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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. 14-CRB-0005 RM – Notice and Recordkeeping
for Use of Sound Recordings Under Statutory License

To the Copyright Royalty Judges:

I write on behalf of SoundExchange, Inc. (“SoundExchange”), concerning the proceeding commenced by the Judges in 2014, in part at SoundExchange’s urging, to examine notice and recordkeeping issues under the statutory licenses provided by Sections 112 and 114 of the Copyright Act (the “Proceeding”). *See* Notice and Recordkeeping for Use of Sound Recordings under Statutory License, 79 Fed. Reg. 25,038 (May 2, 2014). While most of the issues explored in the Proceeding remain relevant today, I write specifically to request expedited consideration of one issue from the Proceeding: proxy distribution of statutory royalties in cases in which a licensee never provides a usable report of use. *Id.* at 25,043. During the pendency of the Proceeding, statutory royalties that are undistributable due to missing or unusable reports of use have continued to accumulate, and SoundExchange presently is holding approximately \$24 million in such royalties for the 2010-2016 period.¹ SoundExchange respectfully requests that the Judges take prompt action to enable the distribution of such royalties based on proxy usage data.

Background

On October 21, 2013, SoundExchange petitioned the Judges to commence a rulemaking to consider a variety of operational issues arising under the Judges’ notice and recordkeeping regulations for the statutory licenses. *Id.* at 25,039-45. One of those issues was a proposal by SoundExchange to allow it to distribute statutory royalties based on “proxy data” (*i.e.*, data about sound recording usage, other than the actual usage for which the relevant royalties were paid), when statutory licensees do not provide SoundExchange usable data concerning their usage of sound recordings. *Id.* at 25,043 & n.13. This issue arises because the Judges have adopted statutory license payment terms that require SoundExchange to distribute statutory royalties

¹ SoundExchange is also currently holding between \$4 million and \$5 million in royalties for 2017 that are undistributable due to missing or unusable reports of use. SoundExchange expects that amount to be reduced to some extent as it works with licensees to obtain missing reports of use.

“based upon the information provided under the Reports of Use requirements for Licensees.” 37 C.F.R. § 380.4(a)(1); *accord* 37 C.F.R. §§ 380.23(h)(1), 380.33(e)(1), 382.4(d)(1) (*SDARS II* period), 382.13(f)(1) (same), 384.4(g)(1); *see also* Final Determination in Docket No. 16-CRB-0001 SR/PSSR (*SDARS III* period) at 120 (new 37 C.F.R. § 382.5(a)(1)).

Over time, there has always been a small percentage of statutory royalty payments for which SoundExchange is never able to obtain a report of use enabling distribution in accordance with those regulations. To address that issue, SoundExchange has twice been authorized to use proxy data to distribute royalties for which reports of use were not provided. The first of these was in 2004, when the Copyright Office authorized SoundExchange to use data reported by the preexisting subscription services to distribute royalties for other types of services for the period from 1998 through 2004. *See Notice and Recordkeeping for Use of Sound Recordings under Statutory License*, 69 Fed. Reg. 58,261 (Sept. 30, 2004). The second was in 2011, when the Judges authorized SoundExchange to use proxy data to distribute statutory royalties that were paid for the 2004-2009 period by licensees that had not provided reports of use. *See Notice and Recordkeeping for Use of Sound Recordings under Statutory License*, 76 Fed. Reg. 45,695 (Aug. 1, 2011); 37 C.F.R. §§ 370.3(i), 370.4(f).

Because the buildup of undistributable royalties due to missing reports of use had proven to be a persistent problem by 2013, SoundExchange’s petition asked that it be given standing authority to make proxy distributions of such royalties. Rather than adopting a one-size-fits-all approach to the methodology to be used in such distributions, and to avoid the need for further protracted proceedings before the Judges to consider the details of proxy distribution, SoundExchange asked the Judges to give its Board of Directors flexibility to make adjustments in the distribution methodology as may be necessary to achieve a fair distribution in any particular case. NPRM, 79 Fed. Reg. at 25,043; SoundExchange Petition in Docket No. 14-CRB-0005 RM, at 28-29 (Oct. 21, 2013).

On May 2, 2014, the Judges published in the *Federal Register* a notice of proposed rulemaking (the “NPRM”) soliciting comments concerning the issues raised by SoundExchange’s petition, along with a separate issue (reporting by webcasters paying only the minimum fee), which had been raised by educational webcasters in a previous notice and recordkeeping rulemaking. 79 Fed. Reg. at 25,039-40. As to SoundExchange’s proxy distribution proposal, the NPRM raised various questions concerning SoundExchange’s request for flexibility in refining its proxy distribution methodology. *Id.* at 25,043. In response to the NPRM, the Judges received 29 initial comments,² most of them from college broadcasters addressing the educational webcaster reporting issue, and eight reply comments.³

In the more than four years since the comment period in Docket No. 14-CRB-0005 RM, the Judges have addressed the educational webcaster reporting issue, under Docket No. RM 2008-7, but taken no action on the issues raised by SoundExchange’s petition. *Notice and*

² Available at <https://www.crb.gov/proceedings/14-CRB-0005/>.

³ Available at <https://www.crb.gov/proceedings/14-CRB-0005/reply/>.

Recordkeeping for Use of Sound Recordings Under Statutory License, 81 Fed. Reg. 31,506 (May 19, 2016); 81 Fed. Reg. 40,190 (June 21, 2016) (technical amendment); 81 Fed. Reg. 52,782 (Aug. 10, 2016) (proposed rule); 81 Fed. Reg. 89,867 (Dec. 13, 2016) (final rule); 37 C.F.R. § 370.4(d)(3)(ii). Specifically, the Judges authorized certain webcasters paying only the minimum fee to report usage data on the basis of a two-weeks-per-quarter sample, rather than on a year-round census basis. That outcome in effect authorized a form of proxy distribution for the royalties paid by those webcasters, since royalties for a webcaster's usage during the other weeks of each quarter are to be distributed based on data concerning usage during the two week sample period. In addressing reporting by educational webcasters, the Judges indicated that they "continue to analyze" SoundExchange's proposals. 81 Fed. Reg. at 31,507 n.1. However, SoundExchange has noticed that Docket No. 14-CRB-0005 RM is no longer listed on the "Rulemakings" page of the Judges' website (although Docket No. RM 2008-7 is listed).⁴ Concerned that the Judges may have concluded their analysis of SoundExchange's proposals without taking any action, SoundExchange asked me to write this letter.

Discussion

Five years after the filing of SoundExchange's petition, it is more important than ever that the Judges provide for proxy distribution of statutory royalties that cannot be distributed because SoundExchange has not been able to obtain usable reports of use from the licensees involved.⁵ At the time of SoundExchange's petition, it was holding approximately \$13 million in royalties for the 2010-2012 period that were undistributable due to missing or unusable reports of use. SoundExchange Petition in Docket No. 14-CRB-0005 RM, at 28 (Oct. 21, 2013). Now, it is holding approximately \$24 million in royalties for the 2010-2016 period, and additional royalties for 2017, that are undistributable due to missing or unusable reports of use. Proxy distribution of similar categories of Section 112 and 114 royalties was recognized as necessary, and was uncontroversial, in 2004 and 2011 when the Copyright Office and the Judges authorized previous proxy distributions. More recently, Congress enshrined in Section 115 a form of proxy distribution for mechanical royalties that the new mechanical licensing collective is unable to associate with a known musical work or copyright owner. 17 U.S.C. § 115(d)(3)(J)(i) (as amended by the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) [hereinafter "MMA"]).

The same kinds of conditions that warranted those instances of proxy distribution apply here. SoundExchange can only know what recordings a licensee has used under the statutory license when the licensee provides that information to SoundExchange in a report of use as

⁴ <https://www.crb.gov/rulemakings/>. Docket No. 14-CRB-0005 RM also was not listed on eCRB until my office contacted the Judges' staff yesterday concerning the logistics of filing this letter.

⁵ The passage of five years since the filing of SoundExchange's petition has meant that not all the issues raised therein are as important as they seemed in 2013. However, most of the issues SoundExchange raised remain relevant, and many of them are very important. Those include reporting of ISRCs, reporting of classical music usage, reporting non-payable tracks, the need for late fees to motivate timely compliance with reporting requirements, procedures for correction of reports of use and statements of account, and requirements for keeping and making available source records reflecting actual usage (rather than the usage that licensees choose to report).

required by the Judges' regulations. SoundExchange wishes that it could obtain the reports of use necessary to distribute the royalties it is holding to the creators and copyright owners of the recordings actually used by the licensees that paid these royalties. However, that sometimes is simply not possible, such as where the licensee did not retain playlist information in the first place, subsequently discarded its playlist information without reporting it to SoundExchange, or refuses to report its playlist information to SoundExchange despite SoundExchange's repeated efforts to obtain a report of use. In such cases, SoundExchange has understood the effect of the Judges' regulations to be that it must hold the associated royalties until it is able to distribute them based on reports of use. *See* 37 C.F.R. §§ 380.4(a)(1), 380.23(h)(1), 380.33(e)(1), 382.4(d)(1) (*SDARS II* period), 382.13(f)(1) (same), 384.4(g)(1); *see also* Final Determination in Docket No. 16-CRB-0001 SR/PSSR (*SDARS III* period) at 120 (new 37 C.F.R. § 382.5(a)(1)).

The Judges should not require SoundExchange to continue to hold millions of dollars that belong to artists and copyright owners in the vain hope that licensees who have for years failed to provide usable reports of use all of a sudden will produce the missing reports. Except perhaps for some missing reports from the most recent reporting periods, SoundExchange has exhausted the efforts that reasonably could be undertaken to try to coax or cajole licensees into providing the missing reports of use for the royalties currently on hold. In some cases, the licensees are not even in business any longer. SoundExchange urges the Judges promptly to release this money from its legal limbo by adopting SoundExchange's proxy distribution proposal as set forth in proposed Section 370.6(b) of the NPRM, or at least by amending current Sections 370.3(i) and 370.4(f) to enable distribution of the amounts currently on hold. If the Judges are not prepared to move promptly on the whole package of issues raised by SoundExchange's petition, SoundExchange respectfully requests that the Judges sever the proxy distribution issue from the other issues raised by SoundExchange's petition and address proxy distribution on an expedited schedule.

The record of this Proceeding provides ample support for adoption of SoundExchange's proxy distribution proposal. On June 30, 2014, SoundExchange filed timely comments addressing the Judges' questions in the NPRM. As set forth more fully in those comments, determination of a proxy distribution methodology is a technical effort that involves identifying an available proxy data set that is likely to be as statistically representative of the relevant missing data as practicable. SoundExchange Comments in Docket No. 14-CRB-0005 RM, at 8-12 (June 30, 2014) ("SX Initial Comments"). That is presumably why Congress gave the new mechanical licensing collective discretion to "establish policies and procedures" for its proxy distributions of unmatched statutory royalties. *See* 17 U.S.C. § 115 (d)(3)(J)(ii). In its comments, SoundExchange explained that while it generally would expect to use the same distribution methodology it used for the 2004-2009 distribution, there could be technical reasons that would militate against using that methodology in any particular case, such as if the missing reports of use made the available data for the relevant licensee type and year unrepresentative, or if the amount of undistributable royalties from a particular licensee group in a particular year was very small. *Id.* at 9 & n.4.

The record reflects unanimous support for SoundExchange's proposal by the artists and copyright owners who are affected by it and would need to pay for any additional process associated with a proxy distribution (since the costs of any activity the Judges require SoundExchange to undertake are deducted from royalty distributions pursuant to 17 U.S.C. § 114(g)(3)). No artist or copyright owner expressed any concern at all with SoundExchange's proxy proposal or felt a need to address the Judges' questions about it. The American Association of Independent Music supported all of SoundExchange's proposals in the Proceeding 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).

Licensee services do not have any direct interest in the details of how statutory royalties are distributed among artists and copyright owners, since "their responsibilities and direct interest end with the payment of the royalty fees." *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,267 (July 8, 2002). Nonetheless, the National Association of Broadcasters, Radio Music Licensing Committee, and National Public Radio supported SoundExchange's proxy distribution proposal, although primarily as a basis for reducing their obligations to deliver actual usage data. NAB/RMLC Comments in Docket No. 14-CRB-0005 RM, at 63-65 (June 30, 2014); NAB/RMLC Reply Comments in Docket No. 14-CRB-0005 RM, at 30-31 (Sept. 5, 2014); NPR Comments in Docket No. 14-CRB-0005 RM, at 9 (June 30, 2014) (volunteering that "the *sua sponte* proposals of the Judges seem to be granular oversight of SoundExchange that on the current record seem to be an unwarranted intrusion into SoundExchange's internal affairs").

Sirius XM and its agent Music Reports acknowledged that use of a proxy may be necessary in some circumstances. However, despite their lack of any direct interest in the distribution of statutory royalties, they stand alone in proposing additional procedural requirements for proxy distribution. Sirius XM Comments in Docket No. 14-CRB-0005 RM, at 3-4 (June 30, 2014); Music Reports Comments in Docket No. 14-CRB-0005 RM, at 6 (June 30, 2014). As detailed in SoundExchange's comments, their proposals are based on various false premises, including speculation about the statistical characteristics of available proxy data as compared to the usage associated with potential pools of undistributable royalties, and suggestions that when a licensee cannot or will not deliver actual usage data after repeated efforts by SoundExchange to obtain a compliant report of use, there is some unspecified further research SoundExchange could do to identify the proper payees for the unreported usage involved. See SoundExchange Reply Comments in Docket No. 14-CRB-0005 RM, at 53-54 (Sept. 5, 2014) ("SX Reply Comments"); SX Initial Comments, at 8-12.

The record reflects that further process, such as providing further notice to the licensees or an opportunity for objection would be dilatory, pointless, and thus a waste of artists' and copyright owners' money. SoundExchange's license management staff regularly sends reminder notices to licensees that fail to provide timely, usable reports of use, and earlier this year contacted comprehensively licensees that are missing submissions for 2014-2016, in an attempt

to obtain as many missing items as possible.⁶ SoundExchange's proposal requires it to exhaust such reasonable efforts to seek the missing reports before making a proxy distribution. SX Reply Comments, at 53. Adding yet another opportunity for cure would just delay payment to artists and copyright owners.

Providing persons beyond SoundExchange's Board of Directors an opportunity to object to a distribution would involve further delay and little potential benefit, because SoundExchange's Board is broadly representative of its constituents and consists of the artist and copyright owner representatives most likely to know and care about the technical details of distribution. SX Reply Comments, at 53-54. SoundExchange doubts that it would receive meaningful comments on a Board-approved proxy distribution proposal if a comment period were provided, and anyone who might potentially comment is likely to be substantially less informed than SoundExchange's Board members. Sirius XM and Music Reports suggest no process for resolving situations where SoundExchange might receive uninformed or unfair suggestions of alternative approaches to proxy distribution. By contrast, SoundExchange's proposed requirement that a proxy distribution methodology be approved by its Board of Directors would ensure an informed, data-driven judgment concerning a distribution methodology that would be as fair as possible to all segments of the artist and copyright owner community. SX Initial Comments, at 9-11.

SoundExchange should not be required to spend artists' and copyright owners' money on carrying out additional proxy distribution procedures that artists and copyright owners do not believe necessary for their protection.

Request to the Judges

Based on the record of the Proceeding, the Judges promptly should adopt SoundExchange's proxy distribution proposal as set forth in proposed Section 370.6(b) of the NPRM. However, if the Judges for some reason believe that they need further administrative process to develop a more complete record concerning SoundExchange's future flexibility to tailor the distribution methodology as circumstances warrant, SoundExchange still would urge the Judges to address promptly the \$24 million currently on hold for 2010-2016, as well as the undistributable royalties for 2017 as to which SoundExchange will soon reach a point of diminishing returns in its efforts to obtain missing reports of use, such as by amending Sections 370.3(i) and 370.4(f) to strike "2010" and insert "2018."⁷

⁶ No licensee should have doubts about whether it has complied with the Judges' reporting regulations, because licensees using SoundExchange's Licensee Direct online portal have the ability to confirm SoundExchange's receipt of their reports of use and receive real-time feedback about the quality of data in those reports.

⁷ Because the MMA incorporates a form of proxy distribution of mechanical royalties, the Judges could potentially resolve this matter within the context of their pending rulemaking to conform their regulations to the MMA, if that was viewed as more desirable than promptly issuing a proxy distribution rule in Docket No. 14-CRB-0005 RM. *See* 83 Fed. Reg. 55,334 (Nov. 5, 2018).

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Because artists and copyright owners are entitled to the royalties that SoundExchange is holding due to missing or unusable reports of use, and should receive that money without further delay, SoundExchange respectfully requests that the Judges grant SoundExchange proxy distribution authority for such royalties at their earliest convenience.

Respectfully submitted,

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