

SX Exhibit 418 DP

Before the
COPYRIGHT OFFICE
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Washington, D.C.

In the Matter of:)
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NOTICE AND RECORDKEEPING FOR)
USE OF SOUND RECORDINGS UNDER)
STATUTORY LICENSE)
_____)
)

Docket No. RM 2005-2

REPLY COMMENTS OF SOUNDEXCHANGE, INC.

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September 16, 2005

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SoundExchange, Inc. ("SoundExchange"), on behalf of the thousands of copyright owners and performers on whose behalf it collects and distributes statutory royalties, respectfully submits these reply comments in response to the Copyright Office's Supplemental Request for Comments for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2005-2, published in the Federal Register on July 27, 2005. 70 Fed. Reg. 43364 ("Supplemental Request").

I. INTRODUCTION

After participating in the rulemaking to establish notice and recordkeeping requirements for services availing themselves of the Section 112 and Section 114 statutory licenses for nearly four years, SoundExchange agrees with the Copyright Royalty Board's ("CRB") characterization of this rulemaking as "frustrating." Millions of dollars sit idle, unable to be distributed to labels and artists – the vast majority of whom are small businesses for whom every dollar counts – because the notice and recordkeeping requirements are not in place. The participants to this rulemaking have demonstrated they cannot agree on such requirements, and it is left to the CRB

to impose them. That is the only way to ensure that those entitled to royalties under the statute receive their just compensation.

At least two things are lost in all of the rhetoric from the licensees. First is the simple fact that webcasting and broadcast simulcasting, by their very nature, require some degree of technological sophistication.¹ The licensees are, after all, running websites to allow listeners to access their stations, and using computers to digitally transmit the copyrighted works. When licensees transmit sound recordings to their listeners, the statute requires them to provide “the title of the sound recording, the title of the phonorecord embodying such sound recording, . . . and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient.”² If services can digitally transmit sound recordings with identifying information, then they should be able to transmit digitally to the agent for copyright owners and performers data identifying the sound recordings transmitted. The licensees’ arguments to the contrary are both unpersuasive and unsupported by evidence.

Second, the entire goal of this statutory scheme is to ensure fair and efficient compensation of artists and copyright owners for the use of their works. The statute allows licensees to use the labor of artists and copyright owners, but only on certain conditions, one of which is to provide reports of use.³ The licensees have all of the information in their possession that is required to ensure that the artists and copyright owners whose sound recordings the licensees transmit are fairly compensated. The licensees know precisely what sound recordings

¹ See Interim Regulations in Docket No. RM 2002-1E, 69 Fed. Reg. 11515, 11521 n.12 (Mar. 11, 2004) (“Transmitting a sound recording to the public is not something that accidentally or unknowingly happens. It takes a significant amount of decision making and action to select and compile sound recordings, and a significant amount of technical expertise to make the transmissions. It is not unreasonable to require those engaged in such a sophisticated activity to collect and report a limited amount of data regarding others’ property which they are using for their benefit.”).

² 17 U.S.C. § 114(d)(2)(C)(ix).

³ 17 U.S.C. § 114(f)(4)(A).

they play and when. Rather than provide that information, which would allow compensation of all those whose labor has been exploited, licensees ask the CRB to bless a system that (1) would ensure that vast numbers of artists and labels whose works are used will not be compensated at all⁴ and (2) would impose enormous burdens (both financial and managerial) on SoundExchange to monitor the licensees' activities or, at a minimum, to constantly have to modify SoundExchange's internal systems to deal with whatever format licensees wish to use.

In both respects, the licensees make arguments that are inconsistent with the statute and simply untenable. Nothing in the statute authorizes the CRB to adopt a system that will result in enormous numbers of artists and labels not receiving any compensation, as the evidence submitted by SoundExchange shows would happen if sample reporting were permitted. Census reporting is absolutely essential, and the licensees provide no evidence (just conjecture) to suggest that it is infeasible. Moreover, no system of royalty collection and distribution – indeed no system of large scale data exchange of any kind – can be based on what the licensees have claimed in this proceeding. In their view, SoundExchange should either monitor the licensees' activities (something that is impossible for SoundExchange but easy for licensees) or conform its systems to whatever types of reporting the thousands of licensees want to make, no matter the cost and complexity that adds to the system.

The premise of most of the licensees' comments, especially the Radio Broadcasters, is that it is somehow unfair to require licensees to do what individuals and businesses do every day in thousands of different contexts – report simple information in a strictly formatted manner.⁵

⁴ See Comments of SoundExchange in Docket No. RM 2005-2, Exhibit B, Declaration of Barry M. Massarsky (Aug. 26, 2005). Unless noted otherwise, all comments cited in these Reply Comments are to those filed in Docket No. RM 2005-2, which were due by August 26, 2005.

⁵ Exhibit A attached hereto contains additional explanatory material on Electronic Data Interchange (“EDI”), including how EDI relies upon structured information for the computer-to-computer exchange of information. From

They argue that it is somehow unfair and burdensome to have to use carats (“^”) instead of quotes surrounding data elements, or to include the name, address, and other basic information about the station with the sound recording information that they are reporting.

That is absurd. A taxpayer cannot create his or her own tax return for the Internal Revenue Service; the standard forms applicable to all taxpayers must be completed. The licensees’ comments (some of which are the exact opposite of the comments they submitted when this rulemaking began) demonstrate that they are not seeking to provide comments in a good faith attempt to assist the CRB in specifying reporting formats, but rather are objecting for the sake of objecting.

In proposing detailed format and delivery specifications, SoundExchange expended considerable time and effort, including creating multiple options for the delivery of reports of use, both in method (i.e., FTP, CD-ROM, floppy diskette and e-mail) and format (i.e., with or without headers). Establishment of clear, simple, and strict formatting requirements is essential for there to be any possibility of collecting, allocating, and distributing royalties in a cost-effective manner. Implementation of a non-system, such as that proposed by the licensees, will result in money going to computer contractors, not to the artists and copyright owners – a result directly contrary to the statute.

In addition to the broad failings of the licensees’ comments identified above, what is most disappointing is their refusal to respond at all to the CRB’s primary request. In the Supplemental Request, the CRB asked parties to provide evidence – not simply lawyer argument – about the key issues. In repeated filings with the Copyright Office and now the CRB, SoundExchange has provided substantial evidence to support all of its arguments, including,

Wikipedia, the free encyclopedia, located at http://en.wikipedia.org/wiki/Electronic_data_interchange (visited Sep. 16, 2005).

among others, publications from U.S. government agencies, state agencies and private corporations explaining the need for or examples of specific data format and delivery specifications;⁶ a declaration from a technology professional answering the CRB's specific questions about format and delivery specifications;⁷ two surveys proving that sample rather than census reporting by Section 114 statutory licensees is not reasonable;⁸ operating manuals from four college radio stations specifying a requirement to record information on every sound recording transmitted;⁹ declarations of record label executives confirming the inclusion of identifying information on commercially released and promotional product;¹⁰ and information on the need for comprehensive identifying information per sound recording in order to ensure the accurate distribution of royalties.¹¹

In marked contrast, the record is devoid of any evidence submitted by statutory licensees. In response to the CRB's request for reliable, independent evidence, the licensees once again provide only argument and unsupported assertions. The licensees submit no evidence to suggest that sample reporting would be statistically valid (it would not) and cannot explain why some artists and copyright owners should be denied payment because the licensee takes the time to obtain the artist's CD, rip it to a computer, place it on a play list, and play it (activities undertaken to generate revenues or contributions for the licensee), but cannot take the minimal time needed to record that it has used the artist's sound recording. The licensee's only answer –

⁶ See Comments of SoundExchange, Inc., Exhibits C-K.

⁷ See *id.*, Exhibit A.

⁸ See *id.* Exhibit B; Reply Comments of SoundExchange, Inc., in Docket No. RM 2002-1D, Exhibit A (Dec 22, 2003).

⁹ See Comments of SoundExchange, Inc., Exhibits N-Q.

¹⁰ See Comments of the Recording Industry Association of America, Inc., ("RIAA") in Docket No. RM 2002-1A, Exhibits F-H (Apr. 5, 2002); Reply Comments of RIAA in Docket No. RM 2002-1A, Vol. 2 of 4, Ex. B, Tabs 1-12, and Exhibits C-G (Apr. 26, 2002).

¹¹ See Comments of RIAA in Docket No. RM 2002-1A, Exhibit J (Apr. 5, 2002); Reply Comments of RIAA in Docket No. RM 2002-1A, Exhibits P-V (April 26, 2002).

“if it is good enough for ASCAP and BMI, it is good enough for SoundExchange” – is no answer at all. There is no statutory obligation compelling reporting to ASCAP and BMI of the use of musical works as there is for sound recordings under Section 114(f)(4)(A). Moreover, there has been no evidence submitted in this rulemaking explaining the sampling methodologies applied by ASCAP and BMI and whether those methodologies would provide statistically reliable evidence for webcasting.

The licensees’ responses to the CRB’s questions about the need for strict formatting of data are similarly devoid of support. SoundExchange is the only party that has ever submitted proposed specifications for how data should be reported, and SoundExchange has provided a declaration and numerous government and private sector documents that demonstrate that the efficient functioning of any major data collection system requires strict formatting.

The responses of the licensees range from the non-existent, to the deceptive, to the comical. The Radio Broadcasters, including the largest players in the industry such as Bonneville International Corporation, Clear Channel Communications, Inc., Cox Radio, Inc., Entercom Communications Corp., Salem Communications Corp., and Susquehanna Radio Corp., provide no evidence at all – only the names of three music scheduling software and digital automation systems – RCS Selector, MusicMaster, and PowerGold.¹² They provide no evidence, other than the assertion of counsel, to suggest that these programs are incapable of providing the information requested by SoundExchange. Whatever the capabilities of these programs, to the extent that they do not today include the ability to provide automated reports in the format that SoundExchange requires, it is only because this proceeding has not been completed. Once the CRB establishes notice and recordkeeping requirements, it is a virtual certainty that such

¹² Comments of Radio Broadcasters at 17.

programs will provide stock report forms, just as they do for ASCAP and BMI.¹³ DiMA failed to disclose that some of its biggest members – such as AOL Radio, Live 365, and MTV Networks – already provide reports of use in SoundExchange’s proposed format. And the Radio Broadcasters’ assertion that “*many* smaller radio stations, particularly noncommercial stations” still use DOS (disk operating system)¹⁴ – is unsupported by evidence. Even if it were true, it makes no sense to have SoundExchange design systems to support a wholly outmoded computer system (Microsoft’s last version of DOS (v.6.22) was released in 1994), which even the music scheduling software companies are abandoning.¹⁵

Lacking evidence, the Radio Broadcasters and noncommercial entities fall back on their claim that Congress did not intend to impose new burdens on them. Nothing in the statute supports that argument, and it has repeatedly been rejected. The Radio Broadcasters have argued repeatedly – in their lawsuit in the Eastern District of Pennsylvania seeking to overturn the Register of Copyright’s determination that broadcast simulcasters were subject to liability for the digital audio transmission of sound recordings,¹⁶ in the Third Circuit appeal of that case,¹⁷ and in

¹³ SoundExchange notes that RCS Selector, to the best of its knowledge, is the software application used by the preexisting subscription services to provide the reports of use required under 37 C.F.R. § 270.2.

¹⁴ Comments of Radio Broadcasters at 22 (emphasis added).

¹⁵ See <http://www.mmwin.com/ad07.html> (scrolling advertisement for MusicMaster which proclaims “DOS stinks”) (visited Sep. 16, 2005).

¹⁶ The broadcaster plaintiffs in that matter plead that:

The [Register’s determination] is flatly inconsistent with Section 114(d)(1)(A), by which Congress exempted from copyright liability FCC-licensed radio broadcasters’ transmission of radio station broadcasts on a nonsubscription basis over the Internet. The Rule cannot be reconciled with Congress’s legislative scheme to exempt from liability nonsubscription broadcast transmissions posing no threat to the sale of sound recordings and its intent to leave unaltered the mutually beneficial relationship between the radio and record industries.

Bonneville Int’l Corp. v. Peters, Complaint at ¶ 34 (filed in E.D. Pa) (Jan. 25, 2001).

¹⁷ Before the Third Circuit, the Radio Broadcasters argued that:

The DPRA thus made it abundantly clear that nonsubscription digital audio transmissions – including expressly ‘nonsubscription broadcast transmissions’ – were not subject to the limited public performance right in sound recordings created by this legislation. It is thus irrefutable that Congress did not intend to subject digital audio transmissions of radio broadcast programming – whether over the air or via *the Internet* or otherwise . . . – to new copyright liability. The Senate Report thus confirmed that “it is the Committee’s intent to provide copyright holders of sound recordings with the ability to control the

this proceeding¹⁸ – that Congress did not intend for them to have to change their business practices if they chose to take advantage of the new license for webcasting. At each level, those arguments were rejected. The Third Circuit noted that:

the exemptions the DPRA afforded to radio broadcasters were specifically intended to protect only traditional radio broadcasting, and did not contemplate protecting AM/FM webcasting. The DMCA’s silence on AM/FM webcasting gives us no affirmative grounds to believe that Congress intended to expand the protections contemplated by the DPRA. The appellants must show something more than congressional silence to argue convincingly that Congress intended to lump AM/FM webcasting with over-the-air broadcasting in § 114(d)(1)(A)’s exemption.¹⁹

The CRB should again reject the argument – unsupported by the statute or legislative history – that Congress never intended Radio Broadcasters to have to change their business practices. Section 114 statutory licensees, including broadcast simulcasters and noncommercial entities, are obligated to provide copyright owners with reasonable notice of the use of sound recordings. There is absolutely no statutory basis for shifting that burden to require copyright owners and performers to monitor the transmissions of Section 114 licensees. Transmitting entities availing

distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without *imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.*”

Bonneville Int. Corp. v. Peters, Brief of Appellants at 42 (July 15, 2002) (internal citations omitted) (emphasis in original).

¹⁸ In this rulemaking, the Radio Broadcasters have argued that:

Congress made clear that, in establishing the sound recording performance statutory license, it attempted “to strike a balance among all of the interests affected thereby. . . . As both the Senate and House Judiciary Committees made clear in their reports accompanying the 1995 Digital Performance Rights in Sound Recordings Act (“DPRA”), the intent of that legislation was:

to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.

Congress also emphasized that it wanted to do nothing to upset “the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.”

Id. at 4-5 (emphasis in original) (internal citations omitted).

¹⁹ Bonneville Int’l Corp. v. Peters, 347 F.3rd 485, 499 (3rd Cir. 2003) (emphasis added).

themselves of the benefits of the statutory license must be the ones to provide the information on the uses of sound recordings.²⁰

Indeed, the Radio Broadcasters' suggestion that, contrary to any reasonable reading of Section 114(f)(4)(A), SoundExchange should itself monitor webcasts to facilitate distributions in lieu of the licensees providing reports of use is completely absurd.²¹ The Radio Broadcasters compare SoundExchange to a telephone company that can monitor telephone calls and bill its customers.²² Unlike a telephone company, SoundExchange does not control the facilities over which the transmissions occur, does not have a separate relationship with listeners to permit them to monitor use, and could not – technologically or economically – take on the burden of monitoring the activities of thousands of webcasters – all of whom already have the relevant information in their possession and are under a statutory obligation to provide it.

The noncommercial entities now make a similar argument,²³ claiming that because they were temporarily granted a reprieve from paying market rates for their transmissions,

²⁰ To the extent the Radio Broadcasters are aware of third-parties that monitor their transmissions, such as BDS (see Radio Broadcaster Comments at 7), and have the capability to provide information consistent with the proposed regulations, SoundExchange would likely not object to receiving recordkeeping data from a third party on behalf of an individual broadcaster, provided that the report submitted by the third party complied with the proposed regulations and also included the information on play frequency that is necessary for the allocation of royalties. See Interim Regulations, 69 Fed. Reg. at 11524 (“For those services that lack the technological ability to report the actual number of performances, or choose not to report such information, the Aggregate Tuning Hours, Channel or Program Name, and Play Frequency information must be reported for each sound recording.”); id. at 11525 (“Under no circumstances may a service fail to report any data in the performance data field when submitting a record of use of a sound recording”); id. (“Aggregate Tuning Hours and Channel or Program Name are not sufficient, by themselves, to permit an equitable distribution of royalties Consequently, it is necessary for services that elect not to report Actual Total Performances to report the number of times each sound recording is played during the two week reporting period.”).

²¹ See Comments of Radio Broadcasters at 6.

²² Id. at 9-10.

²³ Unfortunately, licensees have not provided the CRB with an accurate picture of the broadcasting practices of noncommercial entities. Whereas each of IBS and WHRB have portrayed noncommercial entities as incapable of providing comprehensive reports of use in electronic form, SoundExchange submitted evidence indicating that several college radio stations do in fact track each sound recording transmitted, frequently doing so electronically. See Comments of SoundExchange at 19-20 & Exhibits N-Q. WHRB is also now making its transmissions through Live 365, which is capable of providing the reports of use requested by SoundExchange. Id. at 18, n.12.

comprehensive and electronic reporting cannot be justified under a cost-benefit analysis.²⁴ These arguments are without merit. First, the Copyright Office has previously rejected the arguments that noncommercial entities are entitled to an exemption from reporting.²⁵ Second, it is improper for the noncommercial entities to attempt to rely upon the non-precedential rates and terms that were adopted pursuant to the Small Webcaster Settlement Act of 2002 (“SWSA”) in this rulemaking. SWSA expressly states that:

Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or **notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving . . . the establishment of notice or recordkeeping requirements by the Librarian of Congress under paragraph (4) or section 112(e)(4).**²⁶

Third, there is no basis for the CRB to conclude that the below-market rates established for noncommercial entities pursuant to SWSA will be adopted as the rates for the 2006-2010 rate period. Thus, any reliance on those *de minimis* fees would be misplaced. Congress has amended Section 114 of the Copyright Act twice since December 2002 and on each occasion Congress has not made special accommodations for noncommercial entities, whether on rates or notice and recordkeeping. Therefore, the CRB cannot conclude that Congress intended for noncommercial entities to avoid the reporting obligation that exists for all Section 114 statutory licensees.

Finally, although SoundExchange may at one time have considered supporting the creation of a working group among copyright owners, performers, and licensees to hammer out format and delivery specifications for submission to the Copyright Office, SoundExchange unfortunately has come to believe that such an effort now would be unproductive.

²⁴ See Comments of Intercollegiate Broadcasters, Inc. (“IBS”) at 2.

²⁵ Interim Regulations, 69 Fed. Reg. at 11521 & n.12.

²⁶ Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, 2782 (Dec. 4, 2002) (emphasis added).

SoundExchange's view is the result of the licensees' failure to submit good faith proposals that would satisfy their statutory obligation to provide reasonable notice and their increasingly ridiculous arguments (such as their demand that SoundExchange monitor webcasting or broadcast simulcasting transmissions). Moreover, SoundExchange believes there is no statutory basis for the CRB to create a "collaborative-based, standard-setting forum under the auspices of the Library of Congress."²⁷

SoundExchange recognizes that the CRB has been frustrated by the parties' inability to reach agreement, but that does not alter the CRB's obligation under the statute. The CRB must weigh the *evidence* that has been presented in this rulemaking and adopt regulations consistent with that *evidence*. Because the licensees have failed to introduce evidence as opposed to argument of counsel, the specifications proposed by SoundExchange should be adopted. The licensees should not be permitted to again defer their obligation to provide reports of use by claiming that they will now work in a collaborative manner through a working group. They had their chance to make constructive contributions to the deliberative process and have failed to do so. They have been avoiding their reporting obligations for years and their actions are harming copyright owners and performers. SoundExchange cannot presently allocate the nearly fourteen million in royalties that have been collected for the period April 1, 2004 through May 30, 2005 from eligible nonsubscription transmission services, new subscription services, or services making exempt transmissions to business establishments due to the lack of data needed to allocate such royalties. No further delay is warranted, and the CRB should adopt reporting regulations without further delay so that the copyright owners and performers can receive the royalties to which they are entitled.

²⁷ Supplemental Comments of Harvard Radio Broadcasting Company (hereinafter "WHRB") at 30.

In the remainder of these Reply Comments, SoundExchange will only address a handful of the issues raised by opposing parties. As many of the arguments made by licensees lack supporting evidence or are recycled from previous filings, SoundExchange relies upon its previous filings in this rulemaking for rebuttal.

II. LEGAL AND POLICY QUESTIONS

A. Detailed Reporting Regulations Are Essential

The Radio Broadcasters have complained that the proposed format and delivery specifications are too detailed and “go far beyond what Congress could possibly have considered to constitute ‘reasonable’ requirements.”²⁸ IBS has said that it “does not believe that Congress has required the CRJs ‘to prescribe particular formatting and delivery requirements’ as detailed in the NPRM.”²⁹ But Congress established a scheme whereby copyright owners and artists would receive royalties for the public performance of their sound recordings via digital audio transmissions. In order for copyright owners and artists to be paid *on a per sound recording basis*,³⁰ it is essential to know the sound recordings transmitted under the statutory license. The party best suited to provide that information is the transmitting entity. This is why Congress included language that requires for “records of . . . use . . . [to] be kept and *made available by entities performing sound recordings*.”³¹ There can be no question that Congress intended for licensees to provide copyright owners with data on the sound recordings transmitted. Similarly, there can be no question that the CRB has the authority and the mandate to specify the precise content and format of such reports.

²⁸ Comments of Radio Broadcasters at 3.

²⁹ Comments of IBS at 5.

³⁰ 17 U.S.C. § 114(g)(2)(D).

³¹ 17 U.S.C. § 114(f)(4)(A) (emphasis added).

Because unlimited numbers of services could rely upon the Section 114 statutory license, detailed and highly technical format and delivery specifications must be adopted. While some commenting parties have suggested that SoundExchange should bear the burden of developing a system that would be flexible enough to accept reports of use from thousands of licensees using untold numbers of different software programs,³² it defies logic that such a system could work. First, the materials on EDI submitted by SoundExchange in its initial comments and as Exhibit A to these Reply Comments indicate that electronic reporting requires specificity. Second, by failing to introduce declarations from expert consultants that such a system would be workable, the licensees' have failed to provide even an iota of evidence to support their arguments, which therefore should be flatly rejected.

B. Sample Reporting is Neither Reasonable Nor Supported by Record Evidence

As noted above, SoundExchange has submitted two studies that rebut the suggestion that sample reporting is reasonable. By failing to analyze their own records of use and compare sample periods to census data (which they necessarily possess), the statutory licensees have forfeited their right to claim that sample reporting is reasonable. DiMA, for example, states that “[s]ampling, though ‘imperfect,’ historically produces reasonably accurate results and reliable proxies that fairly compensate rightholders.”³³ Yet where is the evidence from DiMA's members that sampling of their monthly transmissions would be reasonably accurate and create reliable proxies? Moreover, if DiMA is correct that census reporting would track tens of millions of performances, which would generate thousands of dollars in royalties for artists and

³² Comments of Radio Broadcasters at 9 (“[T]here are literally thousands of Section 112 and 114 statutory licensees – consisting of radio broadcasters and others – who employ a myriad of software applications to schedule and play music.”).

³³ Comments of DiMA at 4.

copyright owners, then the artists performing on and copyright owners of those recordings should be paid for that exploitation, but that is only possible with census reporting.

The CRB must conclude that, based on the record in this proceeding, there is no evidence to support sample reporting. Cursory references to the practices of ASCAP and BMI, without even disclosing the sampling methodologies applied by those organizations, are insufficient for concluding that sample reporting under Section 114 is warranted.³⁴ SoundExchange's studies have shown that sample reporting will deprive enormous numbers of copyright owners and performers of royalties, an outcome that is not reasonable.

C. Statutory Licensees Are Obligated to Provide Copyright Owners with Notice of Use of Sound Recordings and Cannot Shift the Burden of Recordkeeping to Copyright Owners and Performers

Statutory licensees, not surprisingly, believe that SoundExchange should bear the burden of enabling reporting by thousands of services. According to the Radio Broadcasters,

[i]t would be far more efficient to require SoundExchange to make reasonable modifications to its music use processing software to enable it to accommodate a variety of music use reporting formats . . . than to force each of the licensees to create music use reports in a single dictated format that does not take into account either the capabilities and limitations of their software (if they use software at all) or the size of their labor pool.³⁵

As noted above, Radio Broadcasters have failed to provide any evidence to support this position. First, Radio Broadcasters have failed to submit evidence that it is more efficient for

³⁴ SoundExchange notes that in addition to sample reporting, ASCAP and BMI each undertake extensive, additional efforts on their own to monitor transmissions by broadcasters. According to a witness who testified on behalf of statutory licensees in the first webcaster arbitration, ASCAP, BMI, and SESAC "distribute royalties based, *inter alia*, on data they have obtained from surveys and other third party sources at their own cost." Comments of Radio Broadcasters at 6-7 (citing *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 200-9 CARP DTRA 1&2, Written Rebuttal Testimony of Ronald Gertz, ¶ 12 n.9 (Oct. 4, 2001)) (emphasis added); see also Ryan Underwood, BMI's Move Stirs Up Technology Battle, *Tennessean.com*, Sep. 12, 2005, available at <http://tennessean.com/apps/pbcs.dll/article?AID=/20050912/BUSINESS01/509120345/1044/BUSINESS> (visited Sep. 16, 2005) (describing BMI and ASCAP efforts to acquire and develop monitoring applications to track public performances of musical works).

³⁵ Comments of Radio Broadcasters at 9.

SoundExchange to develop a system that can handle reporting from untold numbers of licensees and unidentified music use processing software programs than for the individual licensees to report the data in a common format. To the contrary, the evidence submitted by SoundExchange indicates that for the automated exchange of data, fixed standards need to be adopted that are agnostic across software platforms. Second, Radio Broadcasters have failed to identify more than three music use processing software programs and the capabilities or limitations of those programs. Without detailed specifications on the different software applications in the market or information on their limitations, the CRB cannot conclude that those applications, either in their current form or through minor modifications, are incapable of providing data in the format proposed by SoundExchange.³⁶ Third, Radio Broadcasters provide no evidence on how easy or complicated it would be for SoundExchange to develop systems capable of receiving reports of use in multiple formats without common standards. That is because, as SoundExchange's sworn evidence shows, those costs would be very substantial.

At bottom, the bulk of the licensees' complaints are based on their claim (which SoundExchange disputes) that there are no tools/software in the marketplace to allow them to report in the manner that SoundExchange has proposed. Even if true (and it is not), that problem will be solved the day the CRB issues rulings that make clear the specific format for reporting. As soon as that occurs, there will be no shortage of available tools being developed for the licensees.

³⁶ Noncommercial entities have also argued that copyright owners and performers should bear the burden of recordkeeping because educational radio stations, staffed by students/volunteers, cannot be burdened with modern reporting requirements. Yet to the extent that campus webcasting is supposed to "develop students' skills in management techniques, programming techniques, applied engineering, music, etc.," it is not credible to claim that basic computer skills – which are prerequisite for other radio jobs – and providing reporting required of commercial stations is not part of their education. See, e.g., <http://www.beaweb.org/04jobs/jobshu.html> (advertisement for general manager position of Seton Hall University radio station describing knowledge of Excel as "essential") (visited Sep. 16, 2005).

III. SPECIFIC FACTUAL QUESTIONS

A. Spreadsheets

SoundExchange has provided detailed information on how spreadsheets can be used to provide reports of use and how easy it is to complete those spreadsheets. Contrary to the unsupported claims of Radio Broadcasters, no one would need to, among other things, “arrange the fields in the required order” or “convert the spreadsheet into ASCII format.”³⁷ The template created by SoundExchange would do that, and licensees would simply need to input identifying information for each sound recording transmitted and provide the other minimal information needed to complete a report of use, such as naming the file with the appropriate information. As SoundExchange has previously explained, this should be easy for anyone simulcasting over the Internet.

B. Commercially Available Software is Either Available or Soon Will be Following the Adoption of Regulations

SoundExchange has long maintained that once format and delivery specifications are established, vendors will develop products that provide reports of use in the required format.³⁸ The comments submitted by Harvard Radio Broadcasting Co., Inc. (“WHRB”) indicate that this is already happening. WHRB identified a company called Spinitron as providing a beta product that allows webcasters to create play logs and, according to WHRB, Spinitron believes it will be able to modify its current beta product to generate reports of use in the proposed format.³⁹ If a two-person outfit such as Spinitron is confident that it can modify a beta product to generate Section 114 reports of use, then it is difficult to imagine that the companies that developed RCS Selector, MusicMaster, and PowerGold could not make similar modifications.

³⁷ Comments of Radio Broadcasters at 14.

³⁸ Comments of RIAA in Docket No. RM 2002-1A at 35 (Apr. 5, 2002); Reply Comments of RIAA in Docket No. RM 2002-1A at 43-45 (Apr. 26, 2002).

³⁹ Supplemental Comments of WHRB at 13.

Similarly, several of DiMA's members are currently providing electronic delivery of reports of use to SoundExchange and those companies must have either developed their own software to generate the reports of use or they are relying upon third-party products. Radioio identifies its own custom-developed software and some of its capabilities but then fails to explain why its software cannot provide reports of use in the format requested by SoundExchange.⁴⁰ Radioio also fails to disclose how long it took and what it cost to develop that custom application.⁴¹

Thus, both the evidence and common sense demonstrate that commercially available tools are currently available and more will be available as soon as the CRB issues regulations.

C. The Development of a Web-Based Reporting Application Would Impose Significant, Additional Costs Upon Copyright Owners and Performers and Should Not be Mandated by the CRB

SoundExchange submitted detailed information on the issues and range of costs involved in developing a web-based reporting application.⁴² No other entity has identified for the CRB the complexity or cost involved in developing such an application. Instead, lawyers have made arguments, unsupported by evidence, that SoundExchange should be able to develop such an application without much difficulty. For example, Radio Broadcasters argue that because BMI has a web-based tool, it must be reasonable for SoundExchange to incur this cost.⁴³ However, Radio Broadcasters failed to introduce any evidence on how much BMI spent to develop its web-based tool although SoundExchange suspects that BMI spent several million dollars. But without evidence as to the actual costs incurred by BMI, the CRB cannot conclude that such

⁴⁰ Comments of Radioio at 5-6.

⁴¹ Although Radioio appears to have the technological capability to generate reports of use, SoundExchange is not aware of any reason why Radioio has failed to pay statutory royalties for any period after September 2004. Because it is still making transmissions of sound recordings but failing to pay royalties, Radioio is likely infringing the copyrights of many different copyright owners.

⁴² See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 7-10.

⁴³ Comments of Radio Broadcasters at 18-19.

expenditures would be reasonable. Radio Broadcasters have also failed to account for the size differences between BMI (which recently announced revenues of more than \$728 million for its most recent fiscal year)⁴⁴ and SoundExchange (an organization that collected only \$19 million in statutory royalties in 2004). Therefore, to look to what BMI has in order to determine what SoundExchange should do is unavailing.

SoundExchange believes the CRB lacks the authority to impose upon copyright owners and performers, or their agent, SoundExchange, the types of expenditures that have likely been incurred by BMI to develop a web-based reporting tool. Moreover, such expenditures, to benefit the licensees, cannot be justified at the current level of statutory royalty payments. Thus, the CRB must reject the suggestion that SoundExchange be compelled to accept the delivery of reports of use via a Web site.

D. The File Naming Protocols Proposed by SoundExchange are Not Burdensome and the CRB Should Adopt a Single Standard for File Naming

As SoundExchange has explained, there is nothing cumbersome about naming a file with start and end dates in the form "DDMMYYYY." However, what is most important is that the CRB adopt a single standard for the reporting of dates by all services providing reports of use under 37 C.F.R. § 270.3, whether that be "DDMMYYYY" or "MMDDYYYY," or even some other format. As Mr. Sleighter explained in his declaration, final regulations cannot allow licensees to provide date ranges in any format they choose.⁴⁵ Such flexibility would impose tremendous burdens on SoundExchange.

⁴⁴ See BMI Posts World's Highest Performing Rights Revenues; Tops \$700 Million-Plus Milestone (Sep. 12, 2005), available at <http://www.bmi.com/news/200509/20050912a.asp> (visited Sep. 14, 2005).

⁴⁵ Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 10.

Because numerous services are already providing reports of use voluntarily using the file naming protocols proposed by SoundExchange⁴⁶ and because no evidence has been submitted to support another naming convention, SoundExchange requests that the CRB adopt the convention proposed by SoundExchange.

E. Providing Reports of Use With Headers

1. *Providing Reports of Use with Headers is Not Burdensome*

SoundExchange created the option for services to provide reports of use with headers at the request of several DiMA members. These companies had requested that SoundExchange accept reports with headers because their inclusion would enable licensees to review the headers in a file and determine the contents of the file. SoundExchange was told that this would help the licensees in managing their own reporting obligations. Without headers, the contents of a file could only be determined by uploading and processing the file or otherwise examining the contents

SoundExchange accommodated this request even though it was not receiving reports with headers from the preexisting subscription services. The preexisting subscription services do not provide any header information in their reports of use, they simply have to provide the data in the order and using the field delimiters and text indicators specified in the regulations.⁴⁷

If services do not want to submit reports with headers, they can choose to provide reports without headers. The option of reports with headers, however, provides greater flexibility for the service. They can choose text indicators and field delimiters provided that such characters do not appear in the reported data for the reasons explained by Mr. Shane Sleighter. But to the extent licensees are claiming that providing reports with headers would be overly burdensome or costly,

⁴⁶ See *id.* at 6.

⁴⁷ See 37 C.F.R. §§ 270.2(e) & (g).

there has been no evidence submitted to support this argument – only argument of counsel. For example, the Radio Broadcasters allege that “[t]here would be significant costs incurred, and no appreciable corresponding benefits, from requiring services to report the first six lines of information set forth in SoundExchange’s proposal” or to provide start and end dates for a data file.⁴⁸ But those burdens and costs are not identified. In fact, one must question the argument of counsel that typing in the (1) name of a service, (2) name of a contact person, (3) street address, (4) city, state, zip, and country, (5) phone and (6) e-mail would be burdensome, particularly where this information could be prepared once and copied to successive reports of use as required.⁴⁹

Further, for services to maintain that the information requested in the first six rows of data can easily be obtained from the Notice of Use of Sound Recordings filed with the Copyright Office is unavailing.⁵⁰ First, licensees are not required to serve a copy of the Notice of Use upon SoundExchange. Second, the first six rows of header information are requested so that a report of use can be tied to a particular licensee with the name of a contact person in the event of a problem. To argue that SoundExchange can obtain the information elsewhere is like saying a taxpayer should not have to include their name, address, and social security number on Internal Revenue Service (“IRS”) Form 1099 because the IRS is already in possession of that information for each taxpayer – or at least for those who previously submitted tax returns. This argument is without merit.

⁴⁸ See Comments of Radio Broadcasters at 27-28; *id.* at 27 (“[T]he labor costs that services would incur from having to insert [first six rows of data] into each and every music use report would be substantial.”).

⁴⁹ Radioio alleged that the inclusion of the limited information requested in rows 1 through 13 “would create massive files.” Comments of Radioio at 3. To test Radioio’s allegation that “massive” files would result from completing the first thirteen rows of information in a file with headers, SoundExchange created an Excel spreadsheet using the name of undersigned counsel and a service name of SoundExchange.com, and also completed the other eleven rows of data as required in a file with headers. The result was a file of less than 13 kilobytes.

⁵⁰ Comments of Radio Broadcasters at 26.

2. *Reports of Use With or Without Headers Cannot Vary in Order*

Radio Broadcasters have argued that there is no need for the regulations to fix the sequence in which data is reported.⁵¹ However, they once again fail to provide any support for this proposition – and certainly not a supporting declaration from an expert software developer. In contrast, the Declaration of Shane Sleighter indicates that “while software is smart enough to know when data fields are in a delimited file, it is not capable of determining what order data is in.”⁵²

As has been noted previously in these Reply Comments, it is not sufficient for licensees to argue that SoundExchange’s system can “readily, and reasonably” be modified to accommodate the various reporting orders and formats that could be utilized by untold numbers of licensees.⁵³ Because licensees have failed to disclose the capabilities of their software, there is no way for the CRB to gauge the cost or amount of work that would be required for SoundExchange to modify its systems to accommodate all of these various systems. There is no doubt that the costs would be substantial.

It is essential that the CRB adopt regulations that fix the order of data to be reported by licensees. While flexibility could be appropriate if reports of use were provided in extensible markup language (“XML”), that format requires a much greater level of sophistication by the licensees,⁵⁴ which the Radio Broadcasters claim does not exist, particularly among those stations still scheduling music in DOS or tracking sound recordings transmitted on note cards.⁵⁵ Further,

⁵¹ See *id.* at 29.

⁵² See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 14.

⁵³ Comments of Radio Broadcasters at 31.

⁵⁴ *Id.* at 14-15

⁵⁵ SoundExchange questions how, on the one hand, noncommercial entities can claim that their student volunteers lack the sophistication to provide reports of use in the format requested by SoundExchange but, on the other hand, propose that the CRB adopt XML, a reporting language requiring a high degree of technical competence, as the format and delivery standard. See Comments of WHRB at 19-20. To the extent some commenting parties believe

XML would still require the development of standards, such as the tags that would identify the data surrounded by the tag.⁵⁶

Radio Broadcasters also allege that “the eleventh and twelfth lines of proposed information (text indicator and field delimiter) should simply be read and identified from the header row or the lines of data themselves, as the field delimiter *will always be the first character* that appears in a row of data and the *text indicator will always be second.*”⁵⁷ As there is no support cited for this statement – which is simply incorrect – we do not know how or why the Radio Broadcasters got this so wrong. However, if data is reported as SoundExchange requested,

```
^NAME OF SERVICE^ ^TRANSMISSION_CATEGORY^ ^FEATURED
ARTIST^ ^SOUND RECORDING TITLE^ ^ISRC^ ^ALBUM TITLE^ ^MARKETING
LABEL^ ^ACTUAL TOTAL PERFORMANCES^ ^AGGREGATE TUNING
HOURS^ ^CHANNEL OR PROGRAM NAME^ ^PLAY FREQUENCY^
```

the first character in the data row would be the carat (^) mark, which could be a text separator, not a field delimiter, but the second character in the data row would be the first character of the name of the service, not a field delimiter.

3. *Field Delimiters and Text Indicators May Vary in a Report With Headers Provided that the Delimiter or Text Indicator Does Not Appear in the Data Reported*

As Mr. Sleighter explained in his declaration, licensees have the flexibility to use delimiters and indicators of their choosing provided that such delimiters and indicators do not appear in the data being reported.⁵⁸ If field delimiters or text indicators were to appear in a data

XML would be a more appropriate reporting format, SoundExchange notes that those advocates have failed to submit to the Copyright Office, the CRB, or SoundExchange any proposed specifications for consideration and review.

⁵⁶ See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 14-15.

⁵⁷ Comments of Radio Broadcasters at 28-29 (emphasis added).

⁵⁸ Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter at 15-20. For example, if Radioio wants to use a delimiter of a double colon “:” (Comments of Radioio at 3) in a file with headers, then SoundExchange

field, however, then SoundExchange's system would read the reported data incorrectly and SoundExchange would not be able to process a log automatically. Also, while Radio Broadcasters say that "[i]t is a *simple matter* for software to locate and recognize the characters used in a particular file as field delimiters and text indicators and to treat them accordingly,"⁵⁹ this is merely the argument of counsel and there is no independent support for this statement. If these solutions were so simple, then one is left to wonder why these *simple solutions* could not be adopted by the licensees.

F. Abbreviations Increase Costs and Inefficiencies in Log Processing

Several licensees have suggested that the use of abbreviations should be permitted and that common abbreviations would not increase the burden on SoundExchange to process reports of use. Radio Broadcasters, for example, suggest that common abbreviations can be easily recognized by SoundExchange's software using "fuzzy" matching.⁶⁰ According to the Web site www.searchenginedictionary.com,

[f]uzzy matching attempts to improve recall by being less strict but without sacrificing relevance. With fuzzy matching the algorithm is designed to find documents containing terms related to the terms used in the query. The assumption is that related words (in the English language) are likely to have the same core and differ at the beginning and/or end. A search for "matching", for example, would also return documents containing match, matched etc. Unfortunately it will also return documents containing unrelated words like matchbox etc.⁶¹

As the above definition indicates, "fuzzy matching" can assist in narrowing potential matches but it will require SoundExchange staff to manually review thousands of data entries to

could receive and process a report with that delimiter provided that the double colon did not appear in any data field. However, contrary to the assertions of WHRB, comma separated values, although widely adopted for certain data reporting, cannot be used in reports of use provided pursuant to Section 114(f)(4)(A) because commas frequently appear in the names of sound recordings, albums or performing artists. See Comments of SoundExchange, Exhibit A, Declaration of Shane Sleighter, at 18-20 & Tabs 2-4.

⁵⁹ Comments of Radio Broadcasters at 31-32 (emphasis added).

⁶⁰ Id. at 35.

⁶¹ <http://www.searchenginedictionary.com/terms-fuzzy-matching.shtml> (visited Sep. 15, 2005).

ensure that fuzzy matches correctly identify the artist or copyright owner to be paid for the performance of a specific recording (e.g., someone would need to manually review the word “matchbox” to delete it as a possible match to the searched term “matching”). Because human intervention decreases processing efficiency and increases costs, SoundExchange questions how a proposal to allow the use of abbreviations can be warranted – particularly when the services will have the product (either physical or digital) identifying without abbreviation the requested information. SoundExchange is simply asking that licensees be required to provide information as it is presented on the product from which they obtain a sound recording. If abbreviations are not used on the underlying product, SoundExchange should not have to guess the abbreviating conventions used by each of thousands of potential statutory licensees.⁶² Similarly, if a sound recording is released with “JR.” as part of an artist’s name, then the service would not be submitting an abbreviation if it submitted “JR.” in its report of use. The regulations should require that services report data as it is displayed on the product from which a sound recording is obtained.

G. Commercial Databases Are Available to Statutory Licensees and the CRB Lacks Authority to Expropriate SoundExchange’s Proprietary Database for the Benefit of Licensees

Not surprisingly, licensees are once again seeking a regulation that compels SoundExchange to turn over all of the data that exists in its proprietary database.⁶³ Although the information stored in SoundExchange’s database, which information was obtained from

⁶² Radio Broadcasters themselves have noted that there are “[t]oo many permutations for rules to anticipate fully all abbreviations.” Comments of Radio Broadcasters at 35.

⁶³ Licensees should be aware that they are frequently in possession of information on new releases far in advance of SoundExchange’s receipt of such information, thus making the SoundExchange database substantially less reliable than might otherwise be expected. In addition, the Section 114 statutory license does not require copyright owners to provide a common agent with identifying information for individual sound recordings. As noted previously, the only reporting obligation Congress has created in Section 114 is for licensees to provide copyright owners with their notice of use of specific sound recordings.

copyright owners, featured recording artists, foreign performing rights societies, and commercial vendors, in addition to raw data contained in reports of use provided by licensees, may contain information of a factual and not proprietary nature, the organization and compilation of the database is proprietary and highly valuable. Therefore, and contrary to WHRB's argument, SoundExchange should not be compelled to make this database available to the public without compensation.

In arguing that SoundExchange should be compelled to provide access to its database, the licensees are essentially saying that services like Lexis and Westlaw must also be compelled to provide free access to their database of court decisions because those decisions are in the public domain. This is an absurd argument when applied to Lexis and Westlaw and is similarly absurd when applied to SoundExchange. The CRB lacks the authority to expropriate SoundExchange's database for the benefit of licensees.

Furthermore, in arguing that access to SoundExchange's database would ease the reporting burden and costs on licensees, the licensees have failed to introduce any evidence (1) supporting their financial claim that their burden would be eased or (2) specifications on how interaction with the SoundExchange database would function.⁶⁴ If the licensees wanted a complete version of the database delivered to them in machine readable form, then they have failed to submit detailed specifications on how that EDI would occur.

In seeking access to SoundExchange's database, the licensees have also failed to disclose to the Copyright Office or the CRB other available resources.⁶⁵ Two of the best known music

⁶⁴ The Radio Broadcasters say that it "would be tremendously useful if [the SoundExchange database] had the ability to 'sync up' with the services' music information databases," but they fail to provide any guidance on how that "syncing up" would occur. Comments of Radio Broadcasters at 36. Unfortunately, the Radio Broadcasters, as usual, make statements but then fail to provide sufficient evidence to evaluate their suggested approach.

⁶⁵ The easiest reference source available to licensees will always be the product from which they obtained the sound recording transmitted under statutory license.

databases are offered by AMG and Gracenote. The AMG allmusic Web site, www.allmusic.com, for example, provides a robust database that is free for noncommercial purposes. But if a service wishes to use the database for commercial purposes, then they must obtain a license and presumably pay a royalty to the owner of the database.⁶⁶ The database of sound recording information offered by Gracenote, www.gracenote.com, reportedly contains 4,025,621 CDs and 51,445,542 songs.⁶⁷ The Gracenote database is free-of-charge for personal and non-commercial use, but may be available as a resource to statutory licensees under a license.⁶⁸ If licensees wish to obtain access to a database of sound recording metadata, then they are free to purchase a license to use commercially available products, just as they purchase licenses for many of their other business needs.⁶⁹ However, they have no right to expect free access to SoundExchange's proprietary database that was built with the royalties that would otherwise have been distributed to copyright owners and performers.

⁶⁶The Frequently Asked Question ("FAQ") section of the All Music Guide database has the following question and answer:

I am interested in using the allmusic content for business purposes.

The AMG Web sites are for non-commercial use only. Per our [Terms of Service](#), any use of the site for commercial purposes is prohibited without prior arrangement. If you are interested in using the site for such purposes, or if you wish to license AMG content databases, please [contact us](#) for further information.

http://www.allmusic.com/cg/amg.dll?p=amg&sql=32:amg/info_pages/a_faq_general.html (visited Sep. 15, 2005).

⁶⁷ See Gracenote Music Search homepage, available at http://www.gracenote.com/prof/music/index_old.html (visited Sep. 15, 2005). Gracenote also appears to offer applications that enable users to create playlists (Gracenote PlaylistSM) and identify music for both CDs and individual music files (Gracenote MusicIDSM). See Exhibit B attached hereto. It would appear as though these applications could assist licensees in providing the reports of use requested by SoundExchange but, again, the licensees have neither identified these applications nor explained why they could not provide the very information the licensees seek to expropriate from SoundExchange.

⁶⁸ See Gracenote FAQ at <http://www.gracenote.com/corporate/FAQs.html> (visited Sep. 15, 2005).

⁶⁹ WHRB identifies a music metadata database offered by MediaUnbound, Inc. See Comments of WHRB at 26, n.21. A review of the website for MediaUnbound, Inc., www.mediaunbound.com, does not indicate the cost for licensing the database but there is no indication that MediaUnbound's AudioInsightTM system is available gratis. If the President and CEO of MediaUnbound, Michael Papish, who also signed WHRB's Supplemental Comments, can demand licensee fees for the use of MediaUnbound's music metadata database, SoundExchange questions how he can in good faith argue for the expropriation of SoundExchange's database when such expropriation would materially benefit his own company. His proposals and motives – and those of WHRB – must be carefully scrutinized.

H. The Delivery of Multiple Data Files is No Longer Feasible

Although SoundExchange had previously proposed to allow services to submit multiple data files per reporting period, the services' vociferous objection to that proposal resulted in SoundExchange's developing systems that required the inclusion of all reporting information by transmission type in a single file. It is therefore unreasonable to compel SoundExchange to incur additional expenses to develop report processing capabilities to handle multiple data files when the services had the option of accepting this method over three years ago but then chose to reject it in an attempt to discredit the RIAA and SoundExchange.

By way of background, SoundExchange⁷⁰ had originally proposed that licensees provide two reports of use for every reporting period: (1) a Playlist Log that would detail the sound recordings transmitted and (2) a Listener Log that would track transmission activity.⁷¹

SoundExchange proposed to overlay the Listener Log, which would not contain personally identifiable information, on the Playlist Log and then determine the amount of listenership for each sound recording transmitted in order to calculate the amount of royalties that should be allocated to each of those recordings. Sound recordings transmitted to more listeners would receive more royalties than those transmitted to fewer listeners.

SoundExchange believed that its proposal for a Listener Log and Playlist Log would alleviate potential burdens on licensees because SoundExchange would incur the time and expense of marrying up data on sound recordings transmitted with the amount of listenership to those recordings. However, even before comments were filed in response to the February 7,

⁷⁰ At the time the petition was filed, SoundExchange was an unincorporated division of the RIAA.

⁷¹ RIAA Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings In Certain Digital Audio Services (May 24, 2001).

2002 NPRM,⁷² SoundExchange received so many complaints from licensees that it abandoned the proposal for a separate Listener Log and Playlist Log. This is why the record of comments filed in response to the February 7, NPRM has licensees objecting to a proposal that SoundExchange simultaneously withdrew.⁷³

In objecting to a Listener Log, licensees complained that it would create additional burdens for them, including having to obtain streaming logs from third parties and providing enormous amounts of data.⁷⁴ According to the Radio Broadcasters, they

[t]ypically use third party services to stream their broadcast programming over the Internet. Most do not receive server records from their respective service providers on a listener-by-listener basis. In response to broadcaster inquiries, these third parties report that such logs may be technically feasible, but would require expensive development work to implement. Of course, Broadcasters would be forced to rely upon the accuracy of third-party data rather than attesting to it themselves.⁷⁵

The Radio Broadcasters are making similar arguments today – but they’ve switched sides and are now *advocating for* a Listener Log. In their most recent comments the Radio Broadcasters said:

It is not only possible, but logical and feasible, for certain categories of data to be submitted in separate files. For example, for services reporting under the ATH option, allowing the separate submission of ATH listener data is a critical element that the format regulations should permit. For radio stations, music playlist data and listener data come from separate and wholly unrelated sources. While playlist data typically is output from a station’s music scheduling software or digital automation system, listener data comes from a station’s stream provider. If radio stations were required to submit these two vastly different types of data in the same file, stations would be forced to add a field to their playlist data and then manually input ATH data into that field, thus significantly increasing their reporting burden.⁷⁶

⁷² Notice of Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002, 67 Fed. Reg. 5761 (Feb. 7, 2002).

⁷³ Compare Joint Comments of Radio Broadcasters in Docket No. RM 2002-1 at 54-55 (Apr. 5, 2002); Comments of Beethoven.com in Docket No. RM 2002-1 at 3-4 (Apr. 5, 2002); Comments of the Electronic Frontier Foundation, the Electronic Privacy Information Center, Fresno Free College Foundation, KFCE (88.1 FM), and KPFA Radio in Docket No. RM 2002-1 at 3 (Apr. 5, 2002) with Comments of RIAA in Docket No. RM 2002-1 at 32-33 & n.7 (Apr. 5, 2002).

⁷⁴ See Joint Comments of Radio Broadcasters in Docket No. RM 2002-1 at 55 (Apr. 5, 2002).

⁷⁵ *Id.*

⁷⁶ Comments of Radio Broadcasters at 38-39.

Although it is not surprising that the Radio Broadcasters changed their position on this issue, they often appear to do so simply to object to any proposal submitted by SoundExchange. If the Radio Broadcasters believe that it is easier for them to provide two data files to create a single report of use for a reporting period, then they should have said that back in 2002 and suggested amendments to the proposal set forth in the Copyright Office's February 7, 2002 NPRM. But for them to object to a proposal of two data reports in 2002 without providing a constructive alternative, remain silent for three years, and now, after SoundExchange has expended several million dollars to develop systems designed to, among other functions, process a single, unified report of use, and propose that licensees be permitted to provide what is akin to a Playlist Log and a Listener Log, raises questions about whether this is in fact a good faith proposal. After all, if the Radio Broadcasters were now advocating the adoption of regulations that permitted the delivery of two reports of use similar to a Playlist Log and a Listener Log, they should have submitted proposed format and delivery specifications for the CRB's and all other interested parties' consideration.

IV. CONCLUSION

After nearly four years, the Copyright Office and the CRB have received proposed format and delivery specifications from only one party – SoundExchange. SoundExchange has endeavored to offer licensees multiple options for fulfilling their statutory obligation of providing reasonable notice of use. In each instance where a dispute has arisen, SoundExchange has provided evidence – not legal argument – for why SoundExchange's proposals should be adopted. The same cannot be said of the statutory licensees. Even at this late date they have failed to offer a single proposal for how data should be formatted and delivered. They simply say that SoundExchange's proposals are not reasonable, too burdensome, and not consistent with current industry practice. However, they offer little if any support for their positions; simply the

argument of counsel. Because SoundExchange has submitted reliable evidence in support of its positions, the CRB should adopt the format and delivery specifications proposed by SoundExchange.

This proceeding has been more than frustrating. The delay in the adoption of complete recordkeeping regulations has harmed artists and copyright owners. Each day that passes without format and delivery regulations means another day that SoundExchange cannot distribute royalties. For the small businesses represented by SoundExchange – and SoundExchange’s constituents are overwhelmingly small businesses – this is unacceptable. Artists and copyright owners already had to accept an imperfect proxy distribution methodology when statutory licensees were permitted to avoid their obligation to provide *any* reports of use for the period October 28, 1998 through March 31, 2004.⁷⁷ And even though licensees had an obligation to maintain records of use as of April 1, 2004 while awaiting the determination of format and delivery specifications, SoundExchange expects to hear licensees complain that they cannot provide any reports for the period April 1, 2004 through the date that the CRB issues format and delivery specifications because they failed to retain such data.⁷⁸ To avoid further harm to artists and copyright owners, SoundExchange respectfully requests that the CRB adopt format and delivery specifications without further delay.

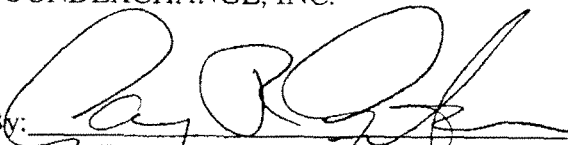
⁷⁷ See Copyright Office Notice of Proposed Rulemaking in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1F, 69 Fed. Reg. 42007, 42008 (July 13, 2004) (“[W]hile the reports of the preexisting subscription services may be a reasonably close approximation of the performances of sound recordings . . . , it is unavoidable that some copyright owners and performers will not receive full compensation for use of their works and others will receive no compensation at all if their works were performed by webcasters but not by any of the preexisting subscription services.”) (emphasis added).

⁷⁸ See *id.* at 42009.

SoundExchange is available to answer any remaining questions the CRB may have.

Respectfully submitted,

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