ORIGINAL

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

In the Matter of	)	
Digital Performance Right in Sound Recordings Rate Adjustment	)	Docket No. 2002-1 CARP DTRA 3 2000-2 CARP DTNSRA

RESPONSE OF ROYALTY LOGIC, INC. TO SOUNDEXCHANGE MOTION FOR DECLARATORY RULING

Royalty Logic, Inc. ("RLI") hereby responds to SoundExchange, Inc.'s ("SoundExchange") motion for a "declaratory ruling." In most respects, SoundExchange asks the Copyright Office to knock down a strawman – to affirm legal principles and standards that are not in dispute in this proceeding. In other respects, SoundExchange effectively requests prejudgment as to the weight that should be accorded sight-unseen to particular fact-based arguments, before contrary arguments and any underlying facts have an opportunity to be considered. Indeed, much of the "substance" of the SoundExchange motion is its effort to expand comments made by the Register in a footnote to the Librarian's decision in *Webcasters I*[1] into a statement of legal authority governing this and, presumably, all future CARP cases. In all respects, the "Motion for Declaratory Ruling" should be denied.

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[1] *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, 67 Fed. Reg. 45239 (July 8, 2002).

I. There is No Dispute as to Many of the Fundamental Legal Issues in this Proceeding.

As an initial matter, RLI believes it would be useful to clarify what is not in dispute in this proceeding and, at the same time, to debunk certain of the rather one-sided assertions upon which the SoundExchange motion is falsely premised.

1. ***SoundExchange does not represent the interests of all copyright owners and performers entitled to receive royalties from the performance of their works by webcasters operating under the statutory license.*** This fact is particularly important in light of SoundExchange's attempts to pretend that RLI represents the interests of only one copyright owner and performer. SoundExchange knows full well that RLI has submitted in its direct case examples of executed affiliation agreements with other sound recording copyright owners, including sound recordings of multi-platinum performers, stars of jazz, country, rock, hip-hop and reggae, classical musicians, and many other Billboard-charted artists.[2] Thus, although Mr. Chambers is a "named party" to this proceeding, and has designated RLI as his agent for the collection of his statutory performance royalties, this proceeding is not merely about the objection of one person; it is about the rights of all performers and copyright owners that have designated and, during the license period, may designate RLI in order to have a meaningful choice of representation with respect to an important element of their income stream.

2. ***RLI was appointed by the Librarian of Congress in Webcasters I as one of two Designated Agents for the distribution of royalties paid under the Section 114 statutory license for the digital transmission of sound recordings by Eligible Nonsubscription Services.*** See 37 C.F.R. §261.4(b). This also is important because SoundExchange suggests that the only reason for

[2] Moreover, RLI's list of affiliates is growing rapidly. Since the submission of direct cases, RLI has added copyright owners of thousands of childrens recordings and Spanish language recordings that are being performed by eligible services every day.

this proceeding is Mr. Chambers's objection. One could more persuasively demonstrate that the only reason for this proceeding is that RIAA, through a private deal with licensees that have no specific interest in who distributes the royalties they pay,[3] excluded RLI from and intentionally did not inform RLI of those negotiations; excluded or, at the very least, did not consult with all copyright owners and performers entitled to compensation during the course of those secret negotiations; then, through that private settlement, anointed SoundExchange as the exclusive agent and, thus, attempted to stifle future competition from RLI, on behalf of its copyright owners and performer affiliates. Had RIAA not unilaterally changed the status quo, the interests of all copyright owners and performing artists would have been properly served and there would have been no need for a CARP.

3. ***RLI was designated as a second Designated Agent in Webcasters I with the express agreement of RIAA and SoundExchange.*** Pursuant to a settlement agreement between RIAA, AFTRA and AF of M on the one hand and the webcasters and broadcasters on the other, the CARP Panel designated RLI and SoundExchange as Designated Agents, which decision the Librarian upheld in his Determination. Having knowingly, willingly and voluntarily accepted, first, the two-tier Receiving Agent/Designated Agent structure and, second, the designation of RLI as a second Designated Agent, SoundExchange cannot credibly argue that it is not feasible to implement such a system at an acceptable cost.[4] Indeed, undoubtedly the cost of this CARP to SoundExchange and its members will exceed several times over SoundExchange's own estimates of the costs of accommodating competition – costs that SoundExchange would have

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[3] *Webcasters I*, 67 Fed. Reg. at 45267 (July 8, 2002).

[4] Moreover, SoundExchange adopted the two tier – two agent model for the regulations covering the current statutory license period in the event that SoundExchange were to break into two Designated Agents (one for copyright owners and one for performers). SoundExchange only recently abandoned this proposed regulation as it severed certain ties to the RIAA.

the right to recoup against royalties due RLI affiliates should they not have the practical ability to exercise their right to designate another fully competitive agent and avoid such costs.

4. ***Sections 112(e) and 114(e) and the Librarian's own ruling permit the designation by copyright owners and performers of more than one agent with respect to the collection, allocation and distribution of statutory royalties.*** Section 112(e)(2) provides that "any copyright owners of sound recordings...may designate common agents to negotiate, agree to, pay, or receive...royalty payments." Similarly, section 114(e)(1) states that "in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments." The Librarian of Congress specifically extended to featured performers, as well, this fundamental right to choose the agent that will represent them.[5]

5. ***The Small Webcaster Settlement Act of 2002 permits both copyright owners and performers to elect to receive royalties from a Designated Agent other than SoundExchange and, in the case of a for profit Designated Agent, entitles such copyright owners and performers to not have SoundExchange deduct its licensing and litigation costs from their royalty shares.*** When Congress passed the Small Webcaster Settlement Act of 2002 ("SWSA")

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[5] "As the Panel acknowledged, 'Copyright owners *and performers,* on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates.' Report at 132 (emphasis added). The Register agrees. It was arbitrary to permit Copyright Owners to make an election that Performers are not permitted to make. The Register can conceive of no reason why Performers should not be given the same choice. Accordingly, the Register recommends that § 261.4 be amended to provide that a Copyright Owner or a Performer may

it permitted a nonprofit agent (*i.e.,* SoundExchange) to deduct certain costs from royalties to be distributed under the statutory license. These costs included licensing, historical litigation and other costs that the Librarian of Congress previously had not permitted SoundExchange (or its predecessor AARC) to deduct. Concurrent with that change, however, Congress created an exemption specifically prohibiting SoundExchange from deducting royalties payable to copyright owners and performers that choose to affiliate with a competing for profit Designated Agent for the collection and distribution of statutory royalties.[6]

New Section 114(g)(3) reflects two important policies relevant to this proceeding. First, Congress not only provided that more than one entity could serve as a Designated Agent in competition with SoundExchange, as they already had done in sections 112(e) and 114(e); Congress explicitly acknowledged that competition among agents that administer the royalties would be beneficial.[7] Furthermore, the benefits of competition were recognized regardless of whether such agents are organized as for profit or not for profit entities.[8]

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make such an election. *See* § 261.4(c) of the recommended regulatory text." *Webcasters I,* 67 Fed. Reg. at 45271 (July 8, 2002).

[6] Section 114(g)(3) provides: "A nonprofit agent designated to distribute receipts...may deduct...prior to the distribution of such receipts to any person...*other than copyright owners and performers who have elected to receive royalties from another designated agent* and have notified such nonprofit agent in writing of such election, the reasonable costs of such agent..." (Emphasis added.)

[7] "The deductibility provision contained in...the bill is one that was viewed as important to several parties. The final provision is ***intended to encourage competition among agents designated to distribute royalties***." 107 Cong. Rec. S11549 (daily ed. Nov. 19, 2002) (statement of Sen. Helms) (emphasis added).

[8] "Under H.R. 5469 as originally passed by the House, SoundExchange, the non-profit entity which collects and distributes royalties owed copyright holders, is permitted to deduct its operating and legal expenses from collected fees. The substitute retains this feature and ***also permits any other for-profit entity designated as an agent by the affected copyright holders*** to deduct its expenses in the same manner." 108 Cong. Rec. H8996 (daily ed. Nov. 14, 2002) (statement of Rep. Sensenbrenner, Chairman of the House Committee on the Judiciary) (emphasis added). Thus, the SWSA retained the principle that any other for-profit entity could be

Second, while Congress acceded to SoundExchange's request to deduct CARP and other costs from the royalties payable to SoundExchange members, Congress specifically prohibited SoundExchange from deducting those costs from royalties payable to copyright owners and performers affiliated with a competing agent with respect to the distribution of royalties.

Thus, it is undisputed that Congress, with knowledge that the regulatory scheme had already designated two "Designated Agents" and that the Librarian had extended the right to choose a designated agent to performers as well as copyright owners, codified the ability to choose among competing agents; provided that performers and copyright owners have the ability to designate an agent other than SoundExchange; and permitted through that election copyright owners and performers to avoid the recoupment by SoundExchange of historical litigation and other costs from their royalties. [9]

6. ***In the absence of a voluntary settlement providing for multiple designated agents, the procedure to obtain Designated Agent status is through a CARP determination.*** The applicable regulations provide: "A *Collective* is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) and adopted pursuant to 37 C.F.R. 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f)." 37 C.F.R.

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designated as an agent by the affected right holders, even without designation by regulation, and that such right holders would be entitled to receive their royalty payments without prior deductions by SoundExchange.

[9] What appears to remain in dispute in this proceeding is whether these grants by Congress created an absolute right for copyright owners and performers to designate, through negotiations or the CARP process, a competing agent; and, if that right is not absolute, under what circumstances may the Librarian negate the right of certain individual copyright owners for the benefit of others. This dispute, and in particular the reasons why this dispute merit the denial of the instant motion, will be discussed, *infra*, at II.

§201.37(b)(1). The Register of Copyrights found in this proceeding that Lester Chambers, a copyright owner and performer affiliate of RLI, had demonstrated a "significant interest" in the outcome of the current proceeding to require that the Librarian convene a CARP to settle the disputed issues rather than to adopt the rates and terms in the proposed settlement.[10] Furthermore, the Register ruled: "Because the law gives a copyright owner or performer a potential choice among Designated Agents and a means to avoid certain deductions, a copyright owner or performer who wishes to argue for the designation of a second agent ***has the right to seek an alternative designation in the only forum available to him at this stage of the proceeding***."[11] (Emphasis added.)

Indeed, although Mr. Chambers' objections are representative of the position of other RLI copyright owner and performer affiliates, the Copyright Office ordered a CARP on the strength of Lester Chambers' objection alone, stating in its Order of August 18, 2003: "The fact that most copyright owners and performers have not objected to the single Designated Agent named in the proposed agreement is no reason to impose that choice on others who have a right to make an alternative choice and avoid certain costs." Thus, indisputably, the Librarian has the right and the authority to impose terms and conditions upon the majority of copyright owners and performers in order to safeguard the rights of the minority. *See also, Recording Indus. Ass'n of Am. v. Librarian of Congress*, 176 F.3d 528, 535 (D.C. Cir. 1999) (Librarian has the authority,

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[10] "Chambers opposes the provisions in the proposed agreement that name SoundExchange as the sole Designated Agent because it would allow SoundExchange to deduct the maximum amount of costs allowable under the law, see 17 U.S.C. § 114(g)(3), without prior approval. For this reason, Chambers seeks to have another agent, RLI, named as a Designated Agent. Chambers clearly has a significant interest in being able to elect to receive his royalties from a Designated Agent other than the single agent designated in the proposed agreement." August 18, 2003 Order of the Copyright Office.

[11] *Id.*, at 4.

over RIAA objection, to impose terms that allocate royalty funds to copyright owners and performers that are not represented by RIAA).

7. ***Absent designation by the Librarian at this stage of the proceedings, SoundExchange will effectively deny RLI the ability to adequately represent its affiliates, and SoundExchange will take from the royalties due the copyright owners and performers represented by RLI, deductions that otherwise could not be taken under the SWSA.*** In correspondence with RLI, acting as representative of Lester Chambers and other sound recording copyright owners, SoundExchange has taken the position that the §114(g)(3) prohibition against deduction of licensing and litigation costs from copyright owners and performers that utilize RLI will only apply to a "Designated Agent" so appointed under the Copyright Office regulations. *See* July 9, 2003, Letter of John Simson to Ronald Gertz, Exhibit 1 hereto ("any distributions made by SoundExchange on behalf of those owners or artists shall be made to RLI ***net of any deductions that SoundExchange may be able to take under governing law or regulations.***" (Emphasis added)). Similarly, SoundExchange and at least one major transmission service have taken the position that proposed regulations do not entitle RLI to access documents that are integral to its ability to represent its affiliates (such as statements of account and records of use) unless RLI is appointed as a Designated Agent. While RLI does not concede that these positions have any foundation in the law, designation of RLI as a "Designated Agent" in this proceeding will resolve any doubt and ensure that SoundExchange does not deny RLI's affiliates their statutory rights to full representation using the agent of their choice, and to full royalties without deductions.

8. ***This proceeding is governed by the "willing buyer/willing seller" standard governing CARP arbitrations under sections 112(e) and 114(f).*** RLI in its Direct Case has stated that the evidence supports designation of RLI under that standard, and accepts that Congress intended that standard to apply to all aspects of CARP proceedings conducted under those sections.

10. ***Lester Chambers, and the other sound recording copyright owners and performers represented by RLI in this proceeding, are "willing sellers."*** Every copyright owner and performer that is entitled to be a beneficiary of the statutory license has the right to enter into license agreements with willing sellers. Perforce, all beneficiaries who have elected to receive distributions through RLI are "willing sellers" for purposes of this proceeding.

11. ***In this proceeding, the "willing buyer" is irrelevant.*** The typical buyer for purposes of this proceeding would include licensees under the statutory licenses. However, as the Librarian noted in *Webcasters I*, the interests of those licensees are to be discounted with respect to the services to be provided by a Designated Agent: "the Panel reasoned that the Services had no real stake in deciding this issue because their responsibilities and direct interest end with the payment of the royalty fees to the Receiving Agent." *Webcasters I*, 67 Fed. Reg. at 45267 (July 8, 2002). Because this proceeding solely pertains to the designation of a Designated Agent, the "willing buyer" has no interest or stake in its outcome and, hence, is irrelevant for purposes of this proceeding.

12. ***The best evidence of the terms that most clearly represent the terms of agreement acceptable to a willing seller is found in the terms of actual marketplace agreements.*** RIAA, AF of M and AFTRA have made this argument in prior proceedings, and we presume they would stand by it here.

13. ***Willing sellers have agreed to use SoundExchange and RLI as their Designated Agents.*** That was the clear import of the finding by the Librarian in *Webcasters I*, at a time when RLI had an expectation of members rather than actual members. Now that such agreements in fact have been executed in the marketplace, the willing sellers have spoken.

Apparently recognizing that it cannot deny these rather clear standards and principles, SoundExchange effectively seeks to evade their inevitable result by attempting to insert into the legal framework requirements that are not set forth in the statute. RLI demonstrates below why SoundExchange cannot through its motion restrict either the factors that a CARP must consider in applying the "willing buyer/willing seller" standard, or preordain the weight that certain factors must be given.

II. The Copyright Office Should Deny the Rulings Requested by SoundExchange.

In its Motion, SoundExchange effectively requests three rulings from the Copyright Office, the first two of which are closely related, but none of which has merit.

A. The requirements of the SWSA cannot be satisfied by limiting RLI's administrative actives to merely voluntary (non-statutory) license transactions – especially where copyright owner and performer affiliates desire administrative services in connection with both non-statutory and statutory licenses.

SoundExchange asks, first, for a ruling that the SWSA "merely acknowledges the possibility that multiple agents could be designated to collect and distribute royalties," and nothing more; and, second, that the SWSA can be satisfied by the voluntary appointment of agents under §§ 112(e) and 114(e), without designation by the Librarian. Motion at 3. As to the first suggestion, SoundExchange effectively reads out of § 114(g)(3) the language providing that copyright owners and performers who have elected to receive royalties from another designated agent can obtain their royalties through such other agent without deductions by SoundExchange. This SWSA provision operates both as a statutory limitation on the recoupment efforts by

SoundExchange and as a statutory right of copyright owners and performers who believe that they will obtain better terms and conditions, accountability and/or service through a competing entity and, hence, that they will benefit from competition among agents.

Second, SoundExchange has requested that the Copyright Office "declare that the requirements of the SWSA can be satisfied by the ability of copyright owners and *performers* to appoint a common agent to negotiate *direct* licenses on their behalf...." (Emphasis added.) This reading of the law is simply wrong and misleading.[12] First, the SWSA added new section 114(g)(3) which affects only the statutory licenses. Thus, the requirements of the applicable section of the SWSA cannot be satisfied by reference to non-statutory licenses that were not the subject of SWSA modifications in the first place. Second, §114(e)(2) authorizes only copyright owners to designate common agents to negotiate voluntary (non-statutory) licenses and §114(g)(1) provides for performers to receive any royalties from the copyright owner pursuant to the terms of the performer's agreement with the copyright owner. Thus, SoundExchange is completely wrong when it asserts that performers' rights under the SWSA can be satisfied in *non-statutory* license situations (where the SWSA does not apply and performers have no right to

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[12] Furthermore, SoundExchange completely mischaracterizes and misinterprets RLI's proposal when it states "unlike RLI's proposal simply to distribute royalties pursuant to statutory license rates...common agents who participate in licensing works as well as collecting and distributing royalties to their members would be providing the whole range of activities that constitutes true competition with the activities of SoundExchange". To be very clear, RLI's members from the very beginning have authorized RLI to administer statutory licenses as well as voluntary direct licenses. There is no true competition where only SoundExchange can collect and distribute statutory royalties. SoundExchange's sole purpose in this proceeding is to take Royalty Logic out of the statutory license administration business so that it would not be able to offer a full panoply of requested services (i.e., both voluntary and statutory royalty collection services) to royalty recipients. SoundExchange would thus be the only party able to offer full statutory and voluntary licensing and administration services limiting only itself to the ability to provide the whole range of activities required by copyright owners and performers. That is not the marketplace competition envisioned by Congress.

choose because they must receive their royalties from the copyright owner). Third, a performer's right to designate another agent came about as a result of the Librarian's decision applicable to *statutory license royalties* in the *Webcaster I* CARP and was shortly thereafter codified in relation to statutory royalties in sections 114(g)(3) and (4) as amended by the SWSA. In those sections congress specifically gave the choice (with respect to designation of agents and cost control issues) to both copyright owners and performers. SoundExchange is completely wrong when it asserts that the rights of performers and copyright owners under the SWSA can be satisfied in statutory licenses (where, if SoundExchange is successful, the only alternative choice will cease to exist or exist with less rights than SoundExchange). Fourth, the rights of copyright owners under the SWSA will effectively be eviscerated if they are allowed to receive only non-statutory royalties through RLI and are forced against their will to receive statutory royalties through SoundExchange. RLI's copyright owner affiliates would unreasonably have to send two sets of data and monitor two separate collectives in order to collect their proper share of royalties. Such a dual agent system (i.e., requiring a copyright owner to receive royalties from two agents) is administratively burdensome to the point that royalty recipients will be discouraged from exercising their statutory right to self-determination and competition will be thwarted.

Moreover, SoundExchange's second request is profoundly cynical in light of its stubborn insistence that copyright owners and performers who affiliate with voluntarily appointed agents do not obtain the same rights as they would from an agent designated by the Librarian. As demonstrated by the correspondence between SoundExchange and RLI, SoundExchange to date has not agreed to assure RLI's affiliates that they will obtain their royalties without first taking deductions that are denied to them under § 114(g)(3), or to assure RLI access to the documents

that will facilitate meaningful, efficient and effective representation of its affiliates. In the former regard, SoundExchange would negate Congress' desire that copyright owners and performers should obtain tangible benefits from competition among agents, and not be saddled with the costs of supporting an agency they do not wish to employ. In the latter regard, if RLI cannot obtain equivalent access to statements of account and records of use, then its only recourse for its affiliates is to incur the expense of an annual independent audit of SoundExchange's books and records. Plainly, the requirements of the SWSA cannot be satisfied in letter or in spirit if SoundExchange will deny the benefits of the SWSA to copyright owners and performers that otherwise would affiliate with a competitor.

In short, SoundExchange's requests for its first two "declaratory rulings" would destroy the competition among equals envisioned by Congress under the SWSA, require the Librarian to reverse its prior ruling, and instead shore up SoundExchange's control as a monopolist.

B. The Copyright Office should not adopt a "majority rule" legal standard that denies the legal rights of some beneficiaries while favoring the rights of others.

Third, SoundExchange seeks to further stack the deck in this proceeding, and asks that the Copyright Office hold that the CARP must place the wishes of the majority over the desires and statutory rights of a substantial minority of copyright owners and performers.[13] Specifically, SoundExchange contends that when applying the "willing seller" rule to this proceeding, a Panel must assess the feasibility and administrative efficiency of the proposed terms on a collective basis, and cannot give equal weight or consideration to the views of the minority copyright

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[13] The patently prejudicial nature of the rulings sought here blares forth from the pages of the Motion itself, which protests on the one hand that it is not asking to resolve the "ultimate issue" of designation, yet flatly proclaims that "Application of the Willing Buyer/Willing Seller Standard Including its Feasibility Component Does Not Support Appointment of an Additional Designated Agent to Accommodate Lester Chambers." *Compare* Motion at 4 and 12.

owners and performers who do not wish to use SoundExchange as their Designated Agent.[14] Of course, neither section 112(e) nor 114(e) so provides. The apparent authority for their position comes from a footnote in *Webcasters I*, wherein the Register expressed personal skepticism about the two-tier system of Receiving and Designated Agents but, nevertheless, found that it should be upheld. *Id.*, 67 Fed. Reg. at 45267 n.46 (July 8, 2002). This cannot merit a determination that the proposal of a disinterested minority should as a matter of law be viewed with skepticism and prejudice, or that it cannot result in a more efficient system.[15] After all, it is inherently "inefficient" and costly for any monopolist to have to respond to competition, yet market competition indisputably promotes efficiencies that can benefit copyright owners and performers served by all competitors. The facts will demonstrate whether such efficiencies can be achieved in this proceeding, but until the facts are fully aired and fairly reviewed, there should be no prejudgment that the wishes of a majority deserves greater consideration as a matter of

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[14] Here, copyright owners and performers have coalesced around two Designated Agents -- one large, the first entrant into this marketplace and a second later entrant, small and growing, utilizing technology and administrative expertise to provide a low cost licensing and administration service. That ***is*** the market -- it should not be reversed by private agreement or by the CARP. Given this real market for royalty collection and distribution services, at the choice of copyright owners and performers (who are the intended beneficiaries of the royalties), the role of the CARP should be to preserve the level playing field and eliminate proposed protectionist regulations (the natural reaction of a monopolist trying to avoid marketplace competition) that would distort the market against the interests of a growing minority of copyright owners and performers (willing sellers) who have chosen to be represented by a second Designated Agent.

[15] The two-tier system of Receiving/Designated Agents only appeared as a sensible accommodation and convenience for webcasters who preferred to have a single point for payment of royalties. In the absence of a two-tier system, the webcasters would be required to pay each Designated Agent directly and any number of marketplace solutions could arise. For example, the statute contemplates a mechanism for that eventuality by providing that entities performing and making ephemeral reproductions of sound recordings may themselves designate "common agents" to calculate and remit royalties to the agents of copyright owners. In addition, RLI could offer, as an alternative convenience for webcasters, the option of being billed directly by RLI after receipt of records of use of sound recordings. RLI could process records of use against its database of represented copyright owners and performers and simply invoice each the webcaster for its actual use of sound recordings affiliated with RLI.

law. SoundExchange has raised the issue of feasibility and administrative efficiency. However, the applicable standard should be feasibility and administrative efficiency as viewed from the standpoint of the copyright owner or performer (the "willing seller") -- not the red herring of feasibility or efficiency for the designated agents.

Moreover, SoundExchange's motion merely begs the question: as a matter of law, at what point does the view of individual copyright owners and performers begin to matter?[16] Is one enough? Does it matter whether the one is Lester Chambers or Britney Spears? Must the CARP discount the wishes of 5%, 17%, 26% or 49.9% because it has to give greater consideration to "the majority"? Is majority determined by a headcount, or is "majority" assessed by the value of the royalties they are to receive on an annual basis (inasmuch as both numbers can change significantly on a monthly basis)?[17] Do copyright owners and performers get counted together or separately? At what point does an "overwhelming" majority start to underwhelm as a matter of law? The fundamental imprecision of the SoundExchange proposed "rule of law," and the inherent need to address such questions in specific factual contexts, requires that the motion be denied.

Ultimately the SoundExchange proposal cannot stand because it disregards the fundamental legal principle that by statute each copyright owner and performer has the right to receive royalties, and to have those royalties administered by the agent of his or her choice. And

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[16] It is of no moment that SoundExchange contends, absent such a ruling, that it theoretically would have to deal separately with agents for each and every beneficiary. Without prejudging whether that or any other hypothetical situation would result in "chaos" or more efficient administration by SoundExchange, that is not the question in this proceeding, involving a single qualified competitor, and not a parade of windmills to tilt at.

[17] Reference to such metrics would needlessly mire the CARP and the Copyright Office in changing statistical detail that Congress has determined is irrelevant to the basic rights of copyright owners and performers to be represented by the agent of their choice.

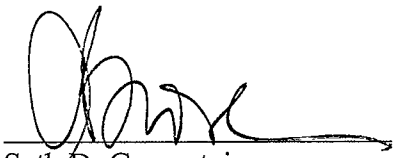
in the real world, the marketplace for statutory license collection and distribution services already has coalesced into two separate groups of willing sellers, one group choosing to be represented by SoundExchange and another choosing to be represented by RLI.

III. Conclusion

The essential legal principles applicable to this proceeding are not in dispute. What SoundExchange seeks to do by its Motion is not to resolve any truly legal issue, but rather to prejudge how the law should apply to its self-serving version of the facts and, ultimately, to entrench its position as monopolist. If the rights of copyright owners and performers under the SWSA are deemed satisfied without the Librarian's designation of alternative designated agents, then there will never be a fair playing field for competition. Against the interests of copyright owners and performers that Congress sought to protect, SoundExchange will first deduct historical costs from royalties to be administered by RLI, then deny RLI access to basic necessary information that would enable RLI to operate efficiently. If RLI affiliates cannot achieve the benefits of the SWSA nor the potential efficiencies that could be achieved via designation, then competitors will be unlikely to attract more than a minority of affiliated copyright owners and performers. And if competitors that represent minorities have an inherent disadvantage in any CARP proceeding, then SoundExchange has achieved its goal – heads I win, tails you lose.

None of the declaratory rulings sought by SoundExchange has any foundation in the statutory framework, or in the policies that underlie the SWSA. The Motion should be denied.

Respectfully submitted,



Date: December 3, 2003

Seth D. Greenstein
Ann M. Brose
MCDERMOTT, WILL & EMERY
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
(202) 756-8000 (voice)
(202) 756-8087 (facsimile)

Counsel for Royalty Logic, Inc, as
representative of Lester Chambers

EXHIBIT 1

soundexchange 1330 CONNECTICUT AVE, NW, SUITE 300, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

July 9, 2003

Ronald H. Gertz
President
Royalty Logic Inc.
405 Riverside Drive
Burbank, CA 91506

Re: Letters of Representation

Dear Ron:

This letter serves as acknowledgement of your letter dated June 19, 2003, whereby you notified SoundExchange of your putative representation of Lester Chambers, North Star Media and The Everest Record Group for the licensing, collection and distribution of all royalties pursuant to Sections 112 and 114 of the U.S. Copyright Act.

As you are aware, the Copyright Office has to date required entities to be designated to collect and distribute statutory royalties on behalf of a copyright owner or performer in a final order. As there has been no designation of Royalty Logic Inc. ("RLI") as a Designated Agent for any statutory royalties other than the royalties payable under the regulations adopted in Docket No. 2000-9 CARP DTRA 1&2 for the period October 28, 1998 through December 31, 2002, the three designations dated January 1, 2003 do not obligate SoundExchange to distribute royalties to RLI as a so-called Designated Agent, with all of the rights attendant thereto.

Notwithstanding the foregoing, SoundExchange will accept a letter of direction from a copyright owner or artist who designates Royalty Logic Inc. ("RLI") as its agent, and any distributions made by SoundExchange on behalf of those owners or artists shall be made to RLI net of any deductions that SoundExchange may be able to take under governing law or regulations.

You should also note that letters of direction, even when executed for payment of royalties to a Designated Agent, do not supersede applicable regulations. For example, under 37 CFR § 261.4(c), "a designation by a Copyright Owner or Performer of a particular Designated Agent must be made *no later than thirty days prior to the receipt by the Receiving Agent of that royalty payment.*" The provision in your Letters of Representation for Licensing, Collection and Distribution of Royalties Pursuant to Sections 112 and 114 of the U.S. Copyright Act that states that the authority granted to

RLI is effective for "performances/uses prior to the date of this letter" applies only to the extent the letters are not in conflict with such regulations.

Finally, please note that The Everest Record Group authorized SoundExchange in a writing dated June 3, 2001 as its agent to license, collect and distribute statutory royalties. Because of the conflicting authorizations, The Everest Record Group's designation of RLI as an agent shall not be effective until SoundExchange is notified in writing by The Everest Record Group that it is no longer authorized to distribute royalties on its behalf.

We look forward to working with you, and please do not hesitate to contact me if you have any questions.

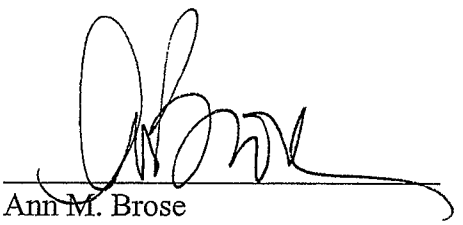
Sincerely,

John L. Simson
Executive Director

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Response of Royalty Logic, Inc. to SoundExchange Motion for Declaratory Ruling has been served on December 3, 2003, by overnight delivery, to:

Michele Woods
Arnold and Porter
555 Twelfth Street NW
Washington, DC 20004-1206
Counsel for SoundExchange



Ann M. Brose

A Partnership Including
Professional Corporations
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
www.mwe.com

Boston
Chicago
Düsseldorf
London
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December 3, 2003

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U.S. Copyright Office
Office of the General Counsel
1st Street and Independence Ave., S.E.
Room LM-403
Washington, D.C. 20559-6000

Re: Docket No. 2002-1 CARP DTRA 3 & 2002-2 CARP-DTNSRA
Client-Matter No. 63550-011

Gentlemen:

Enclosed for filing is the Response of Royalty Logic, Inc. to SoundExchange Motion for Declaratory Ruling. Also enclosed are five additional copies, and a copy of the title page to be stamped by you and given to our messenger for our file.

Please do not hesitate to contact me with any questions or concerns

Sincerely,

Ann M. Brose

Enclosures

cc: Michele Woods, Esq.
Arnold & Porter