

Before the  
United States Copyright Royalty Judges  
Copyright Royalty Board  
Library of Congress

Regulation Concerning Proxy Distributions  
for Unmatched Royalties Deposited During  
2010-2018

Docket No. 20-CRB-0007-RM

**COMMENTS OF SOUNDEXCHANGE, INC.**

SoundExchange, Inc. (“SoundExchange”) appreciates the Judges’ taking action on its request for authority to use proxy data to distribute statutory royalties for 2010-2018 in cases in which the licensee never provided a usable report of use. SoundExchange is pleased to provide these Comments in response to the Judges’ notice of proposed rulemaking (“NPRM”). 85 Fed. Reg. 32,323 (May 29, 2020). These Comments provide background concerning SoundExchange’s proposal that is the subject of the NPRM and then address the specific topics concerning which the Judges inquired. For the reasons set forth herein, SoundExchange respectfully requests that the Judges move quickly to adopt the proposed rule.

**I. Background**

As the Judges know well, SoundExchange is a Section 501(c)(6) nonprofit organization that has been appointed repeatedly and consistently by the Copyright Royalty Judges to receive royalty payments, statements of account and reports of use from statutory licensees under Sections 112(e) and 114 of the Copyright Act and distribute such royalty payments to recording artists and copyright owners.

To be able to distribute any particular statutory royalty payment, SoundExchange generally needs three things it is supposed to receive from a statutory licensee: the payment, a statement of account identifying and showing calculation of the payment, and a report of use as

described in Section 370.3 or 370.4 of the Judges’ regulations identifying which of the tens of millions of recordings in existence the licensee used in the transmissions associated with the royalty payment.<sup>1</sup> The report of use is necessary because there is no other source of comprehensive information about all of the transmissions made by the thousands of services that rely on the statutory license; in general, only the licensees know which recordings they used, and how much they used them, during a particular period of time. The report of use is also necessary because the Judges’ rate regulations generally require SoundExchange to distribute statutory royalties to artists and copyright owners “based upon the information provided under the Reports of Use requirements.” 37 C.F.R. § 380.4(a)(1); *accord* 37 C.F.R. §§ 382.5(a), 384.4(g)(1).

However, there have always been some statutory royalty payments for which SoundExchange is never able to obtain a report of use enabling distribution in accordance with those regulations.<sup>2</sup> To be clear, this is a failing of the licensees, not SoundExchange. The Judges’ regulations require that licensees deliver their reports of use to SoundExchange on a prescribed schedule, not that SoundExchange beg and plead with licensees over a period of years in the hope of obtaining data about their use of sound recordings. *E.g.*, 37 C.F.R. §§ 370.3(a), (b), 370.4(a), (c), (e)(3), (e)(4). Nonetheless, and as described further in Part III,

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<sup>1</sup> The exception is certain noncommercial educational webcasters, where the Judges’ regulations authorize distribution based on proxy data in the ordinary course, and no report of use is provided. See 37 C.F.R. §§ 380.22(a), 380.23(g)(1).

<sup>2</sup> SoundExchange generally refers to such situations as ones where it is “missing” a report of use, and it employs that nomenclature in these Comments. In the vast majority of cases, the licensee did not ever provide any submission purporting to be a report of use for the relevant time period. In a small minority of cases the licensee provided a submission that purported to be a report of use for the relevant period, but the file was corrupted, empty, irrelevant, formatted in an unreadable format, or so incomplete that it could not be used to import a material amount of usable usage data. From the perspective of distributing royalties, these situations are functionally the same.

SoundExchange makes very extensive – and largely successful – efforts to try to secure usable reports of use from licensees that do not provide them of their own initiative on a timely basis. However, there eventually comes a time when either (1) SoundExchange has been told by the licensee that the missing data is just not available or (2) it no longer makes sense to invest further resources trying to obtain usage data from licensees that are out of business, unresponsive or otherwise recalcitrant. In such cases, SoundExchange should not be compelled to keep holding the royalties associated with the missing reports of use for years on end. Something else must be done to put the royalties into the hands of artists and rights owners.

Accordingly, in 2011, SoundExchange sought and obtained permission to distribute royalties from 2004-2009 associated with missing reports of use based on usage data reported by the same type of service for the same year (sometimes referred to as the “annual/license type” methodology). 85 Fed. Reg. 32,323; 76 Fed. Reg. 45,695 (Aug. 1, 2011); 37 C.F.R. §§ 370.3(i), 370.4(f). Likewise, in 2013, SoundExchange again sought permission to use proxy data to distribute royalties associated with missing reports of use. 85 Fed. Reg. 32,323 n.3; Petition of SoundExchange, Inc. in Docket No. 14-CRB-0005 RM, at 26-29 (Oct. 21, 2013); *see also* Comments of SoundExchange, Inc. in Docket No. 14-CRB-0005 RM, at 7-12 (June 30, 2014) [hereinafter “2014 Initial Comments”]; Reply Comments of SoundExchange, Inc. in Docket No. 14-CRB-0005 RM, at 51-54 (Sept. 5, 2014) [hereinafter “2014 Reply Comments”].<sup>3</sup> SoundExchange renewed that request in letters to the Judges in 2018 and 2020. Letter from Steven R. Englund, Counsel for SoundExchange, Inc. in Docket No. 14-CRB-0005 RM (Nov. 20, 2018); Letter from Steven R. Englund, Counsel for SoundExchange, Inc. in Docket No. 14-

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<sup>3</sup> All of SoundExchange’s previous filings on this topic cited herein are incorporated by reference in full.

CRB-0005 RM (Apr. 23, 2020) [hereinafter “2020 Letter”]. Finally, SoundExchange has proposed a provision concerning use of proxy data to distribute royalties associated with missing reports of use in the pending *Web V* proceeding. Proposed Rates and Terms of SoundExchange, Inc. and Artist and Copyright Owner Participants in Docket No. 19-CRB-0005-WR (2021-2025), at 4, 15 (Sept. 23, 2019); Written Rebuttal Testimony of Travis Ploeger in Docket No. 19-CRB-0005-WR (2021-2025), ¶ 77, App. A ¶¶ 72-80 (Jan. 9, 2020).

As the NPRM observed, SoundExchange’s 2013 proposal (like its *Web V* proposal) would have applied on an ongoing basis and given its Board of Directors flexibility to choose to employ a proxy data set different from the annual/license type data used for the 2004-2009 usage. 85 Fed. Reg. 32,323 n.3. SoundExchange continues to believe that such a proposal is well-justified. Almost 25 years of history under the statutory licenses have demonstrated that SoundExchange will never be able to obtain actual usage data for distribution of every last cent of statutory royalty payments. As surely as the sun rises, there will be missing reports of use for 2019 and subsequent years for which the associated royalties will not be addressed by the approach set forth in the NPRM, and that will instead have to be addressed by the Judges at some point in the future.

Further, as SoundExchange has explained, there may be “technical reasons [that would] militate against using the Annual/License Type methodology.” 2014 Initial Comments at 9. Thus, a “reasoned analysis” might well lead to an “informed, data-driven judgment” that an alternative approach would better approximate the actual usage that was likely involved or otherwise be preferable to an annual/license type approach for some royalties. *Id.* at 10-11. However, the annual/license type approach is a reasonable option for the 2010-2018 royalties SoundExchange is currently holding due to missing reports of use. Faced with a coronavirus

pandemic that has had devastating effects on performing artists, SoundExchange decided to see if the Judges were more receptive to a repeat of the 2011 process as a way of allowing the held royalties to flow to artists and rights owners. *See generally* 2020 Letter.

It is important to note that SoundExchange has always been the most outspoken advocate for distributing statutory royalties based on actual, comprehensive usage data whenever that is practicable. *E.g.*, 2014 Reply Comments, at 88-89 (arguing against sample reporting proposal from radio broadcasters); Comments of SoundExchange, Inc. in Docket No. RM 2008-7, at 3-8 (Jan. 29, 2009) (advocating for census reporting); 69 Fed. Reg. 11,515, 11,521-22 (Mar. 11, 2004) (describing Copyright Office decision to initially implement sample reporting over SoundExchange’s objection). However, when that is not practicable, it is a routine feature of collective administration of copyrights to use data other than the actual, comprehensive usage data corresponding to a particular royalty payment to distribute royalties:

- Section 115(d)(3)(J) specifies that the new mechanical licensing collective is to distribute unclaimed accrued royalties based on copyright owner market share data for similar activity for the relevant period, which is essentially the methodology proposed in the NPRM.
- The Judges’ regulations provide noncommercial educational webcasters an option to pay a \$100 fee in lieu of providing reports of use, and have their royalties distributed based on proxy data. 37 C.F.R. §§ 380.22(a), 380.23(g)(1). All but a relative handful of noncommercial educational webcasters choose this option.
- The Judges’ regulations permit “eligible minimum fee webcasters” to report usage for only two weeks per quarter. 37 C.F.R. § 370.4(d)(3)(ii). Those weeks of usage serve

as a proxy for distributing royalties associated with usage during the other eleven weeks of usage in the quarter.

- For the period 1998-2004, when only the preexisting subscription services provided reports of use to SoundExchange, the Copyright Office authorized SoundExchange to use that data as a proxy to distribute royalties for other types of services for the period from 1998 through 2004. 69 Fed. Reg. 58,261 (Sept. 30, 2004).
- In the U.S. and around the world, performing rights organizations other than SoundExchange regularly use sampling and proxy methodologies to distribute pools of royalties. *See, e.g.,* Susan P. Butler, Collective Rights Management Practices Around the World 4, 10-11 (Apr. 2020), *available at* <https://www.copyright.gov/policy/unclaimed-royalties/cmo-full-report.pdf>.

As a result of its efforts to secure missing reports of use, SoundExchange has always been able to reduce the royalties it is holding due to missing reports of use to a small portion of total royalties paid. Currently, SoundExchange is holding about \$30 million in statutory royalties for 2010-2018 due to missing reports of use. While that is a large number in absolute terms, SoundExchange's efforts have driven that number down to a historically small sliver of overall payments, representing less than 1% of total statutory royalty payments for that period. For comparison, when the Judges authorized SoundExchange to use proxy data to distribute about \$20 million in statutory royalties from 2004-2009 that were being held due to missing reports of use, that constituted about 3% of total royalty payments for the period. 76 Fed. Reg. at 45,696. At the time, the Judges observed that that constituted "a small percentage of royalties for the relevant time period." *Id.*

SoundExchange is grateful to the Judges for taking action to permit distribution of the 2010-2018 royalties it has been holding due to missing reports of use. SoundExchange urges the Judges to move quickly to adopt the proposed rule.

## **II. Permissive Proxy Distribution Is Appropriate**

In addition to extending the time periods in Section 370.3(i) and 370.4(f) as SoundExchange proposed, the Judges have also proposed replacing the current mandatory language of those provisions (the word “shall”) with permissive language that would merely *allow* SoundExchange to use proxy data to distribute the relevant royalties (the word “may”). The Judges’ first specific inquiry seeks comment on the propriety of the proposed change.

As a conceptual matter, SoundExchange agrees that “may” is a better choice of words for these provisions. As described above, it is always SoundExchange’s desire to distribute statutory royalties based on actual, comprehensive usage data whenever that is practicable.

SoundExchange would not want to be compelled to use proxy data to distribute statutory royalties if it thought that it might be practicable to obtain actual usage data corresponding to those royalties. Accordingly, SoundExchange believes that the change is appropriate, and welcomes it.

However, SoundExchange feels obligated to note that in the context of this proceeding, the proposed change from “shall” to “may” is unlikely to have any practical effect. As was the case in the 2011 proceeding, the royalties that would be addressed by the rule proposed in the NPRM are for usage during periods that are at least a year and a half ago. From there, the royalties extend back in time to usage that occurred more than a decade ago. The reason for SoundExchange’s increasingly-frequent pleas for authorization to use proxy data to distribute these royalties is that there is nothing more that it makes sense to do to try to obtain actual usage

data corresponding to these royalties. Accordingly, if the Judges adopt the proposed rule – and SoundExchange hopes the Judges will do so quickly – it is SoundExchange’s desire to distribute these royalties using proxy data as soon as arrangements can be made to do that.

### **III. SoundExchange Has Exhausted All Reasonable Means to Obtain Missing Reports**

The Judges’ second specific inquiry seeks comment on whether SoundExchange has “exhausted all reasonable means to ensure that all undistributed royalties for the period from 2010 through 2018, have been distributed to the party that earned those royalties.” The Judges also ask “[i]f not, what other means could SoundExchange use to facilitate further distributions without resorting to proxy reports of use?” Assuming that SoundExchange understands the first question correctly, the answer is “yes.”

We equivocate only because the Judges’ first question refers to “undistributed royalties” that “have been distributed.” To be clear, the reason SoundExchange proposes to use proxy data to distribute the royalties that are the subject of this proceeding is because those royalties have *not* been distributed and are not distributable. SoundExchange is holding those royalties because it has no useful information about what recordings the licensee used during the relevant time period, and hence no information about who actually may have earned the royalties.<sup>4</sup> In such cases, SoundExchange interprets the Judges’ regulations as requiring it to hold such royalties until it obtains reports of use. We understand the Judges’ question as getting at whether SoundExchange has exhausted all reasonable means to obtain actual usage data that would allow it to distribute the relevant royalties to the parties that actually earned those royalties, rather than

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<sup>4</sup> Thus, the pool of royalties that is the subject of this proceeding is distinct from royalties associated with usage for which SoundExchange has received a report of use that can be processed, but for which some part of the royalties cannot be distributed due to an inability to identify or locate the artist or copyright owner. Those royalties are handled in accordance with the Judges’ regulations concerning unclaimed funds. *E.g.*, 37 C.F.R. §§ 380.4(b), 382.5(b).



relying on proxy data as a substitute for actual usage data. The answer to that question is an emphatic “yes.” As SoundExchange observed in 2014, “[i]n general, proxy distribution is not a desirable substitute for having actual usage data on which to base distributions to artists and copyright owners.” 2014 Reply Comments, at 51. For that reason, SoundExchange always desires – and works hard – to obtain actual usage data when that is practicable.

As a threshold matter, not only do the Judges’ regulations generally require SoundExchange to use reports of use provided by the licensees that made the transmissions (as opposed to some other data source) for royalty distribution purposes, but reports of use are the *only possible* source of actual usage data that would enable a precise distribution. Digital music services do not generally publish their playlists, which is why the Judges’ regulations require SoundExchange to treat reports of use as confidential. *See* 37 C.F.R. §§ 370.3(g), 370.4(d)(5), 370.5(e). Even when services publish some playlist information – as in the case of some radio stations that post playlists on their websites – the information they make available at any particular point in time tends to be current (*e.g.*, for yesterday and earlier today, not for periods relevant to overdue reports of use). Further, they do not provide information about the extent of webcast listenership as required by the Judges’ report of use regulations and as necessary to fairly weight distributions. *See* 37 C.F.R. § 370.4(d)(2)(vi), (vii). While third party media monitoring services like Mediabase and BDSradio have historical playlist information for some services (mostly radio broadcasters), that information is far from comprehensive in its coverage of services relying on the statutory licenses and again does not reflect actual webcast listenership. Thus, when faced with a licensee that will not provide a report of use, there is no reference source SoundExchange could consult that would provide a reasonable alternative to reports of use or proxy data for distributing the held royalties based on actual usage.

Given that, the Judges' question boils down to whether SoundExchange has tried hard enough to secure the missing reports of use from the licenses that failed to provide them when due. SoundExchange makes very extensive efforts to obtain those reports of use.

Those efforts start before the reports of use are even due. SoundExchange sends representatives to conferences for broadcasters and other webcasting services (such as the NAB Show, the NAB's Radio Show, the Hispanic Radio Conference and the National Religious Broadcasters' International Christian Media Convention) in order to explain the statutory license's requirements, including what to include on reports of use and how to submit them and stay in compliance with the statutory license. These efforts also help recover missing reports of use from licensees who were unsure how and what to report.

At the end of each year, SoundExchange sends licensees a memo announcing the royalty rates for the coming year and reminding them of what they are required to submit under the statutory license. SoundExchange has long published quarterly newsletters for licensees with reminders of upcoming deadlines. More recently, SoundExchange has sent monthly automated emails reminding licensees of upcoming payment and reporting deadlines. In addition, any licensee who logs into SoundExchange's Licensee Direct portal (as most licensees now do on a regular basis) will see a display of upcoming reporting deadlines.

Once a licensee misses a deadline, SoundExchange takes every opportunity to remind the licensee of the missing item. Licensees who use SoundExchange's Licensee Direct portal (most licensees) are presented with a list of their missing submissions each time they log in to Licensee Direct. Also, if a licensee calls SoundExchange's customer service telephone number for any reason at all, software will present SoundExchange's service representative with a list of the

licensee's missing submissions, and the representative will raise the missing submissions with the licensee while the licensee is on the phone.

SoundExchange has also had ongoing programs for specific follow-up concerning missing submissions, the details of which have evolved over time to respond to the behavior of licensees. Several years ago, SoundExchange's License Management Department undertook a comprehensive review of its records concerning all recently-active licensees to make sure it had identified all missing submissions and tried to contact licensees to obtain them. Since then, any missing or unusable report of use will result in automatic generation of a case docketed for follow-up by SoundExchange's License Management Department, which will in turn result in an email being sent to the licensee's contact requesting the missing item. So long as the case remains open, SoundExchange's License Management Department will continue to inquire periodically as it works open cases on a licensee-by-licensee basis. Through December 2019, SoundExchange's License Management Department has tracked 8381 emails sent to licensees requesting missing submissions, and SoundExchange sent thousands more emails requesting missing items for the period starting in 2010 before it started comprehensively tracking such emails.

SoundExchange has an escalation process for addressing licensees that have been contacted repeatedly by its License Management Department about missing submissions without a definitive resolution. Once a case is escalated, the licensee will receive a formal letter from SoundExchange's Licensing & Enforcement Department by email. If that does not result in a response, the licensee will receive a second and third notice, each accompanied by an effort to contact the licensee by telephone. If the licensee engages with SoundExchange to address its missing submissions, the licensee will receive monthly checklists by email until the matter is

resolved. However, if the licensee becomes unresponsive or does not make reasonable progress towards a resolution, it too will receive a second and third notice, each accompanied by an effort to contact the licensee by telephone. All licensees with outstanding submissions should receive a final notice within five months after the initial Enforcement Department letter was sent, regardless of responsiveness in the interim. Generally, the licensee should have received at least six emails and two calls before the end of this process (and often there will have been additional efforts at outreach). If that still does not result in a resolution, SoundExchange refers selected cases to outside counsel for resolution, when the cost can be justified. Through this process, SoundExchange's Licensing & Enforcement Department has recovered 4,799 missing reports of use corresponding to over \$10 million in royalties that otherwise would have been subject to this proxy request.

After having gone through all these efforts, there are many cases in which SoundExchange has been told by the licensee in no uncertain terms that it does not have actual usage data for the period corresponding to a missing report of use. At this point, it does not make sense to go back years later to ask whether they are really sure about that. SoundExchange's experience has been that the passage of time does not make it easier to track down missing usage data. In some cases the licensee has gone out of business – often years ago. There is nobody left to call to try to get a missing report of use and almost certainly no extant records of usage. Even in the cases where SoundExchange does not know that the missing data is unavailable to the licensee, licensees who failed to provide missing reports have by this point been bombarded with requests for them over a period of years. There is absolutely no reason to think that one more call or email will cause them suddenly to find years-old data that they have been avoiding the delivery of while dodging repeated requests for it. Further, it would be

extremely time-consuming and expensive to mount another comprehensive effort to obtain the missing reports of use, since there are tens of thousands of them, owed by thousands of licensees.

The numbers establish that SoundExchange has been extremely effective at reducing the royalties being held due to missing reports of use to a bare minimum. For 2010-2018, they constitute less than 1% of total statutory royalty payments. Artists and copyright owners should not have to wait for further process before this money is distributed, and they should not be required to pay for further efforts that are unlikely to be fruitful.<sup>5</sup>

#### **IV. Use of the Annual/License Type Method Is a Reasonable Option Here**

The Judges' final specific inquiry seeks comment on whether the annual/license type proxy distribution methodology in Sections 370.3(i) and 370.4(f) is an appropriate means of distributing the 2010-2018 royalties being held due to missing reports of use. No proxy data set will perfectly reflect actual usage, but as described above, use of some proxy data set is necessary to get these royalties into the hands of artists and copyright owners. Use of the annual/license type approach is reasonable, and probably the best option for this pool of royalties.

As SoundExchange explained in 2014, selection of a proxy is a technical issue involving identification of a data set that is available and likely to be reasonably representative of the usage in the missing reports. 2014 Initial Comments at 8-11. Here, almost all of the held royalties are webcasting royalties, and they were paid by thousands of webcasters.

The defining characteristic of the annual/license type approach is that it results in an extremely broad distribution, particularly as applied to webcasting royalties. Given the number

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<sup>5</sup> Artists and sound recording copyright owners pay the costs of SoundExchange's operations, including its efforts to secure missing reports of use, through deductions from their royalty distributions. 17 U.S.C. § 114(g)(3).

of licensees and missing reports of use involved, a broad distribution seems appropriate. Use of the annual/license type approach means that tens of thousands of payees who received webcasting royalties for 2010-2018 will receive a special distribution that is a small fraction of the webcasting royalties they previously received for that period. It is likely that everyone or almost everyone whose recording was used to generate held royalties will receive something from this process. And while achieving that effect will probably result in paying some artists and copyright owners whose works were *not* included in the missing usage, SoundExchange's statistical analyses of the annual/license type approach have found that it results in a percentage distribution of royalties to both higher- and lower-paid artists and copyright owners that is generally consistent with reported usage by services with diverse levels of music usage. In any event, SoundExchange is not aware of any available proxy data set would clearly be a better fit for this particular pool of royalties. In the absence of an alternative that would be demonstrably fairer, SoundExchange believes that the annual/license type approach is the best option for this distribution.

### **Conclusion**

SoundExchange appreciates the opportunity to provide these Comments and respectfully requests that the Judges move quickly to adopt the proposed rule.

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Respectfully submitted,

/s/ Steven R. Englund

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