm to the copyright owner (thus providing strong arguments that such copying is fair use), digital services will be unlikely to engage in expensive litigation and expose themselves to statutory damages to test that proposition – and may end up taking a reproduction license that was never required for traditional outlets that publicly performed musical works directly from records and/or CDs. *See* U.S. Copyright Office, *DMCA Section 104 Report* 133-41 (2001) (conducting fair use analysis for buffer copies); *id.* at 143-44 (noting that buffer copies made "solely to enable" a performance "have no independent economic significance" and "no economic value independent of the public performance that they enable").

The digital music industry has tried to work around this problem in modest but not fully satisfactory ways. The best example is the three-way agreement between RIAA, NMPA, and DiMA, in which the parties agreed between them that non-interactive services subject to Section 114 licensing requirements do not require a reproduction license to conduct their activities.[3] Those parties also agreed between themselves, however, that interactive music services *do* require a reproduction license, even where they offer solely on-demand streaming (*i.e.*, solely performances).

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[3] *See, e.g.*, Comments of the National Music Publishers' Association at 2-3, *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, Docket No. RM 2000-7 (Aug. 28, 2008), *available at* http://www.copyright.gov/docs/section115/comments-3/rm2000-7_nmpa_sga_nsai_aimp.pdf (describing agreement). As NMPA explained in its submission, it did "not believe that the existing legal regime requires music users to obtain licenses to engage in the process of noninteractive streaming (including the making and/or transmission of server, cached, network and RAM buffer copies to the extent necessary and used solely for that process)." *Id.* at 14. RIAA, for its part, denied that "any digital transmission of a sound recording is a DPD," and commented that "reproduction/distribution licenses from copyright owners of musical works are not required to engage in the process of noninteractive streaming, including the making and/or transmission of server, cached, network and RAM buffer copies necessary to engage in such activity." Comments of the Recording Industry Association of America at 2-3, *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, Docket No. RM 2000-7 (Aug. 28, 2008), *available at* http://www.copyright.gov/docs/section115/comments-3/rm2000-7_riaa.pdf.

The Copyright Office previously considered many of these issues in great depth in the context of crafting regulations related to the Section 115 compulsory license. *See, e.g.*, *Compulsory Licensing for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, Docket No. RM 2000-7, 73 Fed. Reg. 66173 (Nov. 7, 2008) (to be codified at 37 C.F.R. pts. 201 and 255). In one promising development, it construed the Section 115 license to cover master, server and other intermediate copies necessary to make and distribute DPDs even where those copies are not, as a technical matter, themselves made and distributed to the public; it also determined that there should be no separate royalty for such copies. *See id.* at 66180. However, as a result of comments received in the rulemaking, as well as the Second Circuit's *Cablevision* decision (*The Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)), the Copyright Office refrained from ruling "whether or when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming." *Id.* at 66174. It also ruled that server and intermediate copies created for transmissions that do not result in the making and distribution of DPDs do not fall within the scope of the Section 115 license. *Id.*

Given these developments, and the many open questions (as well as "agreements" made by interested parties that may impose obligations at odds with the law), Sirius XM respectfully suggests that additional clarification along the lines described above is necessary in any Copyright Act revisions. Server and other incidental copies made solely to transmit public performances should not incur liability or require a reproduction/distribution license. While there may be various ways to achieve this result, one possibility would be to expand Section 112(a) to allow for greater latitude in making server and intermediate copies without liability (*i.e.*, beyond just the single copy currently allowed by 112(a), which is completely insufficient to meet the demands of digital age streaming systems that must address contemporary scale and reliability issues).

C. Section 114(i)

NOI Q. 6: Please assess the . . . impact, if any, of 17 U.S.C. 114(i), which provides that "[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."

Sirius XM believes that this provision should be maintained. The provision was insisted upon by publishers, who now are singing a different tune. *See* H.R. Rep. 104-274, at 24 (1995) (describing provision as dispelling "the fear that license fees for sound recording performance may adversely affect music performance royalties"). Indeed, publishers recently have proposed legislation with precisely the *opposite* default: allowing the rate courts to look at sound recording rates but not the reverse. More to the point, sound recording rates, including those paid by webcasters and Sirius XM for its satellite radio service, are as high as they are in part based on CRB testimony (including by publishing executives) arguing that musical works rates are *not* comparable to sound recording rates, and claiming that sound recording owners typically receive fees that are multiples of what publishers receive.[4] Publishers should not be able to use the higher sound recording rates that resulted from that showing as a bootstrap to compel yet higher musical works rates as well, which in turn may fuel another increase in sound recording rates. Where does the cycle stop?

IV. SOUND RECORDING LICENSING

A. Availability of Statutory Licenses

[4] *See, e.g.*, Rebuttal Testimony of Charles Ciongoli, Universal Music Group North America, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA ("Webcasting II") (Sept. 2006).

NOI Q. 8: Please assess the current <u>need for</u> and effectiveness of the Section 112 and Section 114 statutory licensing process.

As described in the introduction, Sirius XM operates under four different versions of the Section 112/114 statutory licenses. For the same reasons as described above with respect to the ASCAP and BMI consent decrees, the statutory licenses are a necessity for national services using thousands (or tens of thousands) of sound recordings. Negotiating with each and every copyright owner would be extremely difficult and costly for at least two reasons. First, any service would need to be able to identify and then negotiate with the copyright owners of hundreds of thousands (or even millions) of songs. Second, the service would be forced to confront a record industry that has become incredibly concentrated, with three majors (and the smaller independent labels distributed by the majors) each accounting for roughly 25 or 30% of the market. This concentration provides those record companies with tremendous negotiating leverage, as certain services may view each major as a "must have" that they cannot do without.

As is well known from the CRB context, non-statutory services (*e.g.*, interactive services such as Spotify and Rhapsody) who are subject to purely voluntary licensing from the record companies pay as much as 60 or 70% of their revenue to rights owners, and have struggled to survive in the face of such a royalty burden. SoundExchange has argued that Sirius XM and other non-interactive services (webcasters) should pay the exact same percentage rates for their music use, which suggests that the stated concern in the legislative history of the DPRA that copyright owners would charge "supracompetitive" rates is alive and well. H.R. Rep. 104-274, at 22. Sirius XM would not have survived were it subject to such fee demands without the CRB backstop, and eliminating the statutory license and subjecting services to the labels' unconstrained market power (where three companies control distribution of close to 90% of recordings) could decimate the non-interactive market more generally. Pandora, even with more than 70 million active users, has taken years to become profitable even at the lower negotiated "Pureplay" rates, which are well below those set by the CRB in the *Webcasting III* proceeding.

To those who would argue that the statutory license amounts to an unfair subsidy from the recording industry to the digital services – or that anything other than pure market rates are a perversion of their property rights – it must be remembered that the statutory license was an integral part of the bargain reflected in the Digital Performance Right Act in 1995. Namely, sound recording record companies were provided with a digital audio transmission right against non-interactive services only on the condition that such services (who were being hit with a new royalty not borne by terrestrial radio) have access to a statutory license.[5] Sound recording owners present their right to public performance royalties as a given, and the statutory license as a burden on that right; but that position fails to recognize that the statutory license was the *price* for receiving the performance right in the first place. *See* H.R. Rep. 104-274, at 14 (describing need for "balance" among interests and resulting "limitations" on the performance right, including the statutory license).

B. CRB Rate-Setting Standards

NOI Q. 9: Please assess the effectiveness of the royalty rate-setting process and the standards applicable to the various types of services subject to statutory licensing under Section 114.

NOI Q. 12: What is the impact of the varying rate-setting standards applicable to the Section 112, 114, and 115 statutory licenses . . . ?

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[5] This is compared to the interactive services – the providers of the so-called "celestial jukebox" – which Congress feared would substitute for CD sales and which drove the legislation. Sound recording owners, who had never enjoyed a public performance right in the U.S., received a full digital performance right as against on-demand streamers, but not as against non-interactive services that were not viewed as creating the same threat of substitution. Several CARP and CRB proceedings have lent further support to this distinction, as the record industry has failed to present any credible evidence that non-interactive services substitute for record sales.

Sirius XM is aware that copyright owners have stated that 17 U.S.C. § 801(b) provides an artificial subsidy to services and suggested that the "willing buyer-willing seller" (WBWS) standard be applied to all Section 114 licenses, or that the 801(b) standard be altered, for example by removing the "disruption" factor found at 801(b)(1)(D).

The points made above about the importance of the statutory license and the CRB process cannot be separated from the rate-setting standard used by the CRB. The 801(b) standard should be retained as written. That standard provides the Copyright Royalty Board with latitude to consider the enumerated policy factors, including recognizing the "relative contributions" of technological pioneers, and ensuring that both copyright owners and users are treated fairly. It played a meaningful role in the *Satellite I* case, where the Judges recognized, among other things, the disruption that Sirius XM would suffer at the rates proposed by SoundExchange, as well as Sirius XM's need to spend hundreds of millions of dollars in satellite-related expenditures. At the same time, it does not stop (and has not stopped) the Copyright Royalty Board from relying on market rates as part of its determinations. *See* 17 U.S.C. § 114(f)(1)(B) (specifying that "the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements"). The 801(b) standard retains the requirement that the Judges set rates that are "reasonable," and in prior proceedings the Judges have done so by first identifying a "zone of reasonableness" defined by market benchmarks, then used the 801(b) policy factors to identify a rate within the marketplace range. That approach has been blessed by the D.C. Circuit. *See Recording Indus. Ass'n of America, Inc. v. Librarian of Cong.*, 608 F.3d 861, 865 (D.C. Cir. 2010).

The WBWS standard, by comparison, has proven to be a failure. In the absence of marketplace benchmarks involving non-interactive services, the Judges have been forced to rely on agreements between record companies and completely different categories of music users (*e.g.*, interactive services) and adjust them for application to non-interactive services – an inexact science at best, and one that causes the Judges to apply all manner of imprecise "interactivity" and other adjustments.[6] In the wake of the *Webcasting II* decision, Congress was compelled to enact two Webcaster Settlement Acts to allow the record industry and various services to negotiate voluntary agreements (the so-called "WSA" deals) at rates other than those set by the Judges, which would have bankrupted most services. By the time of the *Webcasting III* proceeding, some 95% of the market was operating under such agreements (*i.e.*, <u>not</u> operating under rates set by the Board), and only one commercial service of any size participated in the proceeding. Meanwhile, the three largest providers (Yahoo!, AOL, and Microsoft) all exited the market.[7]

Retention of the 801(b) standard is justified not only because it is fundamentally superior to the WBWS standard, but also as a matter of simple fairness. Congress implemented (and later retained) that standard in recognition that services subject to those standards founded their services at a time when there was no sound recording performance right at all. To change the

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[6] *See* Hearing Transcript at 5006:8-5007:3, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2011-1 CRB PSS/Satellite II (Oct. 16, 2012) (Strasser, J.) (describing the "crazy acrobatics" of adjusting the interactive service rates for application to Sirius XM).

[7] Similar problems plagued the satellite television market. After Congress shifted the Section 119 compulsory license to a "fair market value" standard in the Satellite Home Viewer Act of 1994, the rate increase implemented by the CARP was so drastic that Congress was compelled, in the Satellite Home Viewer Improvement Act of 1999, to slash rates by 45%. *See* U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 110 Report* 8-11 (2006).

standard now would fundamentally undercut the reliance interests of those services. That said, to the extent the Copyright Office or Congress agrees that all non-interactive services should be treated equally with respect to the rate-setting standard, Sirius XM fully supports the 801(b) rate-setting standard being used for all services. The record industry should not be able to use the current disparity as a wedge that results in all services being subjected to the faulty WBWS standard.

C. The CRB Process

NOI Q. 8: Please assess the current need for <u>and effectiveness</u> of the Section 112 and Section 114 statutory licensing process.

NOI Q. 9: Please assess <u>the effectiveness of the royalty rate-setting process</u> and standards applicable to the various types of services subject to statutory licensing under Section 114.

Sirius XM has participated in two full CRB rate-setting proceedings, *PSS/Satellite I* and *PSS/Satellite II*. We have witnessed, firsthand, the many challenges and the incredible expense and burdens of that process. While this is not the place to delve into the intimate details of the CRB process, we highlight several of the most important issues below:

1. ***Information Asymmetry and Discovery Bias***. Perhaps the most significant problem with the CRB process as currently constituted is the lack of discovery prior to the deadline for filing written direct statements with the CRB: the precise opposite of what would happen in federal court litigation. This matters because the chief evidence in CRB proceedings tends to be license agreements entered into between record companies and digital music services other than those participating in the CRB proceeding. SoundExchange and its economists, by virtue of their representing essentially the entire record music industry, have early access to such agreements; they thus are in a position, months in advance of a proceeding to (a) identify those agreements that best support SoundExchange's rate proposals (that is, those with the highest rates); (b) use those agreements to inform settlement negotiations; and (c) use those agreements to support the rate models presented in their written direct statement to the CRB.

The licensee services, by comparison, have no such access prior to filing their rate proposals, and are literally in the dark as to the most probative market benchmarks, including those that might better support a more affordable rate proposal. While they do eventually receive access to certain information during the subsequent discovery process, it suffers from two problems. First, Section 803(b)(6)(C) limits what can be discovered to documents "directly related" to the opposing party's written direct statements. This allows parties to include only those agreements most beneficial to the party's rate position (those establishing the highest rates in the case of SoundExchange), and limits discovery into material that the party chose to exclude. Second, the 15-day window to amend written direct statements to account for information learned during the discovery process is simply too short to meaningfully review, analyze, and incorporate the information into amended testimony and a revised rate proposal. Often, the Judges are still considering motions to compel, and the parties are still producing documents in response to such motions (often among the more critical documents in the case), when that amendment deadline arrives.[8]

2. *Discovery Burdens*. While meant to provide a streamlined form of discovery as compared to full federal court litigation, the CRB discovery process, as it has worked out in practice, results in the parties conducting significant amounts of discovery – document requests, responses and objections to such requests, review and production of documents, review of documents from other parties, motions to compel, interrogatories, and as many as 20 depositions

[8] Recognizing certain of these shortcomings, Pandora recently moved the Judges to issue subpoenas to certain third-party music services in advance of the *Webcasting IV* proceeding. The Judges denied the motion and refused to issue the subpoenas.

– but doing so in an artificially abbreviated 60-day window. That window should be expanded to allow for more meaningful discovery.

3. ***Duplicative, Inefficient Two-Phase Hearings***. The statute governing the CRB provides for a two-phase hearing, with direct and rebuttal phases. To start, this is highly inefficient, and results in essentially two full proceedings rather than one. Moreover, in practice this structure has meant that during the direct phase, parties are not able to respond directly to the opposing party's case (that is reserved for the rebuttal phase); meanwhile, during the rebuttal phase, the parties are often challenged if they attempt to present something new (even if only learned during the discovery process) or respond to the other side's rebuttal case, as opposed merely to rebutting the contentions of the other side's direct case. The result is a "ships passing in the night" phenomenon in which the witnesses for each side never fully join issue at any one time on the full range of topics present in the case. We believe the process would work better if structured more like federal court litigation, with discovery first, written reports and rebuttal reports next, and a single-phase trial last.

While there are many other problems with the CRB process, the bottom line is that billions of dollars are at stake in CRB rate-setting proceedings. Failing a negotiated settlement, such proceedings should be based on the 801(b) rate-setting standards, with procedural protections that ensure that all parties have full access to all relevant information and an adequate schedule to develop arguments, brief their positions, and present evidence. Additional resources should be dedicated as needed to ensure that the process is properly staffed and administered to provide the Judges all the support they need.

D. The Scope of Specific Section 114 provisions

NOI Q. 17: Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

NOI Q. 11: Is the distinction between interactive and non-interactive services adequately defined for purposes of eligibility for the Section 114 license?

Section 114 was drafted nearly 20 years ago at a time when digital audio transmissions amounted to radio simulcasts and radio-like services delivered via satellite or television channels. As such, certain of its very detailed provisions (especially those within 17 U.S.C. § 114(d)(2)) can provide an ill fit with the features and services that have developed in the marketplace in the intervening two decades. Sirius XM itself has withheld new features out of concern that they might exceed certain limitations set forth in these clauses, even where they were not features that made the service interactive, but merely enhancements to the non-interactive service. We discuss a couple such provisions below, but suggest that a thorough review of all of the various requirements and their continued necessity/viability may be warranted at this time.

1. Ban on user-side copying: 17 U.S.C. § 114(d)(2)(c)(vi) requires, with respect to eligible non-subscription and new subscription services, that "the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient." To the extent the concern behind this clause is with a service distributing full-song copies to user computers or devices which users can then access on-demand (or even keep indefinitely), that concern is understandable. But, for reasons similar to those discussed above with respect to musical works, the statute should make clear that some degree of buffering and/or caching on user devices (which, if of sufficient duration, might be argued by copyright owners to be a "phonorecord") solely in aid of non-interactive streaming is acceptable and does not run afoul of the statutory prohibition.

This clarification makes practical sense: it is a reality of digital delivery that user-side devices buffer a few seconds of programming so that the user does not experience gaps and interruptions in the listening experience. Moreover, services increasingly wish to allow users to consume products when they fly, are on subways, otherwise out of streaming range, or simply desirous of avoiding massive data charges from a live stream. To do so, they wish to allow users to temporarily store the programming for later listening (or uninterrupted listening when the live connection is severed). None of those functionalities makes the service interactive, allows for on-demand listening to particular tracks, or provides a copy of individual tracks for personal use. See H.R. Rep. 104-274, at 21 (identifying limits of § 114 (d)(2) as intended to prevent "solicitation of home taping"). And all are increasingly important given listening that now occurs on mobile devices.

In short, allowing user-side caching to do so should be acceptable as long as users cannot access individual tracks on-demand, and the non-interactive listening experience that results is no different than "live" listening (other than being delayed or time-shifted). Indeed, as noted above, major music industry players have agreed as much among themselves, agreeing that whereas interactive streaming implicates the Section 115 license, non-interactive streaming does not similarly require a mechanical/DPD license.[9] That agreement comports with the common view that making intermediate, non-accessible copies of songs in aid of a licensed performance is fair use. *See, e.g.*, U.S. Copyright Office, *DMCA Section 104 Report* 133-41 (concluding that such copies are fair use and that if anything it just makes the performance right more valuable). Allowing for such temporary caching would serve to *increase* the number of compensable performances for which copyright owners get paid.

[9] *See* Section III.B, *supra*.

2. Interactive, "Archived," and "Continuous" programs. Section 114(d) limits the statutory license to services that are not "interactive" (which is defined at 114(j)), while Section 114(d)(2)(c)(iii) sets forth various definitions for "archived," "continuous," and other programs. Crafted in the mid-1990s, these definitions are difficult to understand on their face and fail to capture the types and variety of non-interactive webcasting currently offered in the marketplace, including notably that fact that most such webcasting is now tailored to reflect a user's particular tastes rather than reflecting a fixed playlist delivered to all users. A "continuous" program, for example, appears to be a fixed playlist that loops repeatedly, while an "archived" program appears to be designating a fixed, pre-recorded program stored and accessible on-demand to multiple users – i.e., what might be referred to now as a fixed "playlist." But neither definition spells this understanding out directly or clearly, and Sirius XM believes that the time may have come to revisit these definitions, which appear to have been crafted to prevent listeners from knowing in advance the playlists of particular channels, but which could inadvertently sweep in new types of programming that run afoul of the language, if not the spirit, of the definitions.

Conversely, while the definition of what makes a service "interactive" is not a model of clarity, and resulted in the *Launchcast* litigation addressing whether a service that allowed for user input was or was not interactive, the "custom" webcast industry has blossomed in the wake of the Second Circuit's clarification: witness the growth of Pandora, Slacker, iHeartRadio, and our own MySXM. It is crucial, whatever clarifications are made, to preserve the key finding of *Launchcast*: that interactivity is <u>not</u> brought about merely by tailoring a non-interactive, non-on-demand stream to the tastes of the user, but rather designed to prevent users from being able to pick or predict the particular song they want to hear. *See Arista Records, LLC v. LAUNCH Media, Inc.*, 578 F.3d 148 (2d Cir. 2009). To the extent a more finely tailored or customized experience is argued to be substitutional, that can be accounted for in the rate-setting process (if such substitutional impact can actually be demonstrated) rather than by denying the statutory license altogether or exposing the service to infringement liability.

V. Direct Licensing

NOI Q. 14: How does direct licensing impact the music marketplace, including the major record labels?

In general, Sirius XM believes that flexibility of licensing forms is to be encouraged – including not just blanket licensing, but the ability of services to seek direct licenses as well, and to do so without financial penalty. In the musical works context, courts have recognized that license innovations such as the per program license and, more recently, the adjustable fee blanket license (AFBL), can inject competitive dynamics into an area otherwise subject to market power and monopoly pricing. On the sound recording side, Sirius XM successfully obtained direct licenses from more than 100 sound recording copyright owners and the Copyright Royalty Judges created a "direct license deduction" from its royalty obligation to SoundExchange to account for performances of sound recordings covered by the direct licenses. At the same time, however, we faced a coordinated effort by the record industry – including communications from SoundExchange, RIAA, A2IM, NARAS, and AFM to their members – suggesting that record companies should avoid entering into direct license agreements because it would set a bad precedent before the CRB; those groups actively attempted to convince record companies and recording artists not to entertain Sirius XM's direct license offer, and were successful in many cases in doing so. To the extent necessary, the law should be clarified to make absolutely clear that SoundExchange's antitrust exemption as 17 U.S.C. § 114(e) – which allows it to collectively negotiate the terms of statutory licenses and to collect and distribute statutory royalties – does not allow it to interfere with direct license efforts in this way.

VI. Pre-1972 Sound Recordings

NOI Q. 10: Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included with the Section 112 and 114 statutory licenses?

The topic of pre-1972 sound recordings was fully briefed as part of the Copyright Office's recent pre-72 inquiry, and we are aware that the Copyright Office issued a report arguing in favor of the federalization of pre-72 recordings. Since that time, Sirius XM has been the target of a spate of lawsuits regarding its use of such recordings. Three suits involve a putative class of record companies suing Sirius XM in California, Florida, and New York seeking damages and license fees under the law of those three states. A fourth suit involves the major record companies and ABKCO (coordinated by the RIAA) suing Sirius XM in California for damages and license fees pursuant to California law. A fifth suit involves SoundExchange suing Sirius XM in the District of Columbia for failure to pay for its performances of such recordings under the *federal* statutory license. In short, the record labels are trying to have it all ways, seeking payment for the same performance under both state and federal law, arguing (through the RIAA) that pre-72 recordings should not be federalized, while arguing (through SoundExchange's efforts on Capitol Hill) that performances of pre-72 recordings should be paid for under the federal Section 112 and 114 licenses.

These developments have only strengthened Sirius XM's position as spelled out in its prior comments to the Copyright Office, which we incorporate by reference and will not fully repeat here. Three key points will suffice:

- First, there is no state-law performance right in sound recordings, and there never has been. After months of litigation in three different states, the record companies have failed to identify a single state-court case establishing such a right. To the extent footnote 12 in the NOI suggests otherwise, it is flatly incorrect – and directly at odds with the Copyright Office's own (correct) observation in the pre-72 report that no state right exists. (*See* p. 45.)

- Second, pre-72 recordings should *not* be lumped under the Section 112/114 statutory licenses. Such recordings are not covered by federal law, and it would be inappropriate to force a service to make royalty payments under the federal license for recordings that are not federally copyrighted. This is especially the case when the music industry is fighting tooth and nail to deny other federal protections to services that offer pre-72 recordings, including the DMCA section 512 safe harbor, and doing so on the ground that a federal statute cannot shelter infringements of state-level copyrights. Including pre-72 recordings under the federal license would be tantamount to federalizing such recordings, although without the benefit of other federal protections (e.g., Sections 107, 108, 110, 512, etc.).

- Third, either option above would create new, unexpected, and unfair burdens on Sirius XM and other services. As Sirius XM explained in its prior comments, Sirius XM and other Section 114 licensees built their businesses – and design their programming to this day – within the framework established by the DPRA in 1995. 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 with (a) no benefit in terms of incentivizing new recordings; (b) no corresponding obligation on AM/FM broadcasters (thus further exacerbating the lack of parity between digital and terrestrial radio); and (c) a windfall for record companies for recordings created 50 years ago or more.

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Respectfully submitted,

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