Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In the Matter of:	)	
	)	
Notice and Recordkeeping for Use of	)	Docket No. 14-CRB-0005 (RM)
Sound Recordings Under Statutory License	)	
	)	

REPLY COMMENTS OF
PANDORA MEDIA, INC.

Pandora Media, Inc. ("**Pandora**") respectfully submits these Reply Comments in response to the comments filed by other parties in response to the Copyright Royalty Board's Notice of Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License dated May 2, 2014, 79 Fed. Reg. 25038 (May 2, 2014) (as amended by the *Order Granting NAB Motion for Extension of Time for Commenting in the Copyright Royalty Judges' Notice and Recordkeeping Rulemaking* (May 22, 2014)) (the "**NPRM")** (each, a "**Comment**").

Our Reply Comments are largely supportive of and consistent with the Comments filed by the other statutory licensees.

I. BACKGROUND.

Pandora is the largest and most successful eligible nonsubscription transmission service in operation today and, in fact, since the establishment of the statutory license for webcasting in 1998. Our *total* share of U.S. radio listening (including terrestrial radio) as of June 2014 is

estimated at 8.9%. Our total listener hours in the second quarter of 2014 were 5.04 billion. We had 76.4 million active listeners[1] as of the end of the second quarter of 2014.

We currently have approximately 2.5 million songs in our library and that number is growing by approximately 7,500 to 10,000 every week.[2] Every month we perform more than 1.5 million unique songs by more than 100,000 recording artists, approximately 80% of whom do not receive airplay on terrestrial radio.[3]

We are also the largest single payor of royalties to SoundExchange, Inc. ("**SoundExchange**"), and will pay approximately $400 million in royalties to SoundExchange in 2014 for the right to make digital audio transmissions of sound recordings and ephemeral phonorecords pursuant to the statutory licenses set forth in Sections 114 and 112 of the

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[1] We consider an "active listener" to be a registered user that has requested audio from our servers within the trailing 30 days from the end of each calendar month.

[2] For comparison purposes, many broadcast stations have music libraries only a fraction of the size of Pandora's. *See, e.g.*, Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice and Recordkeeping Rulemaking, Docket No. 14-CRB-0005 (RM), at 53 (June 30, 2014) ("**Joint Broadcaster Comments**") (the National Association of Broadcasters and the Radio Music License Committee are the "**Joint Broadcasters**"); *id.*, at Exhibit B, Declaration of Jim Tinker, Salem Los Angeles, at 4 ("For our Los Angeles stations, we maintain data for approximately 6,500 pieces of music (which includes incidental music), and our other markets are similar."); *id.*, at Exhibit D, Declaration of Michael Cooney, Beasley Broadcast Group, at 3 ("The burden is exacerbated because Beasley maintains different databases for its 11 different markets, and its databases on average include information regarding approximately 3,000 songs – approximately 33,000 recordings overall . . ."); *id.*, at Exhibit E, Declaration of Chris Moran, West Virginia Radio Corporation, at 4 ("Because we maintain separate databases for our 19 different stations that stream, and our databases on average include information regarding approximately 500-700 recordings, I would estimate that we would have to revisit approximately 10,000-15,000 database entries overall."); *id.*, at Exhibit G, Declaration of Douglas Myer, WDAC, at 2 ("Over the years, we have developed a large music information database that includes information for approximately 23,000 sound recordings.").

[3] *See* Executive Summary of Written Testimony of Chris Harrison, Vice President, Business Affairs, Pandora Media, Inc., Music Licensing under Title 17: Part Two: Hearing before the H. Comm. on the Judiciary, 113th Cong. 1, at 4 (June 25, 2014), http://judiciary.house.gov/_cache/files/d846ac2e-4564-4406-89da-9cfa68c8a1f5/062514-music-license-pt-2-testimony-pandora.pdf .

Copyright Act, 17 U.S.C. §§ 114, 112 (the "**Statutory Licenses**"). Since our launch, we have paid nearly $1 billion in total royalties to SoundExchange.[4]

We have invested tens of millions of dollars to develop our technology, both for the purposes of creating our proprietary Music Genome Project and to provide copyright owners with *reasonable notice* of the use of sound recordings under the Statutory Licenses. On a monthly basis we provide SoundExchange with detailed Reports of Use (each, an "**ROU**") that identify the more than 1.5 million unique sound recordings we perform each month.

We provide this background information to indicate the size of Pandora and the scope of our activities under the Statutory Licenses. We are the largest entity whose sole business is statutory webcasting. We are also larger than many terrestrial radio stations, with respect to both revenue and audience size.[5] Yet we share many of the objections to SoundExchange's proposed revisions to the existing notice and recordkeeping regulations as those expressed by the other parties that have filed Comments.

As the Joint Broadcasters state, "SoundExchange seeks to impose substantial new burdens and draconian penalties on [licensees] . . . without any showing that such burdens or penalties are necessary or reasonable."[6] SoundExchange, by its own admission, appears quite adept at distributing the royalties that we and other entities operating under the Statutory Licenses pay to the organization. In its own petition for this NPRM, SoundExchange

[4] For comparison purposes, as of June 25, 2014, SoundExchange reported that it has paid out more than $2 billion in royalties. *See* Statement of Michael Huppe, President and CEO, SoundExchange, Inc., Music Licensing under Title 17: Part Two: Hearing before the H. Comm. on the Judiciary, 113th Cong. 1 at 2 (June 25, 2014), http://docs.house.gov/meetings/JU/JU03/20140625/102411/HHRG-113-JU03-Wstate-HuppeM-20140625.PDF.

[5] *Cf.* Joint Broadcaster Comments, Exhibit C, Declaration of Sandhi Kozsuch, Cox Media Group, LLC, at 2 ("Cox Media Group is a major media company with national breadth, reaching over 14 million Americans each week through its radio properties.").

[6] Joint Broadcaster Comments, at 2.

acknowledged that it only had roughly 1.2% of total royalties identified as "undistributable due to missing or unusable ROUs."[7]

As a result of this nominal percentage, SoundExchange now seeks to impose new and onerous reporting burdens on statutory licensees. As the Joint Broadcasters put it, "[t]here is a unifying theme to SoundExchange's requests. SoundExchange's clear aim is to make its own job easier by shifting any of its (as yet undemonstrated) burdens to others . . . ."[8] We agree with this characterization, and that this shifting of burdens and costs is an improper basis for modifying existing regulations.

As the Joint Broadcasters note, the Copyright Act only mandates that the Copyright Royalty Judges ("**CRJs**" or "**Judges**") "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section."[9] "Reasonable notice" does not – and indeed should not – require that statutory licensees undertake SoundExchange's requested measures because such measure(s) will make SoundExchange's job of collecting and distributing royalties easier. Rather, as the Joint Broadcasters have indicated, the Judges should balance the costs and burdens imposed on statutory licensees by the proposed new regulations against the ability of SoundExchange to distribute the royalties it receives in a reasonable and fair manner under the existing regulations.[10]

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[7] Petition of SoundExchange, Inc. for a Rulemaking to Consider Modifications to Notice and Recordkeeping Requirements for Use of Sound Recordings Under Statutory License, at 28 (Oct. 21, 2013) ("**SoundExchange Petition**"). Surprisingly, SoundExchange gives no further information on its high degree of efficiency in distributing royalties in its Comments in response to the NPRM, possibly because there may be a realization that being highly efficient in distributing royalties under existing regulations may undermine any petition for amendments to those regulations.

[8] Joint Broadcaster Comments, at 2.

[9] *Id.*, at 13, citing 17 U.S.C. § 114(f)(4)(A).

[10] *Id.*, at 13-19.

What SoundExchange has failed to explain, both in its initial Comments and in SoundExchange's Petition, is why more comprehensive and accelerated reporting and onerous penalties – such as additional late fees for non-compliant ROUs – are appropriate in a regime where the governing statute requires licensees only to provide copyright owners with *reasonable notice* of use of sound recordings,[11] rather than perfect notice, which appears to be SoundExchange's objective.[12]

Furthermore, SoundExchange fails to show why measures that it could take to improve its distribution rate (i.e., to reduce or eliminate that 1.2% of undistributable royalties) – such as using additional proxy distributions or sharing its database of identifying information for sound recordings owned by the copyright owners it represents – would not be a more efficient and cost effective remedy for resolving undistributable royalties than the imposition of new reporting obligations that a vast majority of statutory licensees would likely be unable to meet or afford under any definition of "reasonable."[13] Pandora – and likely many, if not most, other statutory

[11] *See* 17 U.S.C. § 114(f)(4)(A) ("The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this sections, and under which records of such use shall be kept and made available by entities performing sound recordings.").

[12] We note that in its Motion for Extension of Time for Reply Comments, SoundExchange argued that allowing more time for the filing of reply comments would permit the development of a more complete administrative record. However, as the proponent of changes to the existing regulations, Pandora believes that SoundExchange should have submitted any supporting evidence for more onerous reporting regulations in its initial comments rather than holding them back for reply comments, when parties opposing SoundExchange would lack an opportunity to respond. *See* SoundExchange, Inc. Motion for Extension of Time for Reply Comments, Docket No. 14-CRB-0005 (RM), at 1 (July 14, 2014).

[13] *See* Comments of KBHU-FM, Docket No. 4-CRB-0005 (RM), at 2 (May 19, 2014) ("KBHU-FM is very relieved to see that the proposed regulations included the qualifier, "if feasible" with respect to reporting the ISRC because it is absolutely not feasible for that to happen at KBHU-FM. We simply do not have the staff or the resources to accomplish this."); Joint Broadcaster Comments, Exhibit G, Declaration of Douglas Myer, WDAC, at 4 ("The ISRC is also a 12-digit alphanumeric code that would need to be manually entered into our automation system for over 20,000 songs (if it is even available). This seems to me to be a herculean task that would require at least 1,500 hours of labor (assuming approximately 5 minutes per song for research and data entry."); *id.*, at Exhibit H, Declaration of Gregory Bone, Cape Cod Broadcasting, at 3 ("For our 1,500 classical recordings, this would take an estimated 375

licensees – would have to expend substantial resources in coming into compliance with these new reporting regulations – sums that may far exceed what SoundExchange would have to expend to achieve the same objectives through changes in its own practices and processes. And, as the Copyright Office has previously noted, "the burdens associated with reporting information cannot be so high as to be unreasonable or to create a situation where many services cannot comply."[14]

If SoundExchange decries the quality of reporting from licensees and the ROUs already delivered (or never delivered), then the CRJs should, at a minimum, ask at least three questions before even considering the imposition of more onerous and comprehensive reporting requirements. First, what is the dollar amount and percentage of royalties collected by SoundExchange on a recurring basis that are not supported by ROUs? Knowing that in 2013, "approximately two-thirds of licensees required to deliver reports of use have not delivered at least one required report, and at least one quarter of such licensees have not delivered any such reports at all"[15] sounds disturbing, however, what SoundExchange has previously failed to disclose is whether these licensees only account for a small fraction of the total royalties collected by SoundExchange or small dollar amounts. If these two-thirds of licensees only represent a small percentage of total royalties collected by SoundExchange, then it does not seem wise, appropriate, or reasonable for the recordkeeping regulations to be made more onerous and compliance more expensive for what can only be described as marginal benefit.

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hours of time by someone with sufficient knowledge to identify this information (most likely our classical music director). We simply do not have the resources for this.").

[14] Copyright Office Interim Regulations in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1E, 48 Fed. Reg. 11515, 11521 (May 11, 2004).

[15] *See* Comments of SoundExchange, Docket No. 4-CRB-0005 (RM), at 12 (June 30, 2014) ("**SoundExchange Comments**").

Second, are the royalties for which SoundExchange lacks ROUs from services that are largely offering narrow playlists of music for which proxy distributions or sample reporting would be particularly appropriate (e.g., from terrestrial radio stations)? We simply cannot tell from SoundExchange's filings. However, as the Joint Broadcaster Comments point out, where there is little variation in a licensee's use of music, then the use of either sample reporting or proxy distributions would appear much more reasonable than costly census reporting.[16]

Third, without knowing the types of licensees that fail to provide ROUs, the CRJs are deprived of the ability to conduct a balancing of interests to determine whether imposing new reporting obligations on entities lacking SoundExchange's extensive financial resources (it has already distributed $2 billion in royalties) is justified when SoundExchange has far more ample resources and access to information with regards to both the identification of sound recordings released to the public with the consent of copyright owners and the ownership of the copyrights of such recordings. To paraphrase William Shakespeare, the fault in insufficient reporting may lie not with the licensees but with SoundExchange itself, which may already have in its possession the tools to improve royalty reporting and distribution.

As the Joint Broadcaster Comments note, SoundExchange's Petition and Comments were devoted principally to increasing the reporting and financial burdens on statutory licensees without providing empirical evidence to support changes to existing regulations when viewed through the prism of (1) whether more notice is necessary (i.e., does reasonable notice, as

[16] *See* Joint Broadcaster Comments, at 53 ("*Second*, sampling would be particularly well-suited to measure music use for radio broadcast streams because radio stations focus more on 'mainstream' music and have more targeted playlists than do large multi-channel custom webcast services.") (emphasis in original) (internal citations omitted).

required by statute, require more reporting) and (2) should statutory licensees bear those costs.[17] Pandora respectfully believes that SoundExchange has failed to present sufficient evidence to support imposing new obligations on statutory licensees, and the majority of SoundExchange's proposed amendments to existing regulations should be rejected.

Pandora's reply to the other Comments filed in this rulemaking is not comprehensive and does not address every comment of every other party. Rather, Pandora only replies to a number of the Comments that address certain proposed amendments to the existing regulations. Silence with respect to any particular proposed amendment should not be deemed consent to such proposed amendment and, absent an express indication of approval, Pandora reserves all objections to any proposed amendments to existing notice and recordkeeping regulations.

II. OBJECTIONS TO CERTAIN SOUNDEXCHANGE PROPOSALS.

A. Reporting of ISRCs.

SoundExchange proposes to make the reporting of ISRC's mandatory "where available and feasible." According to SoundExchange, this should be required because "(1) ISRCs are the gold standard for identifying recordings with precision; (2) they are often available to services today; and (3) ISRCs will only become more available as the digital music market matures."[18] SoundExchange has also said that:

> ISRCs typically will be available to services. ISRCs are widely used by record companies and most digital distribution companies for purposes of rights administration, and are used for reporting purposes in direct license agreements between record companies and webcasting and on-demand services. Larger services that receive electronic copies of recordings typically receive ISRCs as part of the accompanying metadata. To the extent services obtain recordings from commercial products, the ISRC

[17] *See id.*, at 2 ("There is a unifying theme to SoundExchange's requests. SoundExchange's clear aim is to make its own job easier by shifting any of its (as yet undemonstrated) burdens to others, where the burden is clear. That is not a 'reasonable' standard of 'reasonable' for the Judges to apply.").

[18] SoundExchange Comments, at 7.

> generally should be encoded thereon, and when present, easily can be extracted with widely-available software tools.[19]

These statements are unsupported and lack record evidence.

First, Pandora has a database of approximately 2.5 million sound recordings. Yet even with all of the financial resources that Pandora has invested in webcasting and reporting, we still lack ISRCs for approximately 600,000 discrete sound recordings. We have this gap notwithstanding the fact that we have a joint marketing agreement with Apple that provides Pandora with substantial metadata for sound recordings in the iTunes music store that is not otherwise made publicly available by Apple. We therefore do not know on what basis SoundExchange claims that ISRCs are typically available. Typically available to whom? If to SoundExchange, then we would welcome the sharing of such information with the statutory licensee community so that all licensees could provide more accurate reporting to meet SoundExchange's professed needs.[20]

Second, we also do not know whether ISRCs for the approximately 600,000 recordings without such information in our database are available and feasible, and it could be a burdensome and expensive undertaking for us to make such a determination. What, in fact, is available and feasible? All SoundExchange has said is the following:

> SoundExchange is mindful that for some services, particularly smaller services or noncommercial services, ISRCs may not be available, or it may not be feasible to extract ISRCs from the metadata of the library of sound recordings in their possession.

[19] SoundExchange Petition, at 22-23.

[20] When Pandora previously requested access to SoundExchange's database of label ownership information to better identify sound recordings transmitted by Pandora, our requests were rebuffed. Specifically, SoundExchange indicated that it does not allow third parties to access its rights holder database. It is our understanding that SoundExchange may soon be announcing a program to share certain information in its database with licensees, including ISRCs, but that program appears to be both experimental and voluntary (i.e., SoundExchange is not required to provide such information to any licensees). If SoundExchange is not required to share the ISRC and other identifying information that it has in its possession, then it strikes us as improper to demand that licensees report such information or risk penalties for failing to do so

> SoundExchange is also mindful that for some recordings an ISRC may not have been issued, or may not have been encoded in a copy provided to a service. In those cases, services would not run afoul of the requirements to provide ISRCs, because the "available and feasible" standard would excuse them from providing ISRCs. As a result, the fact that ISRCs may be unavailable, or their reporting infeasible, for some services or recordings today is not a reason to reject SoundExchange's proposal.[21]

If one dissects the SoundExchange Comments, then Pandora could be facing significant uncertainty as to its ability to comply with amended regulations. We are neither small nor noncommercial. We also may not know whether ISRCs have been issued for some or all of the 600,000 recordings for which we lack such information. As Mr. Rusty Hodge of SomaFM has noted:

> To begin with, many commercially released sound recordings do not even have an ISRC assigned to them. Artists are not required to obtain an ISRC when distributing a sound recording, and many do not. Although the three major record labels and many larger independent record labels may purchase ISRCs in large, cost-efficient blocks, registration for an ISRC presents discouraging administrative and financial barriers to individual artists who are not affiliated with a recording label. The ISRC registration fee is a burdensome expense for amateur musicians and a serious impediment to financially challenged artists in developing countries. Even artists who distribute through well-established music services may lack ISRCs. Consider, for example, TuneCore, a large, independent music distributor on the Apple iTunes platform, with a long-standing policy of issuing its own song identifier numbers that are formatted like ISRCs but are not actually registered ISRCs.[22]

Mr. Ethan Diamond, the co-founder and CEO of Bandcamp, Inc., has provided similar information:

> Sound recordings sold by Bandcamp rarely contain ISRCs. Only 8.5% of the albums we sell have ISRC information provided for each of the sound recordings on the album. . . .
>
> There are many reasons why a sound recording might not include an ISRC. For example, certain digital file formats, media types, and common music software simply do not support ISRCs. However, the most common reason for sound recordings sold on Bandcamp lacking an ISRC is because the artist/label failed to provide one to us when uploading their tracks to our servers. Many independent artists (who provide the bulk of

[21] SoundExchange Comments, at 6.

[22] Joint Broadcaster Comments, Exhibit K, Declaration of Rusty Hodge, at 2-3.

> the tracks we sell) simply do not have ISRCs to provide. In my experience, most of the independent artists who form our target demographic have little interest in obtaining ISRCs for their sound recordings due to the administrative hassle, the expense, and the fact that ISRCs are completely optional and not particularly useful to them.[23]

Based upon the Declarations of two well-regarded industry leaders, there is evidence in the record directly contradicting the SoundExchange Comments. Under SoundExchange's proposed amended regulation, would Pandora still need to conduct additional research on all of those 600,000 recordings only to find that no ISRCs were ever issued for such recordings? How much additional research and at what expense would be *feasible*? Moreover, what if SoundExchange has an ISRC number for one, some, or many of those 600,000 sound recordings because it received the information directly from one of its member record labels; would that mean that the information is "available and feasible" as a matter of law because it is in SoundExchange's possession, even if SoundExchange refuses to share such information with statutory licensees? There is simply no guidance on how this reporting obligation would apply and what penalties could be imposed upon Pandora under SoundExchange's proposed regulation. Such uncertainty seems inconsistent with a statutory requirement that only requires reasonable notice.

Third, in a recent Copyright Office roundtable meeting in Nashville, Tennessee, a Senior Vice President of Business and Legal Affairs for the RIAA rejected the suggestion that sound recording copyright owners be required to identify ISRC numbers in copyright registrations because the RIAA's "members feel very strongly that there's a lot of just legwork that's involved in tracking all this [ISRCs], and that ***making ISRC numbers mandatory in either registration or***

[23] *Id.*, at Exhibit L, Declaration of Ethan Diamond, at 2. Pandora's own experience with self-submitted recordings by unsigned artists is consistent with the statements of Messrs. Hodge and Diamond. We receive approximately 800 unsolicited album submissions each week. Of those submissions, only approximately 40% (or 320 albums) are ingested into our music library. Out of those 320 albums, only approximately 20% contain ISRCs.

recordation documents would be burdensome.[24] How can sound recording copyright owners claim, on the one hand, that an obligation for them to report ISRCs in registration or recordation documents is "burdensome," while, on the other hand, claim that ISRCs are a gold standard that all statutory licensees should report when such information is "available and feasible?" This is clearly a case where what is good for the goose is good for the gander. If the record industry cannot be burdened with reporting ISRCs in public registrations with the United States Copyright Office, then statutory licensees should not be subject to a mandatory reporting obligation of such information under the Statutory Licenses.

Fourth, if Pandora were subject to financial penalties for failure to provide ISRCs for approximately 600,000 tracks, then we may have no recourse but to stop playing such sound recordings. By penalizing a licensee for not reporting ISRCs under an imprecise standard, the licensee may have no choice but to stop playing any music for which the licensee lacks an ISRC in its database, regardless of whether an ISRC was ever issued or is "available and feasible." Pandora may simply choose not to expend time, resources, or money trying to chase down information that it may eventually discover does not exist, if the alternative is to simply remove a sound recording from the service. This could mean the disappearance of scores or hundreds of thousands of sound recordings by independent labels and unsigned artists from webcasting services.

If the major labels are the primary issuers of ISRCs but many smaller labels and unsigned artists do not apply for and include ISRC numbers in their releases, then the result of this new regulation could be extremely beneficial to the major labels (e.g., Sony Music, Universal Music Group, and Warner Music Group), who control one third of the seats on the SoundExchange

[24] Transcript of United States Copyright Office, Music Licensing Study Public Roundtable, Nashville, TN, at 283 (June 4, 2014).

Board of Directors (inclusive of the two seats controlled by the Recording Industry Association of America, or "**RIAA**").[25] Performances of major label content would increase as a percentage of total performances while recordings released by independent labels and unsigned artists disappear from services such as Pandora.

Fifth, as a predominantly statutory licensee, we (and others operating under the Statutory Licenses) are not required to enter into direct license agreements with record companies for the majority of sound recordings performed on our service. The statutory license is an alternative to direct licenses, which are required for entities wishing to offer on-demand (i.e., interactive) services. The CRJs should therefore not assume that any statutory licensees have direct agreements with record companies pursuant to which the statutory licensees receive ISRCs directly from copyright owners.

Sixth, we do not know if ISRCs are in fact *widely used* by record companies because copyright owners failed to submit initial comments providing information as to (1) the number of record labels that regularly assign ISRCs to sound recordings, (2) when labels started assigning ISRCs, (3) the number of sound recordings commercially released that contain ISRCs, and (4) the number of commercially released sound recordings that do not contain ISRCs. What we do know is that SoundExchange represents more than "24,000 copyright owner accounts,"[26] yet when acting on behalf of these 24,000 copyright owner accounts, SoundExchange has failed to put forth any information that would permit the CRJs to determine the accuracy of SoundExchange's statements. Because SoundExchange has failed to provide such information in its initial Comments, Pandora respectfully requests that the CRJs reject SoundExchange's

[25] *See* http://www.soundexchange.com/about/our-team/board-of-directors/.

[26] *See* Statement of Michael Huppe, President, SoundExchange, Inc., Music Licensing Under Title 17: Part One: Hearing before the H. Comm. On the Judiciary, 112th Cong. 2, at 2 (March 28, 2012) http://judiciary.house.gov/_files/hearings/Hearings%202012/Huppe%2011282012.pdf.

assertion that ISRCs are widely used, notwithstanding any information that SoundExchange may include in its reply comments.[27]

Seventh, in its Comments, SoundExchange indicates that it "hopes" to be able to make its database of ISRCs available to statutory licenses, yet it has placed no timetable on making such information available or, in fact, made a firm commitment to doing so:

> [A]s SoundExchange continues to enhance its computer systems and work with interested services to improve reporting, SoundExchange ***hopes that it will be able to provide ISRCs to interested services***, either by offering them an ISRC search capability for recordings in its repertoire database or supplying them ISRCs that are missing from their reports of use (when the recordings can be identified in SoundExchange's repertoire database with reasonable confidence from other available information including the album title and marketing label name).[28]

As noted above, we believe that SoundExchange may be announcing a plan for providing ISRCs to interested services for the first time in its reply comments. Frankly, this is too late as it deprives licensees of the opportunity to comment upon any SoundExchange proposals. Absent a binding obligation to make ISRCs (and other identifying metadata) available to statutory licensees, SoundExchange's statement is only that: a statement. Until such time as the SoundExchange database is made publicly available without restriction, Pandora respectfully believes that the CRJs should not assume that such a database will be provided and should therefore reject an amendment to existing regulations that would require reporting of ISRCs.

Pandora supports Sirius XM Radio Inc.'s ("**Sirius XM**") suggestion that, where SoundExchange or its members possess ISRC data, they should be required to make that

[27] It is worth noting that the American Association of Independent Music ("**A2IM**") supports SoundExchange's request for ISRC numbers, but also fails to give any evidence that ISRCs are widely applied by its own member labels. Comments of American Association of Independent Music, Docket No. 4-CRB-0005 (RM), at 3 (undated). Both SoundExchange and A2IM have failed to introduce any record evidence of the widespread use of ISRCs, whether as an absolute number of the total sound recordings released by their respective member labels or as a percentage of the sound recordings reported to SoundExchange by statutory licensees.

[28] *See* SoundExchange Comments, at 7 (emphasis added).

information publicly available.[29] If there truly is a desire to make ISRCs a "gold standard," then the parties that assign those numbers – or their agent, SoundExchange – should make that information widely available in useable form so that all parties can seek to incorporate such information into ROUs. And if an ISRC is not made publicly available by SoundExchange for a sound recording that has been released to the public with the consent of a copyright owner, then the CRJs should create a presumption that there is no available and feasible ISRC for such sound recording.

B. Late Fees and Accelerated Reporting.

SoundExchange proposes that licensees be required to deliver ROUs in 30 rather than 45 days and be subject to an additional late fee[30] for the failure to provide late or noncompliant reports of use.[31] The alleged reason for accelerating payment is to enable expedited payments to copyright owners and artists.[32] The justification for imposing a late fee for late or incomplete ROUs is to ensure that "licensees are motivated to provide the information necessary to allow SoundExchange to distribute royalties with reasonable precision."[33]

There is simply no basis for accelerating the delivery of ROUs under the existing regulations. As SoundExchange appears to acknowledge, it is already able to distribute the overwhelming majority of royalties paid to it, and there appears to be little demand for

[29] *See* Comments of Sirius XM Radio Inc., Docket No. 14-CRB-0005 (RM), at 2 (June 30, 2014) ("To the extent published recordings do have an ISRC assigned, and that information in SoundExchange's possession, Sirius XM would support a regulation requiring SoundExchange (or its members) to make that information available to licensees in a format allowing licensees easily to ingest it into their internal databases of sound recording information.").

[30] Statutory licensees are already subject to a late fee for the late payment of royalties and/or late delivery of statements of account. 37 C.F.R. § 380.4(e).

[31] *See* SoundExchange Comments, at 12; SoundExchange Petition, at 30-31.

[32] *See* SoundExchange Petition, at 31.

[33] SoundExchange Comments, at 12.

accelerating payments by 15 days. Moreover, it strains credulity that reporting to SoundExchange could be improved by giving statutory licensees *less time* to complete ROUs. If SoundExchange is truly receiving ROUs that are incomplete or untimely, then perhaps the extant regulations are already too burdensome or the time period for reporting is too short. There is no evidence that accelerating reporting obligations will improve the quality of reporting, which is SoundExchange's stated goal.[34]

There is also no indication that licensees lack motivation to deliver ROUs in a timely manner, at least those that are paying substantial royalties to SoundExchange. SoundExchange fails to identify the total amount of royalties at issue for which late ROUs have been provided or what percentage of total royalties those late ROUs represent. We therefore do not know if this is a material problem that calls out for the imposition of a punitive late fee, regardless of whether SoundExchange has received the required royalty payment from a statutory licensee.

As the Joint Broadcaster Comments also point out, SoundExchange is already entitled to receive a late fee when a royalty payment is not paid in a timely manner.[35] SoundExchange should not be entitled to (1) an additional late fee in the case that royalties are paid timely and an ROU is late or (2) a double late fee if a payment is late and an ROU is late. There is simply no justification for imposing multiple penalties.

The preparation of ROUs can be challenging. As described above, Pandora currently plays over 1.5 million unique sound recordings. This means that for any given month, Pandora generates an ROU with no fewer than 1.5 million rows of data. To compile those over 1.5

[34] *Accord* Joint Broadcaster Comments, at 61 ("Maintaining a 45-day deadline also is an efficient outcome, as it would minimize reporting errors that would lead to amended reports and additional processing time by SoundExchange by ensuring that Broadcasters have adequate time to prepare the ROUs in the first instance.").

[35] *See id.*, at 56-58.

million rows of data, Pandora must determine the play counts for each one of those 1.5 million songs from billions of server instances (i.e., each time a user received a transmission of a sound recording). It takes significant resources to generate those reports and track performances at the volume at which Pandora operates.

It is also unclear on what basis SoundExchange might claim that any monthly ROU was noncompliant, and therefore subject to a late fee.[36] Without a specific definition of compliance or even substantial compliance, SoundExchange, or the sound recording copyright owners it represents, could indiscriminately accuse a statutory licensee of failing to comply with governing regulations, be subject to onerous late fees, and, potentially, copyright infringement for failing to comply with regulations promulgated under the Statutory Licenses.[37]

Although Pandora can and does comply with today's reporting requirements within 45 days, accelerating ROU delivery while at the same time increasing the information to be included within ROUs while being subject to financial penalties for failing to do so accurately, will impose a significant and unreasonable burden on Pandora (and likely many other statutory licensees).[38]

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[36] *See* Comments of KBCU-FM, Docket No. 4-CRB-0005 (RM), at 3-4 (May 22, 2014) ("What constitutes a non-compliant ROU? Is that one line of data with missing information or a typo? What is the threshold level of non-compliance which would justify a late fee?").

[37] Pandora does not concede that a statutory license would be subject to liability for copyright infringement if it failed to provide a fully compliant ROU. However, Pandora does not know whether individual copyright owners may take a contrary position that could only be resolved in federal district court.

[38] *Cf.* Joint Broadcaster Comments, Exhibit B, Declaration of Jim Tinker, Salem Los Angeles, at 19 ("We presently file our Reports of Use within the 45-day window. The proposal to shorten that time period to 30 days seems unnecessary, burdensome, and potentially problematic. We currently report on 95 streaming channels, and one individual must go in after the conclusion of the month and generate the report, review it for conformance to the requirements, add or correct any information that requires attention, and complete and submit the report. While we are able to perform this exercise within the current time period allowed, we are uncomfortable with shortening the time period given the growing number of stations that we have and the amount of data we are reporting. Also, we have had instances in which there has been a temporary disconnect between our streaming provider and our automation system,

For the reasons stated above, Pandora respectfully requests that the CRJs reject SoundExchange's proposal to accelerate reporting and impose a late fee on late or noncompliant ROUs.

C. No Adjustments After 90 Days.

Pandora strongly supports the Joint Broadcasters in opposition to SoundExchange's proposal to bar licensees from claiming credit for a downward adjustment in royalty allocations after the date that is 90 days after submission of the original ROU or Statement of Account ("**SOA**").[39]

There are numerous reasons why a statutory licensee may need to make adjustments to previously delivered ROUs or SOAs. For example, a statutory licensee could enter into direct licenses with record labels[40] that may require adjustments for payments made to SoundExchange if the direct licensor owns the recordings for which payments were previously made to SoundExchange.

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and we must revisit the reports at the end of the month to address any impacted time periods for particular stations. Shortening the reporting period would unreasonably reduce the time to deal with unexpected problems and to ensure our report is accurate and complete."); Exhibit E, Declaration of Chris Moran, West Virginia Radio Corporation, at 5 ("We object to shortening any time period for filing our report of use or for any time period in which we are allowed to submit for overpayments. This is a complex, data driven process and there is potential for mistakes that cannot be avoided. Furthermore, our reports require the input from third parties, such as our streaming provider. While we typically do not experience problems meeting the 45 day reporting requirement, shortening it makes us uncomfortable for the reasons I have described above."); Exhibit M, Declaration of Michael Gay, Cumulus Media, Inc. ("We object to shortening the time period for submitting reports of use to 30 days (down from the current 45-day period). As stated, we have hundreds of stations, and our reports must be some of the largest received by SoundExchange. We need time to prepare and check the reports, and 45 days is currently working for us fairly well.").

[39] *See id.*, at 59-60.

[40] Pandora has recently entered into a direct license agreement with Merlin, the global rights agency for the independent label sector. *See* Press Release: Merlin and Pandora Partner to Help Independent Labels and Artists Grow Their Businesses, http://press.pandora.com/phoenix.zhtml?c=251764&p=irol-newsArticle&ID=1955864&highlight.

A licensee may also discover after making a royalty payment to SoundExchange that a sound recording for which a payment was previously made was a sound recording for which no payment is due under the Statutory Licenses, such as a pre-1972 sound recording.[41] In those instances, a statutory licensee should be able to make adjustments to their SOAs and ROUs regardless of whether 90 days has elapsed since payment. Otherwise, there would be an unjustifiable windfall for SoundExchange due to an overpayment of royalties.

As the Joint Broadcaster Comments note, existing regulations permit SoundExchange to verify the payments of a statutory licensee for up to three years following the year in which a payment was made.[42] If the purpose of the verification is to ensure the accuracy of payments, then statutory licensees should not only be subject to claims of underpayments but should be permitted to make adjustments in the event of overpayments to SoundExchange.

The Joint Broadcaster Comments have also noted that SoundExchange retains the "unlimited right to recoup its own erroneous overpayments from the copyright owners and performing artists it has paid, with no time restriction on that right whatsoever."[43] If SoundExchange retains an unlimited right to correct incorrect payments for itself, then statutory licensees should be permitted to make corrections to SOAs whenever under- or overpayments of royalties are discovered.

[41] *See* Notice of Inquiry of the Copyright Office, Library of Congress, Music Licensing Study: Second Request for Comments, Docket No. 2014-03, 79 Fed. Reg. 42833, 42834, n. 3 (July 23, 2014) ("[L]icenses for the digital performance of pre-1972 sound recordings, and for the reproductions to enable such performances, are not available under Section 112 or 114.").

[42] *See* Joint Broadcaster Comments, at 60; *see also* 37 C.F.R. § 380.6(b).

[43] Joint Broadcaster Comments, at 59 (emphasis in original).

D. Character Encoding.

SoundExchange has recognized that ASCII reporting has significant limitations, and proposes that licensees be required to use the UTF-8 format where feasible.[44] Pandora currently reports to SoundExchange using UTF-8.

However, Pandora agrees with the position taken by the Joint Broadcasters.[45] Because the CRJs regulations are static in nature, we do not believe it is appropriate to enshrine in regulations a specific preference for any particular character encoding format so long as it is "feasible." Each statutory licensee should be free to use any character encoding format that best suits that licensee's particular needs. Just because Pandora uses UTF-8 today does not mean that Pandora will want to continue using UTF-8 in the future, and Pandora (and all statutory licensees) should be permitted to use ASCII or UTF-8 character encoding, or any different character encoding that the licensee determines is most efficient for its purposes, regardless of whether UTF-8 remains "feasible."

E. Increased Reporting Obligations for Classical Recordings.

SoundExchange proposes that statutory licensees be required to submit significant, additional information to identify classical recordings transmitted pursuant to the statutory license.[46] Pandora supports the Comments of those parties that have opposed these new proposed requirements.[47]

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[44] *See* SoundExchange Petition, at 17-18.

[45] *See* Joint Broadcaster Comments, at 83-84.

[46] SoundExchange Petition, at 23-24.

[47] *See* Joint Broadcaster Comments, at 43-46; Comments of WJCU, Docket No. 4-CRB-0005 (RM), at 5 (May 21, 2014); Comments of KBCU-FM, Docket No. 4-CRB-0005 (RM), at 3 (May 22, 2014); Comments of SCAD Atlanta Radio, Docket No. 4-CRB-0005 (RM), at 3 (May 22, 2014); College Broadcasters, Inc.'s Comments in Response to the Copyright Royalty Board's Notice of Proposed Rulemaking, Docket No. 4-CRB-0005 (RM), at 10 (June 30, 2014).

Even though "classical" recordings currently comprise only approximately 200,000 sound recordings in Pandora's entire database, they present particular difficulties due to the significant amount of time it already takes to ingest such recordings (i.e., incorporate such music into our library and classify such music for use with our proprietary algorithms). We estimate that ingesting even a single classical album can take our music analysts up to forty-five minutes or more.

The reason why ingesting classical albums is so time consuming for Pandora is due to a process we refer to as "classical tagging." Classical music albums often do not have all the metadata embedded in the sound recording source file, so Pandora employees must first locate (often by pulling the insert from the CD case and reading it) and then manually enter various metadata, including the conductor, the ensemble, and the performer.

We record the "classical tagging" metadata at the level of the musical work (e.g., Beethoven's Fifth Symphony) rather than track-by-track (e.g., the individual movements within the work). This fulfills Pandora's business needs, since our recommendation algorithms can process metadata at the level of a single work. However, SoundExchange now wishes to impose upon licensees the obligation of reporting the metadata for classical music on a track-by-track basis. This is more challenging because the metadata is not always the same for each track within the larger musical work. For example, a soloist might perform in the first movement of a symphony but not in the third movement. It is not clear to us why Pandora should have to report soloist information when such information is presumably already in the hands of sound recording copyright owners, who could provide such information to SoundExchange.

We already spend substantial resources acquiring classical metadata for the purposes of programming music but our systems are not designed to report such information in an output that

is compatible with ROUs. We would therefore need to undertake substantial new programming efforts at great expenses to comply with these new reporting obligations. We may also have to research the existing works in our library – including by going back to source materials for necessary information – if the existing regulations are amended to require such reporting. As with the case of the 600,000 sound recordings lacking ISRCs, we may simply be forced to pull classical music off of our service if we are required to provide new information that has not previously been identified by us in a manner that can be reported to SoundExchange if the cost of researching such information is too time consuming and expensive or the risk of being subject to late fees is too high.

We therefore respectfully request that the CRJs reject SoundExchange's proposal to make such additional reporting for classical recordings mandatory.

F. Reporting of Non-Payable Tracks.

SoundExchange proposes that statutory licensees be required to report sound recordings transmitted by a service even if the licensee is not required to pay royalties for such sound recordings. SoundExchange claims that such reporting is necessary to ensure that there are not improper exclusions from royalty payments.[48] Pandora strongly opposes this proposed new regulation and endorses the position of the Joint Broadcasters.

As the Joint Broadcasters note, SoundExchange is only entitled to "reasonable notice of use of sound recordings under" the Statutory Licenses.[49] If a sound recording is transmitted by a licensee *without reliance* on the statutory license, then SoundExchange has no right under the Statutory Licenses to information regarding such transmission.

[48] *See* SoundExchange Petition, at 24-26.

[49] *See* Joint Broadcaster Comments, at 48-49.

Furthermore, requiring services to report non-compensable uses of sound recordings does not further any purpose for which SoundExchange has been granted authority. Such information would not be used for SoundExchange's royalty distribution purposes or ensuring compliance with any other statutory condition (to the extent the reporting of information for such purposes is even appropriate).

SoundExchange's authorization under existing regulations runs only to the boundaries of the Statutory Licenses. For activities outside the scope of the statutory license, SoundExchange not only lacks any right to receive any notice of use, but also lacks antitrust immunity to act on behalf of multiple copyright owners.[50] Pandora respectfully requests that the CRJs reject SoundExchange's request to receive notification of uses of sound recordings when the Statutory Licenses have not been relied upon for such uses.

G. Retention of Raw Server Logs.

SoundExchange proposes that statutory licensees be required to retain and provide SoundExchange, or presumably its outside Qualified Auditor (as that term is defined in 37 C.F.R § 380.2), with access to "unsummarized source records of usage in electronic form, such as server logs or other native data . . ."[51] Pandora strongly objects to this requested amendment to the existing regulations.

As the Joint Broadcaster Comments note, SoundExchange previously sought such a regulation in the Webcaster III proceeding, a request which was rejected by the CRJs.[52] SoundExchange should not be permitted to seek such information now in a rulemaking where the request for such information was previously rejected in a litigated proceeding.

[50] *See* 17 U.S.C. § 114(e)(1).

[51] SoundExchange Petition, at 34.

[52] *See* Joint Broadcaster Comments, at 65.

Also, Pandora's raw server logs contain more than just a list of who listened to what song and when. The logs contain an immense amount of proprietary information, providing valuable insight into the algorithms that drive the Pandora service. Pandora should not be compelled to share this valuable trade secret information with third parties, and the Judges should reject any request to make us do so.

SoundExchange does not present a sufficient need for such raw server log information, and should therefore not be permitted to require licensees to retain or disclose such information. Furthermore, as Triton Digital, Inc. notes in its Comments, a better approach to ensure accuracy in reporting is for there to be an adoption of an accreditation process that would certify the accuracy of reporting systems utilized by licensees (or their third party service providers) rather than requiring licensees to turn over raw data.[53] SoundExchange should be required to work with third parties to establish industry standards that confirm the accuracy of reporting systems rather than requiring licensees to turn over raw server logs for verification purposes.

We therefore respectfully request that the CRJs reject SoundExchange's proposed amendment that would require licensees to retain and make available raw server logs.

III. NO OBJECTIONS TO CERTAIN SOUNDEXCHANGE PROPOSALS.

SoundExchange petitions to amend several notice and recording regulations that Pandora generally does not find objectionable. Pandora supports the position of the Joint Broadcasters in not opposing the following amendments, subject to the caveats identified by the Joint Broadcasters in their Comments:

- Authorization for parties to vary the reporting requirements by agreement with SoundExchange;
- Use of electronic signatures;
- Consistent naming and use of account numbers;

[53] *See* Comments of Triton Digital, Inc., Docket No. 14-CRB-0005 (RM), at 8 (June 30, 2014).

- Consistent scope of performance activity in SOAs and ROUs;
- Separate ROUs for separate services;
- Modification of SoundExchange's address;
- Deletion of requirement that SoundExchange maintain a Quattro Pro NOU template; and
- Conforming changes.

To avoid duplication in argument, Pandora incorporates Section VI.A of the Joint Broadcaster Comments into these Reply Comments in their entirety.[54]

IV. PANDORA'S SUPPORT FOR MORE RIGOROUS DISCLOSURE OBLIGATIONS BY SOUNDEXCHANGE.

The amount of money paid to SoundExchange by Pandora, Sirius XM, and other statutory licensees has reached staggering levels. Pandora alone will pay over $400 million in royalties to SoundExchange in 2014. As noted above, SoundExchange has now distributed over $2 billion in statutory royalties and presumably has collected sums in excess of that amount. Yet for all of this money flowing through the organization, there appears to be little public scrutiny and no government oversight.

The CRJs currently exercise no ongoing oversight over SoundExchange. Nor do the vast majority of the 24,000 copyright owner account holders or recording artists paid by SoundExchange. Instead, there is an unelected Board of Directors that answers only to itself. Of that Board, one-third of the seats are held by the three major record companies or their representatives from the RIAA.

So as to ensure that the hundreds of millions of dollars in royalties that Pandora is paying are fairly and accurately accounted for and subject to appropriate oversight and inspection, Pandora heartily endorses the suggestions of the Joint Broadcasters to impose new reporting

[54] *See* Joint Broadcaster Comments, at 65-72.

obligations on SoundExchange. These include, but are not limited to, requiring SoundExchange to do the following:

- Publish an annual report within 90 days after the close of the company's fiscal year;[55]
- "Include more comprehensive and detailed information regarding SoundExchange's structure and operations;"[56]
- Disclose information about SoundExchange's expenses, especially expenses unrelated to collecting and distributing royalties;[57] and
- Disclose more information on distribution methodologies (e.g., uses of proxies) and dispute resolution mechanisms.[58]

As the Joint Broadcaster Comments note, "the lack of third party oversight and transparency into the workings of the organization should be deeply troubling to any party that pays money to SoundExchange, litigates against it, or is subject to its policies."[59] For example, the CRJs (as well as the thousands of copyright owners and artists who are entitled to statutory royalties) might be deeply troubled, both in terms of the organization's apparently excessive lobbying efforts and in its taking positions that would appear to benefit primarily the three major record companies to the detriment of the thousands of independent labels and recording artists whose music is heard largely only on Pandora, other webcasting services, and Sirius XM.

In order to improve overall reporting by and transparency of SoundExchange, Pandora endorses the amendments to 37 C.F.R. § 370.5(c) proposed in the Joint Broadcaster Comments.[60] Pandora believes that such amendments will ensure that there is greater accountability by an organization that may soon be collecting close to one billion dollars in royalties a year, a

[55] *See id.*, at 84-85.

[56] *Id.*, at 85-86.

[57] *Id.*, at 88.

[58] *Id.*, at 89-90.

[59] *Id.*, at 86.

[60] *Id.*, at 87-89.

staggering sum of money to flow through a nonprofit organization that is not subject to CRJ – or for that matter, Congressional – oversight.

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We thank the CRJs for the opportunity to provide these Reply Comments and are available to assist the CRJs in evaluating the appropriateness of any amendments to existing notice and recordkeeping regulations.

Respectfully submitted,

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