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**By eCRB**

The U.S. Copyright Royalty Judges  
Library of Congress  
P.O. Box 70977  
Washington, D.C. 20024-0977

Re: Docket No. 20-CRB-0007-RM – Regulation Concerning Proxy  
Distributions for Unmatched Royalties Deposited During 2010–2018

To the Copyright Royalty Judges:

I write on behalf of SoundExchange, Inc. (“SoundExchange”) to respectfully ask the Judges to complete the rulemaking they commenced two years ago concerning proxy distribution of statutory royalties paid for the 2010-2018 period for which the licensee never provided SoundExchange a usable report of use. The Judges issued their proposed rule in this proceeding in 2020 at SoundExchange’s request. *See* 85 Fed. Reg. 32,323 (May 20, 2020). SoundExchange appreciates the Judges’ prompt commencement of a rulemaking proceeding to consider that request. However, two years later, the proposed rule has yet to be made final, and SoundExchange continues to hold approximately \$30 million in statutory royalties for the period 2010-2018 that are not distributable due to missing reports of use. While SoundExchange recognizes that the Judges have many pending matters competing for their attention, it respectfully submits that the proposed rule is noncontroversial and should be adopted as a final rule promptly so this money can be distributed to artists and copyright owners who in many cases continue to suffer the continuing effects of the coronavirus pandemic.

**Background**

This issue has a long history. The Judges have adopted statutory license payment terms that require SoundExchange to distribute statutory royalties “based upon the information provided under the Reports of Use requirements.” *E.g.*, 37 C.F.R. §§ 380.4(a)(1), 382.5(a)(1). When licensees fail to deliver reports of use, SoundExchange has no way to know what recordings they used, and so cannot distribute their payments to the proper payees in accordance with this requirement. For as long as there has been a statutory license, there has always been some small percentage of statutory royalties for which SoundExchange is never able to obtain a report of use. For the period 2010-2018, the approximately \$30 million SoundExchange is holding corresponds to less than 1% of total statutory royalty payments over that period.

As SoundExchange described in its comments in this proceeding, it makes extensive – and largely successful – efforts to try to secure usable reports of use from licensees that do not provide them of their own initiative on a timely basis. Comments of SoundExchange, Inc. in Docket No. 20-CRB-0007-RM at (June 29, 2020). There are no third-party sources from which the usage information can be obtained, and at this point, in many cases, the licensee is out of business or has told SoundExchange that it does not have the missing usage data. *Id.* at 9, 12. There simply is no realistic possibility of obtaining a material amount of additional usage data for performances that occurred at least four years ago, and up to twelve years ago. As a result, it does not make sense for SoundExchange to continue to hold this money indefinitely, or even for another year or two. Rather it should be placed into the hands of artists and copyright owners.

While it is not possible to know whose recordings were actually used to render the performances that generated these statutory royalties – because the licensee services have failed to provide that information despite SoundExchange’s repeated efforts to obtain it – there is a history of distributing such royalties based on “proxy data” (*i.e.*, real data about sound recording usage, other than the actual usage for which the relevant royalties were paid). Distributing the held money as provided in the proposed rule was previously authorized by the Judges for the 2004-2009 period. 76 Fed. Reg. 45,695 (Aug. 1, 2011); 37 C.F.R. §§ 370.3(i), 370.4(f); *see also* 69 Fed. Reg. 58,261 (Sept. 30, 2004) (proxy distribution for the 1998-2004 period).<sup>1</sup>

Such a distribution has strong support among the artists and copyright owners that have a stake in the issue. SoundExchange’s board, which includes performing artists, representatives of musicians’ unions, and artist lawyers, as well as representatives of major and independent record companies, has long sought to get this money out of SoundExchange’s hands and into the hands of artists and copyright owners. When the issue originally arose in another proceeding, the American Association of Independent Music supported all of SoundExchange’s proposals in that proceeding, including a proposal for proxy distribution, and expressed satisfaction with independent record companies’ voice on SoundExchange’s board. A2IM Comments in Docket No. 14-CRB-0005 RM, at 2 (June 30, 2014).

### **Other Comments Do Not Provide a Basis for Non-Adoption of the Proposed Rule**

The two other comments files in this proceeding do not provide a substantial reason for the Judges to continue to require holding of this money, or to do anything other than adopt the

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<sup>1</sup> To be clear, the request to distribute these royalties based on proxy data is separate and distinct from the handling of unclaimed funds. The Judges’ regulations concerning unclaimed funds (*e.g.*, 37 C.F.R. § 380.4(b)) address royalties that SoundExchange has been able to allocate to particular recordings and even particular payees based on reports of use it has received, but that it cannot pay out for reasons having nothing to do with reporting by the licensee, such as because the artist or copyright owner has not registered with SoundExchange or not provided the information SoundExchange needs to send payment. By contrast, the request to distribute royalties using proxy data applies to royalties that cannot be allocated to particular recordings or payees, because the licensees have not provided any usage information to enable such allocation.

proposed rule. One of those comments comes from Mr. David Powell d/b/a Circle God Network Inc., whose only objection appears to be that he thinks the Judges should direct 5% of the held royalties to him. Mr. Powell is a frequent participant in proceedings before the Judges who has never purported to represent artists or copyright owners whose works may have been used to generate the held royalties. The Judges have previously dismissed Mr. Powell from their proceedings and rejected his efforts to claim against statutory royalties. *See, e.g.*, Order in Docket No. 19-CRB-0005-WR Dismissing David Powell and Circle God Network Inc. from the Proceeding (Mar. 23, 2020); Order in Docket No. 16-CRB-0013-DART-MWF Denying David Powell and Circle God Network Motion Agreeing to Royalty Distribution w/ Settling Parties (Jan. 24, 2020); Order in Docket No. 16-CRB-0001 SR/PSSR Granting SoundExchange's Motion to Dismiss Music Reports, Inc. and David Powell (June 24, 2016). Mr. Powell has no interest in the disposition of the held royalties and certainly no basis to claim 5% of them.

The final comment in this proceeding was submitted by SUN-GLO Records, Inc. SUN-GLO is a record company that has released a small number of recordings.<sup>2</sup> SUN-GLO did not oppose the proposed rule. Rather, SUN-GLO admitted in its comment that it did not understand the proposed rule and said that it is “on the fence” about it. SUN-GLO Comment, at 2. Its comment in this proceeding principally complains of alleged unauthorized use of its recordings by certain on-demand streaming services, which is not germane to this proceeding.

To the extent that SUN-GLO addressed topics relevant to the proposed rule, SoundExchange endorses its statement that statutory licensees should report their usage. However, and with regret, SoundExchange does not believe that SUN-GLO's suggestion of an order from the Judges compelling licensees to report their usage would have any effect. The Judges' regulations already require reporting, and SoundExchange has been unable to obtain the missing reports of use nonetheless.

SUN-GLO was simply wrong when it speculated that larger record companies may have already received their share of royalties for which reports of use were not provided. *See* SUN-GLO Comment, at 2. To be clear, SoundExchange has not distributed to artists or to record companies of any size, large or small, statutory royalties paid for the 2010-2018 period for which it does not have reports of use, since it does not have data to make such distributions based on actual usage. That is the crux of the issue here and the circumstance that SoundExchange, artists and copyright owners would very much like to address.

SUN-GLO mischaracterized the proposed rule when it suggested that it would allow distribution “at the sole discretion of SoundExchange.” *Id.* The proposed rule clearly states that when a report of use was not provided, “reports of use for the corresponding calendar year filed by other services of the same type may serve as the reports of use for the non-reporting service.” 85 Fed. Reg. at 32,324. Applying that rule is not a discretionary act; it is a data processing

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<sup>2</sup> SUN-GLO has registered with SoundExchange as a copyright owner. Since SUN-GLO submitted its comment, SUN-GLO has received statutory royalty distributions from SoundExchange.

exercise that will result in whatever distribution the specified proxy data indicates. SUN-GLO's comment provides no reason for the Judges not to adopt the proposed rule.

### **Web V Does Not Provide a Basis for Non-Adoption of the Proposed Rule**

In *Web V*, SoundExchange proposed a broader and forward-looking proxy distribution arrangement that would have given SoundExchange's board discretion to determine the timing and methodology for using a proxy data set to distribute royalties that cannot be allocated due to missing reports of use. While it was not opposed by any participant, the Judges rejected this "particular proposal." 86 Fed. Reg. 59,452, 59,588 (Oct. 27, 2021). Instead, they expressed an "intent to refresh the record on the subjects of" a 2014 rulemaking that addressed a similar proposal. *Id.* The Judges had no occasion to address SoundExchange's narrow proposal in this proceeding, and almost eleven months after the issuance of the Judges' initial *Web V* determination, they have taken no public steps to address SoundExchange's broader proposal.

In contrast to SoundExchange's *Web V* proposal, the current proceeding relates only to a one-time distribution of statutory royalty payments for the 2010-2018 period, and SoundExchange proposes only to use the annual/license type approach to proxy distribution that the Judges previously approved for the 2004-2009 period. Even if the Judges harbor doubts about the discretion SoundExchange sought in *Web V*, no such discretion is sought here.

### **Conclusion**

SoundExchange should not be forced to continue to hold indefinitely the 2010-2018 royalty payments for which it has been unable to obtain a report of use. Instead, artists and copyright owners should finally receive that money on a basis that approximates the usage likely involved to the best extent practicable. SoundExchange urges the Judges to authorize it to get that money into their hands using the annual/license type approach to proxy distribution specified in the proposed rule. The Judges appropriately issued a proposed rule on the matter. That proposal is strongly supported by representatives of artists and copyright owners and not opposed by anyone except Mr. Powell, who has no interest in the matter. Given the lack of controversy in the comments to the proposed rule, it is ripe for adoption as a final rule.

Respectfully submitted,

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