Before the
U.S. Copyright Office
Library of Congress

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

COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange") is pleased to provide these Comments in response to the Copyright Office's second Notice of Inquiry ("NOI") concerning music licensing. *Music Licensing Study: Second Request for Comments*, 79 Fed. Reg. 42,833 (July 23, 2014). As the sole collective designated by the U.S. Copyright Royalty Judges to collect and distribute sound recording royalties under the statutory licenses provided by Sections 112(e) and 114 of the Copyright Act, SoundExchange appreciates the Copyright Office's efforts to look for opportunities to improve the music licensing marketplace.

The initial comments and public roundtables in this proceeding reflected substantial agreement that the sound recording statutory licenses generally work well. For example:

- Representatives of artists reported that "the Section 114 statutory license has delivered extraordinary benefits to music creators, music investors, digital music services and music listeners."[1]
- One sound recording copyright owner group characterized the statutory licenses as "the appropriate mechanism to ensure fair treatment of creators/investors and their

[1] SAG-AFTRA/AFM Comments, at 2; *see also* FMC Comments, at 7-8 ("Future of Music Coalition supports the Section 114 statutory license"); Recording Academy Comments, at 4 ("The Recording Academy supports the statutory license under Section 114, which is beneficial for performers and efficient for licensees.").

artists,"[2] and another as "an efficient mechanism for administering licensing and payment for the large number of services providing radio-like programming."[3]

- Digital music services and other commenters find the statutory licenses "necessary"[4] and even "critical."[5]

However, with a few changes, the statutory licenses could be fairer and even more effective. Most importantly, Section 112/114 should be applied evenhandedly to all radio-like services – a concept that the Office has referred to as "platform parity."[6] Terrestrial radio generates billions of dollars each year in advertising revenues without sharing a cent with the artists and copyright owners that create the music that attracts the listeners that makes the ad sales possible. That loophole should be closed. Moreover all statutory licensees should pay royalties set under the same royalty rate standard, and that standard should be a fair market value standard such as the willing buyer/willing seller standard.[7] Many commenters in this proceeding have echoed SoundExchange's calls for platform parity, including a terrestrial performance right.[8]

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[2] A2IM Comments, at 3.

[3] RIAA Comments, at 35.

[4] MRI Comments, at 6 ("Music Reports believes that the Section 112 and 114 statutory licensing processes are necessary, and they are effective for license users."); *see also* DiMA Comments, at 33-35 (stating that "there is currently a need for the Section 112 and Section 114 statutory licensing process"); Music Choice Comments, at 11 ("the exemptions and licenses in Sections 112 and 114 remain essential"); Sirius XM Comments, at 11 ("the statutory licenses are a necessity").

[5] NAB Comments, at 2 ("The statutory sound recording licenses and exemptions are critical to music licensing.").

[6] *Music Licensing Study: Notice and Request for Public Comment*, 79 Fed. Reg. 14,739, 14,742 (Mar. 17, 2014).

[7] *See* SoundExchange Comments, at 6-8, 14-18, 23-24.

[8] *E.g.*, A2IM Comments, at § 13 ("AM/FM broadcasters make billions selling ads to folks who tune in for our music while our sound recording creators get nothing"); CFA/Public Knowledge

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In addition, SoundExchange believes that pre-1972 sound recordings should be incorporated into the statutory licenses. It is for this reason that SoundExchange supports the Respecting Senior Performers as Essential Cultural Treasures (RESPECT) Act (H.R. 4772). Pre-1972 recordings constitute about 5% to 15% of the performances made by major radio streaming services. It is simply wrong for the providers of these services to make hundreds of millions of dollars in part off these recordings and share nothing with creators. On this point too, many commenters agreed.[9]

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Comments, at 9 ("[p]latform parity is a lofty principle that should be the goal"); Copyright Alliance Comments, at 2 ("[a]mong the obstacles hindering equitable compensation of musicians and others involved in the creation and delivery of musical works and sound recordings are the lack of a full public performance right in sound recordings"); DiMA Comments, at 40 ("the current system lacks balance and further tilts the competitive landscape in favor of some music service providers, to the disadvantage of others"); FMC Comments, at 14 ("[p]erhaps the most glaring disparity in the current licensing environment for music is the lack of a public performance right for terrestrial radio"); Recording Academy Comments, at 8-9 ("[t]he use of different rate standards for different licenses and different delivery platforms is both irrational and inequitable" and "[n]owhere is this disparity more clear . . . than in the context of terrestrial AM/FM radio"); RIAA Comments, at 30-32 ("this historical inequity is a major issue for sound recording licensing that should be addressed in any discussion of a fair market" and "[a]ll services subject to the statutory licenses should be subject to the same willing buyer/willing seller rate standard"); SAG-AFTRA/AFM Comments, at 6 ("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."); Sirius XM Comments, at 2 ("platform parity must be the goal" (all caps omitted)).

[9] *E.g.*, A2IM Comments, at § 10 ("Pre-1972 sound recordings should be included within the Section #112 and #114 statutory licenses."); ABKCO Comments, at § 10 ("pre-72 recordings should absolutely be included under Sec. 112 and 114"); FMC Comments, at 8-10 (advocating full federalization of pre-1972 recordings); IPAC Comments, at 10-11 ("[t]he music marketplace would benefit by extending federal copyright protection to pre-1972 sound recordings"); NMPA/HFA Comments, at 23 ("Artists releasing pre-72 recordings deserve to be paid for exploitation of their works, including by non-interactive services."); Recording Academy Comments, at 6-8 ("[a]t a minimum, and as a stop-gap until full federalization can be achieved," advocating inclusion in statutory licenses); RIAA Comments, at 32 ("we propose incorporating pre-1972 recordings into the federal statutory license system"); SAG-AFTRA/AFM Comments, at 5 ("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"); *see*

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SoundExchange's initial comments also advocated legislative changes to promote settlement of rate proceedings[10] and promote compliance with statutory license requirements.[11] These are important areas of potential improvement if the details of the statutory licenses are revisited legislatively.

In the remainder of these comments, SoundExchange addresses the Office's specific questions relating to sound recording licensing.

A. Data and Transparency

1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

SoundExchange focuses its answer to this question on sound recordings, rather than musical works. Sound recording identification and ownership information is generally available, because such information appears on product packaging; digital music services generally receive significant metadata from the record companies and distributors providing them recordings; and significant information about many commercial recordings is available from internet sources.

SoundExchange also has been working hard to expand and refine the database of repertoire information it uses to distribute statutory royalties. When it completes its next database update this month, SoundExchange expects to have good identification and ownership information, including International Standard Recording Codes ("ISRCs"), for approximately

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also DiMA Comments, at 39 (advocating either full federalization or no federalization); Music Choice Comments, at 16 (advocating "an express safe harbor for licensees who choose to report and pay SoundExchange (or any other designated collective) for uses of pre-1972 sound recordings.").

[10] SoundExchange Comments, at 8-10.

[11] SoundExchange Comments, at 4-6.

14 million recordings. SoundExchange is actively exploring means by which it might provide interested services a means of accessing this data for use in identifying to SoundExchange with greater precision the recordings they use under the statutory licenses. SoundExchange anticipates that it will do so in some manner, such as by offering services the capability of searching for ISRCs or supplying services ISRCs that are missing from their reports of use (when the recordings can be identified from other available information).

Because information concerning sound recordings is already relatively available, and will only become more so as SoundExchange proceeds with its plans to provide services access to information from its repertoire database, there should be stronger incentives for statutory licensees to use available identifying information, and particularly ISRCs, to report their usage to SoundExchange clearly and accurately. The Copyright Royalty Judges are currently considering updates to the "notice and recordkeeping" regulations under the statutory licenses. *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 79 Fed. Reg. 25,038 (May 2, 2014). Among the issues presented by the Judges' Notice of Proposed Rulemaking is whether webcasters will be required to report ISRCs for the recordings they use, where ISRCs are available and their reporting is feasible. *Id*. at 25,042-43. This proposal is important, because ISRC is the single most useful data element for identifying sound recordings with precision, and wider use of ISRCs in reporting of usage to SoundExchange would both increase the amount of reported usage that automatically can be matched to known repertoire and facilitate accurate manual matching when that is necessary. Because the Judges' adoption of this requirement would encourage broader use of the ISRC standard by statutory licensees, it would thus allow SoundExchange to distribute royalties to artists and copyright owners with greater speed and with greater confidence in the accuracy of its distributions.

SoundExchange has also explained in other contexts that the Office could encourage copyright owners to share ISRCs and other useful information (such as territory of fixation, performers and their country of residence and the producer name), and facilitate other private actors' assimilating that information, if the Office collected that information on a voluntary basis as part of the registration and recordation processes. Collecting ISRCs would likely never turn the Copyright Office Catalog into a comprehensive ISRC database, but it would make the Catalog more useful, by providing an additional means of identifying relevant Copyright Office records and a defined connection point between third party databases and Copyright Office records. It may also increase use of ISRCs generally and facilitate the linking of recordation documents to registration records. Collecting the other information would help facilitate identification and protection of recordings, both in the United States and particularly abroad. *See* SoundExchange Comments in Docket No. 2014–1, at 3-5 (Mar. 15, 2014); SoundExchange Comments in Docket No. 2013–2, at 2-5 (May 21, 2013).

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

As SoundExchange has explained in other contexts, the International Standard Musical Work Codes or "ISWC" (ISO 15707) is the most widely embraced identifier for musical works. For sound recordings the most widely embraced identifier is ISRC (ISO 3901), and for individuals and entities such as songwriters, composers and artists the most widely embraced identifier is the International Standard Name Identifier or "ISNI" (ISO 27729). *See* SoundExchange Comments in Docket No. 2014–1, at 3-4 (Mar. 15, 2014); SoundExchange Comments in Docket No. 2013–2, at 2-5 (May 21, 2013). Each of these standards has a multi-tiered level of management. For example, ISRC is ultimately managed by the international ISRC

Agency, and RIAA administers ISRC in the U.S. We leave it to commenters more directly involved in management of these standards to describe the details of their administration.

SoundExchange believes there are two things the government could do to incentivize more universal availability and adoption of ISRC. First, as described above, the Office could collect ISRCs on a voluntary basis as part of the registration and recordation processes. Second, the Copyright Royalty Judges could, as part of their pending notice and recordkeeping proceeding described above require statutory licensees to report their usage to SoundExchange using ISRCs to identify the recordings used where ISRCs are available and it is feasible for the licensee to report them.

3. Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of nonusage-based forms of compensation (e.g., advances against future royalty payments and equity shares).

SoundExchange provides detailed royalty statements directly to the artists and to copyright owners when they receive royalty distributions from SoundExchange. These statements show the royalties paid out on a service-by-service and track-by-track basis, and identify each service's reporting periods included on the statement. SoundExchange has also launched SoundExchange Direct (https://sxdirect.soundexchange.com), an online portal for artists and copyright owners that allows them to access their statements electronically (both in summary and in track-level detail), download statement history, manage their accounts (*e.g.*, to change contact or bank information), and upload and manage repertoire information. Pursuant to the payment terms applicable to each category of statutory service, artists and copyright owners also have the right to audit SoundExchange to verify its royalty distributions. *E.g.*, 37 C.F.R. § 380.7. Thus, there is currently significant transparency in reporting by SoundExchange. See SAG-AFTRA/AFM Comments, at 3 ("The importance to Artists of direct payment cannot be

overstated. . . . [I]t . . . means that they have the very substantial benefit of transparent administration by the designated collective agent, SoundExchange.").

Where the statutory licenses lack transparency is in the reporting of usage by licensees. There are several significant respects in which the reporting practices of licensees under the current Section 114 notice and recordkeeping regulations (particularly 37 C.F.R. §§ 370.4) are lacking in transparency:

- Data delivery and quality. In 2013, lateness in delivering reports of use affected approximately 31% of statutory royalties. The reports of use that SoundExchange received late were, on average, delivered about 90 days late, and for a small percentage of usage, reports of use are never received at all. Even when licensees submit their reports of use, an average of about 29% of the lines of licensee-reported usage data ingested by SoundExchange could not be matched automatically to known repertoire, with the vast majority of the issues due to data quality problems.
- Exclusion of tracks. Some licensees purport to administer licensing at the individual recording level so as to rely on the statutory licenses for some of their usage and direct licenses for other usage, or to exclude from their royalty payments use of particular tracks for which a license may not be required. Of those services, only Sirius XM is required to report to SoundExchange the tracks that it excludes from its royalty calculations (and it is only required to do so for its SDARS service). However, even a large, sophisticated service like Sirius XM has not demonstrated that it is capable of accurately distinguishing payable tracks from non-payable tracks. Thus, there is significant reason to believe that payable tracks might commonly be

omitted improperly from reports of use by services that purport to administer licensing at the individual recording level.

- Access to original source records. Most categories of statutory licensees are not currently required to preserve the source records they use to prepare the reports of use they deliver to SoundExchange. However, when SoundExchange's auditors have been able to access underlying source records, SoundExchange frequently has found underpayment and underreporting having significant economic consequences.

In the notice and recordkeeping proceeding currently pending before the Copyright Royalty Judges, SoundExchange has proposed changes to address each of these issues. The Judges should adopt these proposals.

As described in SoundExchange's initial comments in this proceeding, consideration also should be given to additional mechanisms for promoting compliance with the statutory licenses, and at a minimum, there should be a clear mechanism for termination of statutory licenses for services that repeatedly fail to act in compliance with applicable requirements. SoundExchange Comments, at 4-6; *see also* RIAA Comments, at 34-35.

C. Sound Recordings

8. Are there ways in which Section 112 and 114 (or other) CRB ratesetting proceedings could be streamlined or otherwise improved from a procedural standpoint?

Because SoundExchange is frequently required to appear in royalty rate proceedings before the Copyright Royalty Judges, it knows very well the high cost of such proceedings, and would certainly be interested in reducing their cost. Perhaps the one single improvement that would most reduce the complexity and cost of proceedings would be simplifying the rate standards. As described in SoundExchange's initial comments in this proceeding, the Section 801(b)(1) standard complicates litigation because it invites the parties to place every aspect of

their businesses at issue, and it is difficult to predict how the Judges will exercise their discretion in setting a rate. SoundExchange Comments, at 7-8. Relative to a streamlined fair market value standard, every specific factor included in a rate standard increases cost and decreases predictability. SoundExchange also proposed in its initial comments various refinements to the rate setting process that it believes would further encourage settlements. SoundExchange Comments, at 8-10. SoundExchange is certainly open to evaluating other ideas that might reduce the cost of proceedings as well.

However, in their initial comments in this proceeding, many statutory licensees suggested changes to rate setting procedures designed to advantage licensees,[12] or that would increase the already-substantial costs of rate proceedings.[13] Most frequently, the licensees sought broader-ranging and longer discovery in rate proceedings. Notably, however, these commenters did not identify any instance in which the Judges believed the current procedures prevented a full record from being developed. Rate proceedings before the Copyright Royalty Judges are already too complicated and expensive, due in large part to aggressive litigation by the many licensees that often participate in proceedings, including their efforts to take discovery of issues that have not proven important to the Judges' decisions. The Office should not embrace any proposal that would make rate proceedings more complicated and expensive.

[12] DiMA Comments, at 34 (permit consideration of Webcaster Settlement Act agreements entered into on the understanding they would be nonprecedential); Music Choice Comments, at 32 (burden of proof on copyright owners); NAB Comments, at 20 (same).

[13] DiMA Comments, at 38-39 (more and longer discovery); EMF Comments, at 12 (separate proceedings for noncommercial licensees); Music Choice Comments, at 30-32 (more and longer discovery, Federal Rules of Civil Procedure and Evidence, broader appellate review); NAB Comments, at 20-21 (Federal Rules, more and longer discovery); NRBMLC Comments, at 27 (same); Sirius XM Comments, at 15-17 (more and longer discovery).

CONCLUSION

SoundExchange appreciates the opportunity to provide these Comments and looks forward to participating further in discussions concerning the important issues raised by the NOI.

September 12, 2014

Respectfully submitted,

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