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RE:

37 CFR Part 370

[Docket No. RM 2008-7]

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

Proposed revisions to interim regulations for filing notice of use and delivery of records of use of sound recordings under two statutory licenses of the Copyright Act.

I. Introductory Statement

My name is Frederick Wilhelms III. I am an attorney who works for recording artists and songwriters. I do not currently have any clients involved in providing digital audio services. My primary goal in submitting this comment is to assure myself, and my clients, that the Copyright Royalty Board (CRB) is taking every appropriate step to see that the proposed rule changes promote the interests of all parties with a legitimate expectation of royalties from the exploitation of their sound recordings by digital audio services.

II. The Need For Census Reporting

As an attorney for individuals and groups entitled to a share of the royalties generated by the licenses covered by these proposed regulations, I am strongly in favor of establishment of rules requiring census reporting by digital audio services. Reliance on sampling to allocate royalties clearly favors artists in the popular mainstream as a class. Artists who are played more often by digital audio services are more likely to appear in sample playlists than ones who appear more infrequently. Sampling does not adequately recognize the value of contributions made by artists intentionally testing the borders of our culture. The fact that a sample may find one or more “representative” artists from the fringes, and overpay them in relation to other artists of their kind does not mean that sampling is fair to all such artists. The wonderfully broad palette of digital audio services now available to listeners provides a way for artists to reach new audiences, and conversely, provides those audiences with a way of finding new and previously unfamiliar artists. Fostering the development of new art requires proper compensation of

those artists creating it. Proper compensation of those artists requires that all their performances be counted.

As the CRB has itself noted in the Notice, "The failure to report the full actual number of performances of a sound recording is at odds with the purpose of the recordkeeping requirement to the extent that, as a result, many sound recordings are under-compensated or not compensated at all from the Section 114 and 112." If census reporting can be done efficiently and effectively, this disparity disappears.

Formal adoption of census reporting by all digital audio services would, in addition, put an end to the fiction that it is already in place. The website of SoundExchange, the only Collective currently recognized under 37 CFR 370, does not acknowledge that they have to rely on sampling, and, in fact, it makes representations to the contrary.

On the SoundExchange website, www.soundexchange.com , the "General Questions" FAQ contains the following question and answer:

"How are royalties distributed to the right person?

All royalties collected by SoundExchange are accompanied by extensive electronic play logs submitted by the statutory licensee, the service offering the digital transmission to consumers. These logs are "matched" to a database of unique sound recording information, which are in turn referenced to an SRCO and featured artist. This allows SoundExchange to accurately match unique performances with record companies and artists, and pay exactly what has been earned. SoundExchange has matched millions of digital performances from play logs submitted by the subscription service."

This is the only reference on the website to the manner in which royalties are allocated. It must be noted that there is no reference to sampling at all, and the opening phrase, "*All royalties collected by SoundExchange are accompanied by extensive electronic play logs submitted by the statutory licensee,"* is not only incorrect, but is patently misleading in disregarding SoundExchange's current reliance on sampling. In a public defense of this language on a music industry message board, John Simson, the Executive Director of SoundExchange pointed to the last sentence as an indication that SoundExchange only receives census data from subscription services, and that the entire answer should be read in that context. Furthermore, he stated that a reader would be aware of the limitation in regard to non-subscription services from the wording that was used in the FAQ. He also noted that SoundExchange filings with the CRB noted the reliance on sampling, which, apparently, was, in his opinion, sufficient notice to artists.

Mr. Simson and other SoundExchange representatives have promised me personally for more than a year to amplify and explain their reliance on sampling on their website. They have not done so. The lack of accurate and publicly accessible information has created unhappiness and cynicism among artists who hear their recordings on digital audio services but discover that these performances have not been captured in the samples used by SoundExchange to allocate royalties. Prompt adoption of full census

reporting will make this a moot problem, subject to resolution of the concerns I raise below.

III. The Reporting Requirements

I am certain that the digital audio service providers will address these specific regulations with far more expertise than I could offer. In seeking advice for this comment from friends who provide such services, I am assured that, with some adjustment, the need for census reporting can be satisfied. Saying that, I do note that the reporting requirement for the "total number of performances during the reporting period" in 370.4 (d) (2) (vi) and (vii) appears to be redundant in light of the fact that all individual performances are being reported separately.

Furthermore, I am also aware that many digital audio services play recordings that do not have an ISRC number or an album or "marketing" title, as required to be reported under 370.4(d)(2)(v). This would clearly apply to streamed extemporaneous or live (in concert or in-studio) performances. This would also appear to be an impossible reporting requirement for services featuring recordings made before the ISRC numbering system was established or appearing on recordings produced by record companies or labels that are no longer in business, either independently or as a subsidiary of another entity. To date, there is no single database of which I am aware by which the provenance of a recording can be clearly established. I believe the rules must be flexible enough to deal with the lack of accurate information when it impinges on what must be reported.

The reporting requirements must also demonstrate flexibility in those circumstances in which formal playlists do not exist at the time of the covered broadcast. While this is most obviously the case with simulcasts of terrestrial radio-originated "request" shows, this spontaneity and serendipity is also a familiar hallmark of much programming on college radio simulcasts. ISRC and "marketing" titles may not be available to the deejay or show programmer, who may have no more information that that normally contained in an mp3 tag, or any assurance that the tag is itself accurate.

I remain certain that common sense will provide workable solutions to what are essentially technical problems. There are also concerns about cost of mechanically collecting and reporting the data, but I believe these can be addressed by the parties directly involved finding a simplified and streamlined process through additional experience and continued experimentation.

IV. Use of the use reports

I am far less confident as to what happens after the use reports are submitted to the Collective, and it is here that I believe that the rights of recording artists are at the greatest risk.

A. The Collective's Obligations

There is nothing in the proposed rules that demands that the Collective be prepared to deal with the increased volume of information that will be created by census reporting. There is nothing to require that the Collective commit adequate resources to see that the appropriate artists are identified, nor is there any requirement that these artists are also located and paid. Because of that, new data collection and reporting regulations could be seen as nothing more than the imposition of an additional burden on digital audio services serving no real purpose.

SoundExchange's history in this regard is not promising.

IN 2002, SoundExchange began collecting money and data relating to digital audio service broadcasts. On September 15, 2006, they publicly admitted that they could not locate over 9,000 artists for whom performances had been reported. The admission, and publication of the list of artists they had been unable to find on the SoundExchange website was done in conjunction with an announcement by SoundExchange that all amounts contributed for performances prior to March 31, 2000 would be subject to forfeit and available for SoundExchange to use in it's general budget after December 15, 2006.[1] The forfeiture was in accordance with a regulation promulgated by the CRB relating to money held and undisbursed for three years. A grassroots effort by people outside SoundExchange was instrumental in removing over 1,500 names from that list by the forfeiture deadline.[2]

Early in 2007, SoundExchange announced a second forfeiture, and updated the list of artists it could not locate to approximately 8,300 individuals and groups.[3] At the time, they claimed they had registered 26,000 artists, which meant they had yet to locate, register and pay one in four recording artists for whom they had received money.

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[1] SoundExchange spokespeople had originally stated that the forfeited money would be paid to artists who had registered, but were forced to retract that statement when it was proven to be untrue.

[2] It must be noted that the SoundExchange list of unregistered artists contains thousands single line items for individual artists and thousands of single line items for group entities. Each group entry represents the rights of multiple individuals SoundExchange has been unable to locate. This means that the number of "artists" SoundExchange admits it has not registered greatly understates the number of individuals who have not been registered and who are not receiving their share of the royalties. From information provided me by a SoundExchange representative, the claimed number of "registered" artists is the total number of individuals who have registered. This leads to a further distortion of the number of actual unregistered artists versus the number of registered artists, as an "unregistered" quartet will only create a single entry on the SoundExchange list, while a "registered" quartet will ordinarily create four separate payment accounts.

[3] SoundExchange made no effort to publicize this forfeiture beyond stating it was going to happen on their own website.

Because SoundExchange could not identify, locate, register, or pay these artists, it resorted to establishing a "reserve" of approximately 40% of the royalty allocation for artists to cover future contingent claims. This arrangement not only deprived the "unlocated" artists of their due, but also eliminated any possibility that the amounts paid to the artists who had registered were in any way based on the actual frequency of the appearance of their recordings on digital audio services. The determination of which artists earned what royalties became, in a very fundamental way, an arbitrary exercise by SoundExchange.

Furthermore, the need for SoundExchange to establish a reserve of millions of dollars was a direct and proximate result of having to rely on sampling of playlists rather than census data, thus illuminating the distance between the SoundExchange FAQ and actual SoundExchange procedure. If SoundExchange actually knew all the artists who were entitled to a share of the royalty revenue and the number of times their recordings were played by the digital audio services, it would be relatively simple to set up an account for each such artist and allocate royalties to each such account based on the proportional airplay their recordings received. A reserve, however, became necessary when SoundExchange lacked information regarding either the identity of the recording artist or the amount of play their recordings received.

In April, 2008, at a talk at Harvard University, John Simson, Executive Director of SoundExchange, claimed that the organization had registered 31,000 artists. However, he acknowledged that there were then 40,000 artists who had not yet been registered. At that time, there were approximately 7,850 artists on the website's list of artists SoundExchange had been unable to find. The "new" 32,000 represented artists for whom royalties were not yet subject to forfeiture. Another short and low-keyed independent effort reduced that number by 300 over the next three months.

In the five months since July, 2008, when the independent effore ended., SoundExchange, left to its own devices to locate people on the unfound artist list, has managed, as of the first week of January, 2009, to remove exactly FIVE artists from the list. There hasn't even been a minimal public relations effort to let people know the list of unfound artists are there. During the same period of time, when SoundExchange sent multiple emails to all the registered artists asking for their support for the "musicFIRST" campaign for a terrestrial radio performance royalty, there was not a single email sent to the registered artists, or any other outreach effort, aimed at finding artists on the list.

This is why I am terribly worried about what will happen if SoundExchange is given census data and expected to do something positive with it. They simply have not proven themselves capable of that, and it doesn't appear as if it is even a priority for them.

Last year, webcasters from Live365, who had contributed greatly to finding and registering those 300 artists on the list, estimated that their service featured recording by over 120,000 different artists in any given year. That evidence is anecdotal, but if it is true, census use reports from Live365 will, all by themselves, triple the number of artists

SoundExchange will have an obligation to find and pay. There is no assurance they will do so. Based on their record, there is a good chance they won't even try hard.

Even worse, there is nothing artists can do to even make them try. Recording artists cannot be members of SoundExchange unless they are also copyright holders. They cannot choose their own representatives on the SoundExchange Board of Directors. In fact, none of the "artist representatives" on that board are currently working as recording artists, and they don't even have the obligation to speak to artists about the decisions they make, supposedly on their behalf. From a comparison of the effort to get registered artist support for the musicFIRST campaign, it is clear that SoundExchange only worries about artists when they can help the organization expand its authority, and not when they have to discharge the duties they already have. In essence, recording artists must rely on "the kindness of strangers" to look out for their interests at SoundExchange. This kind of reliance has rarely worked to their advantage.

In regard to its conduct, SoundExchange is accountable to no one, except the CRB. This is why it is essential that the CRB predicate the regulations regarding submission of census-based use reports on a showing that SoundExchange can not only accept the massive increase in data flow, but can use it effectively and efficiently to meet its obligations to recording artists for whom it collects money.

Artists have nothing else to rely on. There is nothing in the proposed regulations that requires SoundExchange to meet these obligations, and there is no other way for recording artists to make heard their demands that they do.

It is respectfully requested that the CRB suspend implementation of the proposed recordkeeping and reporting rules until SoundExchange openly demonstrates that it is capable of identifying, locating, registering and paying at least 80% of the current load of unfound artists within six months of the date the final rules are promulgated, and 90% of all artists newly reported after that within 60 days of the initial report including those artists.

There is no excuse for SoundExchange's historic failure to meet these obligations. There is no excuse to permit those failures to continue, and to grow to catastrophic proportions. Only the CRB can change this.

B. Access to Use Reports

Proposed regulation 370.5(d) permits sound recording copyright holders to view Reports of Use for the previous three years.[4]

No parallel right of inspection is provided for recording artists.

[4] The proposed regulation stipulates that the inspection will be held without charge "during normal office hours," but it doesn't designate that the inspection are to take place in SoundExchange's office, rather that the copyright holder's office, or anywhere else.

There is no valid reason for this distinction. Reasonable rights must be afforded to recording artists or their representatives to review the Reports of Use that give rise to their rights to a share of the license revenue that passes under those Reports.

A regulation directing SoundExchange to make Reports of Use available for inspection by recording artists under terms and conditions equal to that imposed on sound recording copyright holders would not only be equal treatment, it would address a serious disparity in the current treatment of artists by SoundExchange.

As previously noted, recording artists are expressly excluded from membership in SoundExchange. The only right they have to view SoundExchange's books and records is by invocation of their right to a formal audit.

By all practical measures, this is an empty right, because the costs associated with an audit will undoubtedly greatly exceed any discrepancy likely to be uncovered. SoundExchange itself has stated that the average annual artist royalty is under $400. The hiring of qualified auditors and the time spent reviewing the appropriate books and records by those qualified auditors will certainly be, at a minimum, several times that average. Without having anyone within the organization directly responsible and accountable to artists, there has to be some alternative means of assurance that the Reports of Use being submitted are timely, accurate and complete. The copyright owners have the same need for assurance, and they get it by the proposed regulation granting them access to the Reports. Recording artists deserve no less.

It is respectfully requested that the proposed regulation 370.5(d) be amended to permit recording artists the same rights of inspection of Reports of Use as are granted to copyright holders in the present version.

C. Abuse of Access To Use Reports

Proposed Regulation 370.5(e) requires that copyright holders keep confidential the information contained in the Reports of Use, and to not use the information for purposes other than "royalty collection and distribution." It is acknowledged at the outset that this promise will be difficult to enforce, and it will be even more difficult to detect a breach of confidentiality or a misuse of the information. Be that as it may, the proposed regulation, as it stands, is toothless, as there is no penalty for violation, either negligent or intentional.

It is respectfully requested that the proposed regulation 370.5(e) be amended to include a stated penalty for violation of the confidentiality and use restrictions on access to the Reports of Use. It is suggested that, for the first offense, that a penalty be exacted equal to 75% of the royalty paid to the violator in the previous year, and that for a second offense, the penalty be increased to 100% of the royalty paid in the previous year. Subsequent offenses should result in the offender being denied all access to Reports of Use.

D. Annual Report

Proposed Regulation 370.5 (c) requires that the Collective issue an Annual Report on "how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses."

For recording artists, who are precluded from access to SoundExchange's books and records by their lack of membership in the entity, the elements required by the proposed regulation are woefully insufficient to determine if the organization is keeping its promises to them. The regulations under which SoundExchange currently operates as a Collective do grant individual artists the right to audit

In public comments, John Simson has stated that SoundExchange has a need for transparency in its financial dealings. Unfortunately, the organization has not lived up to his hopes in this regard. In fact, requests for general financial information on behalf of individual artists has been met with resistance, and an assertion that the information requested is "proprietary." This situation does not instill confidence that SoundExchange is keeping the promises it made to conduct itself in the best interests of recording artists in regard to digital audio service royalties.

Furthermore, in these circumstances, the concept of "proprietary" information is totally inaccurate, as SoundExchange has obtained the royalty revenue and the playlist data as an agent for the CRB, which, in turn, is charged with serving the public interest. The data, and the revenue, is not SoundExchange's to own or determine who gets access to it.[5]

At the very least, an annual report from the Collective must disclose the following information:

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1. The number of artists for whom royalties have been collected, both within the past year and cumulatively since inception.

2. The number of artists who have registered in the past year.

3. The current number of artists who have been identified but not yet registered.

4. A detailed explanation of policies and procedures for identifying, locating and registering artists.

[5] Of course, the individual recording artist's access to data does not extend to discovering what payments other individual artists may have earned from, or been paid by, SoundExchange. However, in a circumstance where an artist makes a legitimate case that comparative data is necessary to determine if SoundExchange has paid equivalent artists equally, data, carefully redacted to eliminate the possibility of identification of other artists, should be provided.

5. The total amount of license revenue collected in the past fiscal year.

6. The total amount of payments made to registered copyright holders in the past fiscal year.

7. The total amount of payments made to registered recording artists in the past fiscal year.

8. The total amount of money transferred to the control of AFTRA and AFM for compensation of session musicians and background singers.

9. The amount of any reserve established, previously or in the future, by the Collective to pay future claims, the location of the reserve, and the procedures by which claims against the reserve are proven. In addition, there needs to be a full and separate accounting for any previously established reserve.

10. The amount of money subject to any forfeiture for failure to be claimed under current regulations, and the location of the escrow accounts for those moneys as also required by the current regulations. The annual report should also include a certification from the appropriate authorities at SoundExchange that all regulatory requirements regarding forfeitures, including segregation of the funds, have been complied with.

11. A detailed breakdown of administrative expenses, including any and all amounts expended by SoundExchange on legislative lobbying on issues not related to royalties from digital audio services.

12. A prospective schedule for the next year, giving approximate dates of payments and the reporting periods to be covered.

13. A prospective schedule of all forfeitures for the next year, giving deadline dates, the reporting periods covered by the forfeiture and the number of recording artists affected. The report should also include an explanation of what actions, if any, SoundExchange intends to take to publicize the forfeiture.

None of this information should be considered "proprietary," especially in light of the need for recording artists to be able to determine that SoundExchange is meeting its obligations to them, individually and as a group.

<u>It is respectfully requested that the proposed regulation 370.5(c) be amended to include these specific requirements for any Annual Report issued by the Collective.</u>

V. Summary

The comments above are offered in the sincere hope that they inform and enlighten the Copyright Royalty Board as to some of the defects and deficiencies of the current royalty regime. The intention to move to full census reporting represents an unparalleled opportunity to address these issues before the sheer volume of information created by the proposed changes overwhelms the capacity of the present system.

All artists deserve to be paid all the royalties their recordings earn from the digital audio services. The CRB is the only entity that can assure that happens.

Respectfully submitted,

Frederick Wilhelms III