

**Before the  
COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
Washington, D.C.**

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In The Matter Of:

Notice and Recordkeeping for  
Use of Sound Recordings  
Under Statutory License

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: Docket No. 14-CRB-0005 (RM)  
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**JOINT REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS  
AND THE RADIO MUSIC LICENSE COMMITTEE REGARDING THE  
COPYRIGHT ROYALTY JUDGES' NOTICE AND RECORDKEEPING RULEMAKING**

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## INTRODUCTION

SoundExchange's opening comments in this rulemaking<sup>1</sup> confirm that SoundExchange's contested proposed changes should be rejected and the proposals of the National Association of Broadcasters ("NAB") and the Radio Music License Committee ("RMLC") (collectively, "Broadcasters") should be accepted. SoundExchange's comments do not remotely provide the requisite factual basis necessary to justify adopting SoundExchange's proposals, and support offered in reply comments comes too late to permit others to respond meaningfully – an essential component of notice and comment rulemaking.

SoundExchange was the proponent of each and every one of the Copyright Royalty Judges' ("Judges") proposed changes to the current notice and recordkeeping requirements other than the proposal to amend the definition of "minimum fee broadcaster." *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License: Notice of Proposed Rulemaking*, 79 Fed. Reg. 25038, 25040 (May 2, 2014) (the "NPRM"). Moreover, the Judges expressly did not take a position regarding the desirability of any of these changes, instead making clear that they were relying on the commenters to justify any regulatory changes that they favored. *See id.* at 25045. It was incumbent on SoundExchange to provide a sound factual basis for each of its proposed changes at the appropriate time in the rulemaking process – during the opening comments – so that other interested parties could respond meaningfully to its proffered support – a fundamental prerequisite of regulatory changes issued through notice and comment rulemaking. *See infra* Part I.A-B.

SoundExchange does not come close to providing a factual basis for its proposals in its opening comments. Rather, those comments concededly "only briefly address a few points,"

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<sup>1</sup> SoundExchange's opening comments are referred to herein as "SoundExchange Comments."

total a scant 17 ½ pages, and do not include any supporting documentation or declarations by individuals with firsthand knowledge of any purportedly supporting facts. Many proposals are not mentioned at all, including SoundExchange's requests for:

- an accelerated due date for reports of use ("ROUs");
- access to services' server logs;
- harsher reporting requirements for classical stations;
- an abbreviated period for services to reclaim overpayments;
- mandatory 17-line header records with duplicative and unnecessary information;
- unnecessary and inaccurate changes to reporting provisions discussing aggregate tuning hours ("ATH");
- mandatory duplicate service of notice of use forms ("NOUs") on SoundExchange; and
- required use of UTF-8 character encoding format despite previously having sought mandatory use of ASCII.

Other proposals are at least mentioned, but SoundExchange fails to provide the factual support necessary to enable the Judges to adopt them. For example, SoundExchange makes unsupported assertions that International Standard Recording Codes ("ISRCs") are readily available and in widespread use, but those claims are directly contradicted by multiple Broadcasters and other witnesses who make clear that ISRCs are not widely used or readily available. *See infra* Part I.C.2.a. Moreover, this very request smacks of chutzpah given that a key representative of the very record industry that SoundExchange itself represents recently told the Copyright Office that:

our members feel very strongly that there's a lot of just legwork that's involved in tracking all this, and that making ISRC numbers mandatory in either registration or recordation documents would be burdensome. And that this is something that sort of the Office should be following the industry and not making the industry follow the Office.

U.S. Copyright Office Music Licensing Study Public Roundtable, Belmont University, Nashville, TN, Tr. 279-80 (June 4, 2014) (statement of Susan Chertkof, Recording Industry Association of America Senior Vice President, Business and Legal Affairs) (“Nashville Tr.”) (emphasis added) (Ex. C hereto). SoundExchange also:

- (a) misinterprets the import of a statutory amendment in attempting to support its request for artist access to ROUs;
- (b) grossly exaggerates the financial impact allegedly arising from late or missing ROUs in attempting to justify its late fee request; and
- (c) fails to support its request for a six-month extension in providing an annual report, particularly where the differences between its draft and final 2013 annual report are virtually nonexistent.

*See infra* Part I.C.2.b-d.

SoundExchange should not be permitted to correct its lack of factual support for its proposals by filing “more extensive reply comments.” *See* SoundExchange Comments at 1. Reply comments come too late to enable other interested parties to respond to and rebut any proffered support. Nor can SoundExchange’s failure be cured by a surreply round of comments – Broadcasters already have devoted significant time, resources, and personnel to preparing two rounds of comments, and a third round would collide head-on with their preparations for – and participation in – the upcoming webcasting proceeding to set digital sound recording performance royalties for 2016-2020 (“Web IV”). Notice and comment rulemaking is designed to require parties to provide the primary support for their position in the opening round of comments. SoundExchange chose not to do so. Other parties should not be prejudiced by SoundExchange’s sandbagging tactics. Rather, any new support for SoundExchange’s proposals offered in its reply comments should be disregarded, and its contested proposals should be rejected for lack of a satisfactory basis for implementing them. Conversely, Broadcasters’ proposals should be accepted because they are supported by a satisfactory factual basis provided

in Broadcasters' opening comments. Proposed modified regulations reflecting Broadcasters' positions are attached hereto in clean and redlined versions as Exhibits A and B.

**I. SOUNDEXCHANGE'S CONTESTED PROPOSALS SHOULD BE REJECTED BECAUSE SOUNDEXCHANGE FAILED TO PROVIDE TIMELY SUPPORT FOR THEM.**

**A. Regulatory Proposals Must Be Supported by a Factual Basis.**

It is an elementary principle of administrative law that regulations must be "based on a sound factual foundation." See 1 Charles H. Koch, Jr., *Administrative Law and Practice* § 4:41, at 388 (3d ed. 2010). "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data . . ." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973); accord *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008); see also *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 709 (D.C. Cir. 2014) (finding that issuance of rule was arbitrary and capricious where it was "not only unsupported by the evidence, but contradicted by it").

The Judges have made clear that unsupported assertions of counsel do not provide a proper factual basis to justify requested regulatory changes and should be disregarded. Specifically, the Judges rejected proposed notice and recordkeeping changes similar to those proposed here because the parties seeking those changes supported their requests only with conclusory assertions of counsel. The Judges observed that:

The parties' proposals, with one exception discussed below, all suffer the same deficiency: they are nothing more than bare proposals unsupported by record evidence. The need for the changes and the benefits to be obtained from them are backed by nothing more than argument of counsel in their closing briefs. Without more, the Judges decline to exercise their discretion to amend the notice and recordkeeping regulations.

*Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services: Final Rule and Order*, 73 Fed. Reg. 4080, 4101 (Jan. 24, 2008).

Similarly, federal agencies and other entities subject to the Administrative Procedure Act (“APA”), including the Copyright Office, repeatedly have refused to base final rules following notice and comment rulemaking on unsupported or conclusory assertions. To illustrate, the Register of Copyrights rejected a proposed rulemaking change where the “proponents had offered very little support for their claim.” *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule*, 77 Fed. Reg. 65260, 65275 (Oct. 26, 2012). “The Register opined that proponents’ conclusory declaration ... was inadequate in the context of the rulemaking.” *Id.*

The National Highway Traffic Safety Administration (“NHTSA”) likewise declined to adopt a regulatory proposal by General Motors regarding the scope of a motor vehicle manufacturer’s reimbursement notification obligation toward owners with respect to certain recalls, finding that “GM’s comment is conclusory.” *Motor Vehicle Safety; Reimbursement Prior to Recall: Final Rule*, 67 Fed. Reg. 64049, 64060 (Oct. 17, 2002). In the same vein, the Federal Communications Commission (“FCC”) “decline[d] to exempt [commercial mobile radio service] providers from the requirement to obtain express prior authorization from their current subscribers before sending them any [mobile service commercial message].” *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003: Final Rule*, 69 Fed. Reg. 55765, 55773 (Sept. 16, 2004). The FCC found that “very little support for such an exemption was provided in the record in this proceeding” and that “[m]uch of the comment in support of the exemption [wa]s conclusory in nature.” *Id.*

Yet another agency – the Department of Energy (“DOE”) – disregarded comments suggesting a change to a proposed DOE regulation relating to its weatherization assistance program for low-income persons. *Weatherization Assistance Program for Low-Income Persons:*

*Final Rule*, 58 Fed. Reg. 12514, 12523 (Mar. 4, 1993). The agency observed that “these comments only offered conclusory opinions and lacked any supporting data. Therefore, DOE did not find them persuasive . . .” *Id.*<sup>2</sup>

Agencies also have refused even to act on petitions that are unsupported. For example, the NHTSA denied a petition for rulemaking because it “found [the petitioner’s] conclusion unsupported.” *Denial of Petition for Rulemaking; Federal Motor Vehicle Safety Standards*, 63 Fed. Reg. 38802, 38802 (July 20, 1998). Similarly, the Federal Maritime Commission denied a petition for rulemaking in part because “[b]oth the Petition and Replies are unverified documents containing minimal factual allegations and broad conclusory statements.” *Application of the Commonwealth of the Northern Mariana Islands for Section 35 Relief from Certain Tariff Filing Requirements; Order Denying Petition*, 46 Fed. Reg. 40578, 40579 (Aug. 10, 1981); *see also EPA’s Denial of the Petitions To Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 75 Fed. Reg. 49556, 49563 (Aug. 13, 2010) (denying request for administrative stay because, *inter alia*, petitioner “present[ed] general, unspecific, and unsupported arguments”); *1,2,4,-Trichlorobenzene; Response to Citizens Petition*, 59 Fed. Reg. 52156, 52157 (Oct. 14, 1994) (“determin[ing] that Valley Watch’s assertions do not support its request to ban the production of [1,2,4-

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<sup>2</sup> See also *Approval and Promulgation of Air Quality Implementation Plans; State of Nevada; Regional Haze State Implementation Plan: Final Rule*, 77 Fed. Reg. 17334, 17337 (Mar. 26, 2012) (“EPA has considered the comments and the comments have not provided any further specific facts that should have been considered in the State’s analysis beyond conclusory criticisms. Therefore, given the broad discretion the [Regional Haze Rule] affords the State, and the lack of specificity in the comments on this issue, EPA reaffirms its proposed decision to approve the State’s reasonable progress goal for Jarbidge.”); *Approval and Promulgation of Air Quality Implementation Plans: Final Rule*, 72 Fed. Reg. 31749, 31750-51 (June 8, 2007) (refusing to respond substantively to commenter who “merely asserts in a single sentence, without support, that there is a technology that ought to have been considered” but “does not provide any information from which EPA could evaluate the claim”); *Changes To Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications: Final Rule*, 72 Fed. Reg. 46716, 46800 (Aug. 21, 2007) (“While the Office received comments suggesting that the Office’s cost estimate for an examination support document was low, these comments provided only conclusory statements and contained few facts or information.”).

trichlorobenzene] for its use as a retrofilling fluid” where “Valley Watch supports its petition request with unsupported allegations”).

Federal courts likewise frown upon unsupported comments and repeatedly have upheld agency decisions to disregard them. *See, e.g., Vt. Pub. Serv. Bd. v. FCC*, 661 F.3d 54, 63 (D.C. Cir. 2011) (“We have little trouble rejecting these three items as a basis for questioning the Commission’s finding . . . . The Governor’s letter is entirely anecdotal, Vermont and Maine’s conclusory comments are unsupported by any data, and the lawyer’s declaration simply states [a] self-evident proposition . . . .”); *HBO v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (“Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response.” (citing *Portland Cement Ass’n*, 486 F.2d at 393-94); *Direct Commc’ns Cedar Valley, LLC v. FCC*, No. 11-9900, 2014 WL 2142106, at \*35 (10th Cir. May 23, 2014) (“Given the speculative nature of the comment and the complete lack of supporting evidence, we conclude that the FCC did not act arbitrarily or capriciously in failing to address the comment in the Order.”).

**B. The Requisite Factual Foundation Must Be Provided Early Enough in the Notice and Comment Process To Enable Meaningful Public Comment.**

The requisite factual support for prospective regulations cannot be provided at just any time during a notice and comment rulemaking. Rather, it must be provided early enough in the rulemaking to provide adequate notice to interested parties to enable them to comment meaningfully on those regulations. “Notice is the crucial element of sound and fair rulemaking procedures.” 1 Koch, *supra*, § 4:32, at 341. As one commentator has observed:

The purpose of the notice required by § 553(b) is to permit potentially affected members of the public to file meaningful comments under § 553(c) criticizing (or supporting) the agency’s proposal. . . . Yet, it is impossible to file meaningful comments critical of a proposed action that is premised on particular data unless that data is available in time for comments. Analysis of the data may reveal major problems in measurement, sampling, methodology, or statistical validity.

Consideration of such criticism might well cause an agency to modify its proposal. Because no such criticism is possible without access to the data, access to the data that putatively supports a proposed rule is critical to the right to comment on the rule and, hence, is part of the notice required by § 553(b).

1 Richard J. Pierce, Jr., *Administrative Law Treatise*, § 7.3, at 583-84 (5th ed. 2010) (emphasis added).

The U.S. Court of Appeals for the D.C. Circuit has emphasized the importance of providing adequate notice of the basis for proposed rules to enable meaningful commentary:

Notice of agency action is “crucial to ‘ensure that agency regulations are tested via exposure to diverse public comment, ... to ensure fairness to affected parties, and ... to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.’”

*Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013) (quoting *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010) (alterations in original)).

“Such notice must ... provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988); accord *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (“[T]he most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding and exposed to refutation.” (quoting *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999))); *Am. Radio Relay League*, 524 F.3d at 236-37 (“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”); see also 1 Koch, *supra*, § 4:44, at 423 (“The agency must include relevant information in the rulemaking record in a timely fashion so that participants can

comment on the information.”). Indeed, “fairness requires that the agency afford interested parties an opportunity to challenge the underlying factual data relied on by the agency.” *Chem. Mfrs. Ass’n v. EPA*, 870 F.2d 177, 200 (5th Cir. 1989).

“An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.” *Ct. Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). Courts have not hesitated to vacate or remand rules where adequate notice of their factual basis was not provided in a timely manner. *See, e.g., Owner-Operator Indep. Drivers Ass’n, Inc.*, 494 F.3d at 193, 206 (vacating rule because agency “failed to provide an opportunity for comment on [its] methodology” and “failed to provide an explanation for critical elements of that methodology”); *Portland Cement Ass’n*, 486 F.2d at 392-93, 402 (remanding case and finding “a critical defect in the decision-making process” where “[t]h[e] record reveals a lack of an adequate opportunity of the manufacturers to comment on the proposed standards, due to the absence of disclosure of the detailed findings and procedures of the tests” forming partial basis for standards); *Am. Radio Relay League*, 524 F.3d at 236-37 (remanding rule to FCC where agency “failed to comply with the APA by not disclosing in full certain studies by its staff upon which the Commission relied in promulgating the rule”).

Here, SoundExchange has sought broad regulatory changes based on a petition that lacked evidentiary support. As a result, the Judges were not able to include evidentiary support in the NPRM and simply published the proposed changes sought by SoundExchange, emphasizing that they “are neither adopting them nor endorsing their adoption.” *NPRM*, 79 Fed. Reg. at 25045. The Judges further stated that they would determine what changes to make, if any, based on the comments that they receive in this rulemaking. *Id.* As the proponent of broad

changes, it was incumbent upon SoundExchange to provide the missing support for those requested changes in a timely manner in its opening comments. As described below, it failed to do so.

**C. SoundExchange Failed To Support Its Proposed Regulations in Its Opening Comments.**

Far from including the type of factual support that would suffice to justify regulatory changes, SoundExchange's opening comments total fewer than 20 pages. The comments are devoid of evidentiary support, containing only argument and conclusory assertions by counsel. They were not accompanied by any data, supporting documentation, or a single witness declaration by anyone with firsthand knowledge of the issues. Such comments are insufficient to support the changes that SoundExchange seeks, particularly where SoundExchange's unsupported assertions have been resoundingly contradicted by evidence submitted by other commenters in this rulemaking, including Broadcasters.

**1. SoundExchange's Opening Comments Are Silent About Many of Its Proposals.**

To begin with, SoundExchange does not even mention many of its proposed changes in its comments, much less provide a basis that would warrant their adoption. Rather, it candidly admits that its comments "only briefly address a few points." SoundExchange Comments at 1. That is reason alone to reject those proposals.

**a. SoundExchange Does Not Discuss Its Request for an Accelerated Due Date for ROUs.**

SoundExchange does not even attempt to defend its request to accelerate the submission of ROUs, much less offer any evidence providing a basis for granting that request. By contrast, Broadcasters discussed why this request is unreasonable and should be rejected and submitted declarations from at least seven radio broadcaster witnesses that described why their broadcast

companies need the full 45-day window to prepare, verify, and submit ROUs. *See* Broadcasters' Comments Part IV.C.

Numerous other commenters strongly opposed this request as well. For example, "Sirius XM strongly opposes this proposal on simple practical grounds: in [its] experience, providing complete, accurate reports even in the current 45-day window is extremely challenging." Comments of Sirius XM Radio Inc. at 5 (June 30, 2014). National Public Radio ("NPR") similarly opposed this request, observing that "[s]hortening this deadline would be highly undesirable and may result in the filing of incorrect and/or incomplete reports." Comments of National Public Radio, Inc. at 12 (June 30, 2014) ("NPR Comments"). Music Reports, Inc. ("MRI"), a music rights administration company, states that the 45-day window "is absolutely necessary to enable a service to compile the information necessary to calculate fees and report properly" and that "shortening the time to prepare and deliver ROUs is counter-productive." Comments of Music Reports, Inc. at 6 (June 30, 2014) ("MRI Comments"). Many other commenters agree.<sup>3</sup> In the face of such strong opposition – particularly when compared with SoundExchange's silence on this issue – SoundExchange's unsupported acceleration request should be rejected.

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<sup>3</sup> *See* Comments of All-Campus Radio Network (ACRN) 5 (June 9, 2014); College Broadcasters, Inc.'s Comment in Response to the Copyright Royalty Board's Notice of Proposed Rulemaking 11 (June 30, 2014); Comments of KBCU-FM 4 (May 22, 2014); Comments of KBHU-FM 3 (May 19, 2014); Comments of KNHC 3 (May 19, 2014); Comments of KSSU 5 (June 18, 2014); Comments of KUIW 4 (June 2, 2014); Comments of KWSC-FM 3 (June 23, 2014); Comments of Lasell College Radio 3 (May 22, 2014); Comments of SCAD Atlanta Radio 4 (May 22, 2014); Comments of SCAD Radio 4 (May 20, 2014); Comments of WJCU Radio 4 (May 21, 2014); Comments of WKNC-FM North Carolina State University 4 (June 9, 2014); Comments of WRFL-FM 4 (June 25, 2014); Comments of Seton Hall University (WSOU-FM) 3 (June 25, 2014); Comments of WSLX 4 (June 19, 2014); Comments of WSOU Seton Hall University 4 (May 28, 2014).

**b. SoundExchange Does Not Mention Its Request for Access to Server Logs.**

SoundExchange also is notably silent about its request for server log access in its opening comments. By contrast, Broadcasters strongly opposed this request, which the Judges already rejected in the Web III rate-setting proceeding. *See* Broadcasters' Comments Part V; *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 79 Fed. Reg. 23102, 23125 (Apr. 25, 2014). Among other grounds, Broadcasters observed that they frequently use third-party stream providers to facilitate their simulcasting and often do not even have access to server logs; they also pointed to the difficulties in interpreting those logs, supporting their points with at least five witness declarations. *See* Broadcasters' Comments Part V.

Multiple commenters joined Broadcasters in opposing SoundExchange's recycled request. For example, Triton Digital – a stream provider that many broadcasters use not only to stream their content but also to help them prepare ROUs for submission to SoundExchange – opposed any such requirement, stating that it would be “likely to create more issues, not fewer.” Comments of Triton Digital, at 6 (June 30, 2014). It provided a number of instances of activity that might initially look like a sound recording performance in a server log but really isn't, such as rejoined sessions, where a listener logs off and then immediately logs back on while the same recording is playing, very short sessions where no performance ever reached a listener, and connections to audio content other than copyrighted sound recordings, such as commercials and the like. *Id.* at 7.

Similarly, Sirius XM opposed SoundExchange's attempt to gain access to server logs, noting the Judges' previous refusal to transform the verification process into “technical audits.” Comments of Sirius XM Radio Inc. at 6 (June 30, 2014). It further observed that it has

“witnessed first-hand ... attempts by the retained auditors to conduct intensive, onerous, and time-consuming audits into the technical workings of our systems.” *Id.* Again, SoundExchange’s failure to defend this request, coupled by comments by Broadcasters and others demonstrating that the proposal is unreasonable, warrants rejection of this proposal.

**c. SoundExchange Fails To Discuss Numerous Other Proposals in Its Opening Comments.**

SoundExchange also does not attempt in its opening comments to defend or support with evidence a host of other proposals it made. For example, its comments are notably silent regarding its proposals to, *inter alia*:

- impose harsher reporting requirements on classical stations to require at least 5 additional data points;
- create an unreasonably short forfeiture period for barring services from seeking refunds for overpayments;
- require 17-line header records with unnecessary and/or cumulative information in all ROUs after having long accepted no-header ROUs;
- alter reporting provisions discussing ATH in unnecessary, inaccurate, and underinclusive ways;
- require services to provide duplicate copies of NOUs to SoundExchange that they already are required to file with the Copyright Office; and
- require UTF-8 as the preferred character encoding format after having long advocated for ASCII format.<sup>4</sup>

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<sup>4</sup> SoundExchange also does not discuss its proposal to refer to the section 114(d)(2) statutory license as the more general section 114 statutory license, nor did it provide any reasons supporting that proposal in either its petition or its opening comments. *See* Petition of SoundExchange, Inc. for a Rulemaking To Consider Modifications To Notice and Recordkeeping Requirements for Use of Sound Recordings Under Statutory License 28 (Oct. 21, 2013) (“SoundExchange Petition”) (proposing to refer to the section 114(d)(2) statutory license as the “Section 114” statutory license “unless a more specific reference is indicated by the circumstances” but providing no reasons for its proposal); *see generally* SoundExchange Comments. Broadcasters are unaware of any reason why the specific, accurate reference to the section 114(d)(2) statutory license should be replaced with a more generic reference, particularly where the section 112(e) statutory license is referred to as section 112(e) rather than section 112.

Unlike SoundExchange's silence on these issues, Broadcasters addressed in detail each of these proposed changes in their opening comments, supporting their positions with multiple witness declarations where appropriate. *See* Broadcasters' Comments Part III.D (classical station reporting); *id.* Part IV.B (forfeiture of right to reclaim overpayments); *id.* Part VI.B.1 (header records); *id.* Part VI.B.2 (ATH); *id.* Part VI.B.3 (direct delivery of NOUs to SoundExchange); *id.* Part VI.B.5 (UTF-8). In the face of SoundExchange's failure to provide a proper factual basis for these proposals in the comments record, each of these proposals should be rejected.

**2. SoundExchange Fails To Support Many of Its Other Proposals with a Factual Basis.**

While SoundExchange does at least mention a handful of its proposed requests in its opening comments, it does not provide a factual basis for adopting them. Those proposed changes should be rejected.

**a. SoundExchange Fails To Support Its Request for Mandatory ISRC Reporting, Which Its Own Members Have Vigorously Opposed in an Analogous Context.**

A prime example of SoundExchange's failure to support its proposals with a sound factual basis is its request for mandatory ISRC reporting. To begin with, SoundExchange's request is simply not credible given that the very record labels that it represents – which are the entities in complete control of whether their sound recordings are assigned ISRCs – strongly oppose any such ISRC reporting requirement as applied to them. Broadcasters discussed this opposition in their opening comments and now have the transcript of record industry representative Susan Chertkof's telling remarks:

And so when you start looking at questions like should sound recording copyright owners be required to include ISRC numbers when they register, some of them don't even exist at the time of registration. And so you certainly can't say they all have to be there or somehow you're dinged for something because it didn't exist

at the time of registration. And beyond that our members feel very strongly that there's a lot of just legwork that's involved in tracking all this, and that making ISRC numbers mandatory in either registration or recordation documents would be burdensome. And that this is something that sort of the Office should be following the industry and not making the industry follow the Office.

Ex. C at 279-80 (Nashville Tr.) (emphasis added); *see also* Broadcasters' Comments at 42. Ms. Chertkof's remarks are particularly striking when one considers that record labels – not services – are in complete control of whether to assign ISRCs to begin with and are far better equipped to identify and track these codes.

Apart from the sheer irony of the record industry's strong opposition to the very type of requirement that SoundExchange now seeks to impose on Broadcasters, SoundExchange's comments (like its original petition) are littered with sweeping conclusory claims – unsupported by any witness declarations or supporting documentation – regarding the availability of ISRCs and the ease of reporting them. Those comments are not only devoid of actual evidence supporting SoundExchange's proposal but also directly contradicted by evidence submitted by Broadcasters and others in opening comments. For example, SoundExchange claims that “ISRCs are widely used by record companies and most digital distribution companies” (SoundExchange Comments at 6), but Broadcasters submitted numerous declarations in their opening comments that show that Broadcasters, many record labels, and others do not use ISRCs. Specifically:

- Ethan Diamond, the co-founder of an Internet music store called Bandcamp, stated that “Sound recordings sold by Bandcamp [a digital music store] rarely contain ISRCs.” *See* Broadcasters' Comments Ex. L ¶ 6.
- Eugene Levin, of Entercom Communications Corp., affirmed that “[t]he [ISRC] is not something that we generally use in our radio broadcasting operations, and many of our program personnel have not even heard of an ISRC.” *Id.* Ex. A ¶ 7.
- Jim Tinker, of Salem Los Angeles, stated that his “understanding is that many of the recordings in our database do not have ISRCs assigned to them, and we know

of no reliable resource that provides an ISRC for all of the recordings that have been issued ISRCs.” *Id.* Ex. B ¶ 15.

- Sandhi Kozsuch, of Cox Media Group, LLC, attested that ISRC “is a code that Cox does not use for any purpose in its digital automation systems, music scheduling software, or any other aspect of our broadcasting operations.” *Id.* Ex. C ¶ 5.
- Michael Cooney, of Beasley Broadcast Group (“Beasley”), confirmed that “[Beasley] do[es] not use the ISRC in any aspect of [its] operations – terrestrial or Internet – so it is not a data point that is otherwise relevant to Beasley.” *Id.* Ex. D ¶ 11.
- Chris Moran, of West Virginia Radio Corporation, stated: “I have asked others, and we are not aware of West Virginia Radio using the ISRC in any of its broadcasting operations.” *Id.* Ex. E ¶ 13.
- Michael Gay, of Cumulus Media, Inc., stated that “[t]he ISRC is not relevant to our broadcasting operations.” *Id.* Ex. M ¶ 12.
- Gregory Bone, of Cape Cod Broadcasting advised that Cape Cod’s “main studio automation system ... does not capture or store ... ISRC metadata.” *Id.* Ex. H ¶ 5.
- Rusty Hodge, the Founder and General Manager of webcaster SomaFM, testified that “[W]e have ISRCs for less than 2% of the total recordings we have received or obtained.” *Id.* Ex. K ¶ 5.

In addition to the many declarations submitted with Broadcasters’ opening comments, MRI, which, much like SoundExchange, is a music rights administration company, observed that many copyright owners and artists are making their recordings available without assigning them ISRCs:

many copyright owners make recordings available to services with minimal metadata attached to the digital file (often only “title” and “artist” fields). More artists are choosing to remain independent of record labels, and a vast amount of new recorded music is being created and made available in a “singles” format with no ISRC code and minimal accompanying metadata.

MRI Comments at 5. In light of this mountain of evidence, SoundExchange’s claim regarding the allegedly widespread use of ISRCs is simply not credible.

Another example revealing the fault lines in SoundExchange's proffered support for its proposed ISRC reporting is its unsupported assertion that certain "[l]arger services that receive electronic copies of recordings ... should typically receive ISRCs as part of the accompanying metadata." SoundExchange Comments at 6-7. The problems with this claim are at least fourfold. First, it is self-limited to "larger" services and thus does not speak to the many smaller statutory licensees that also are subject to notice and recordkeeping requirements. For example, Gregory Bone of Cape Cod Broadcasting, a group of four radio stations that files ROUs, has stated that "we are not even sure where we would obtain [ISRCs]." Broadcasters' Comments Ex. H ¶ 10. In any event, even Broadcasters of substantial size such as Entercom, which "owns and operates more than 100 terrestrial radio stations in 23 markets," have confirmed that "label representatives ... do not generally provide ISRC information." *Id.* Ex. A ¶¶ 2, 7 (statement of Eugene Levin of Entercom); *see also id.* Ex. D ¶ 11 ("Even if an ISRC has been assigned to a recording, it is not always – or even typically – provided from music sources ....") (Michael Cooney of Beasley); *id.* Ex. F ¶ 10 ("I do not believe that the recordings we receive from record labels contain[] ISRC information in most cases.") (Thomas Rupe of Emmis). And MRI, a prospective competitor of SoundExchange, affirmed in its comments that "the data SoundExchange requests, such as ISRC, is often not available to services at the time programming decisions are made by them." MRI Comments at 5. Moreover, "[m]any independent artists ... simply do not have ISRCs to provide." Broadcasters' Comments Ex. L ¶ 7 (Ethan Diamond of Bandcamp).

Second, SoundExchange's claim is further limited to "services that receive electronic copies of recordings," (SoundExchange Comments at 6) thus ignoring the significant volume of music still provided as physical copies. *See, e.g.,* Broadcasters' Comments Ex. F ¶ 7 ("Emmis

still receives the vast majority – about 95% – of the music that it plays directly from record labels in the form of promotional CDs and electronic audio files. Promotional music often comes in the form of CDs delivered to our program directors, and it may be as simple as a plain audio CD with just a title of the song hand-written on the disc.”) (Thomas James Rupe of Emmis); *id.* Ex. M ¶ 5 (“Promotional CDs come to us in many forms, some fully packaged as single releases, some hand delivered with sharpie writing on the CD.”) (Michael Gay of Cumulus); *id.* Ex. A ¶ 5 (“One of the most common ways that Entercom stations access new music is through the promotional activity of record label representatives. ... In these meetings, the record label representatives typically provide new music in the form of promotional CDs and electronic audio files.”) (Eugene Levin of Entercom).

Third, SoundExchange’s assertion is qualified by the words “should” and “typically,” further undermining its persuasive force. And fourth, even apart from these numerous limitations, it is contradicted by numerous declarations submitted by Broadcasters, which make clear that multiple electronic file formats do not embed ISRC information in the metadata for a recording. To illustrate:

- Rusty Hodge, of SomaFM, attested that “the WAV and AIFF file formats often used for music transmission on personal computers do not support storing an ISRC.” *Id.* Ex. K ¶ 7. He further stated that “[t]he ubiquitous MP3 file format is technically capable of storing an ISRC, but the field is commonly left empty in the MP3s we receive from artists and record labels.” *Id.*
- Michael Cooney, of Beasley, advised that “TM Studios provides WAV files” that “do not contain the [ISRC].” *Id.* Ex. D ¶ 6.
- Chris Moran, of West Virginia Radio Corp., stated that he is “not aware that we ever receive the ISRC with ... audio files.” *Id.* Ex. E ¶ 5.

Yet another example of SoundExchange’s failure to justify its ISRC proposal is its assertion that ISRCs “easily can be extracted with widely-available software tools.”

SoundExchange Comments at 7. But the very need to purchase software to extract these codes shows how burdensome such a process would be. Michael Gay of Cumulus ably articulated this concern:

Even if the ISRC is embedded in certain CDs that are sent to us, we cannot easily read it. I am aware that there is software that can read ISRC codes on those CDs that contain the information, but we presently have no such software. If we were required to read the codes off of CDs sent to us, I would need to obtain this software for hundreds of stations and have them trained on how to use it, and it would serve no operational purpose other than to track the code for SoundExchange reporting. This could be an enormous expense with a great deal of associated manpower.

Broadcasters' Comments Ex. M ¶ 14 (Michael Gay of Cumulus); *see also id.* Ex. F ¶ 10 (“[E]ven if the ISRC is embedded, we would need special software and training for program directors to know where to access the information.”) (Thomas Rupe of Emmis); *id.* Ex. G ¶ 11 (“If [the ISRC] is embedded on a CD, my understanding is that we would need special software to read such information – yet another step in the process and another software resource that would need to be licensed by us and maintained.”) (Douglas Myer of WDAC).

Even if this extraction process were easy and cost-free, SoundExchange does not account in its comments for the current inability of many Broadcasters' systems to store this additional information. *See id.* Ex. D ¶ 12 (Michael Cooney of Beasley discussing “the costly modification to our systems to accommodate information that is of no operational concern to us otherwise”); *id.* Ex. E ¶ 14 (“If we are forced to backfill our music databases with ISRC data, that would be an additional, enormous effort, requiring modifications to our digital automation systems, and a major research and data entry effort.”) (Chris Moran of West Virginia Radio Corp.); *id.* Ex. F ¶ 13 (“If SoundExchange is asking that we purchase new software and alter our technology to read, accept and maintain the ISRC for all of our recordings, that seems to be a completely unreasonable request.”) (Thomas Rupe of Emmis). In light of the spotty assignment to

recordings, and numerous difficulties with identifying, storing, and reporting ISRCs, they are not remotely close to the “gold standard for identifying recordings” that SoundExchange claims them to be. SoundExchange Comments at 7.<sup>5</sup>

SoundExchange attempts to defend its request for mandatory ISRC reporting by emphasizing that it only seeks to require such reporting “where available and feasible.” *Id.* at 6. But it makes no sense to impose a default requirement to report this information where ISRC availability and usage is simply not commonplace across the industry and reporting even ISRCs that are available would be unduly burdensome and problematic. This holds particularly true given that industry acceptance of mandatory ISRC reporting is so low that even the record industry itself strongly resists any such reporting requirement imposed on it. There is thus no basis for imposing such a default requirement on services, even where reporting is available and feasible.<sup>6</sup>

If anything, SoundExchange’s comments confirm that SoundExchange, not services, is the right party to be tasked with the responsibility of associating ISRCs with other reported information regarding a particular recording. SoundExchange states that it “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.” SoundExchange Comments at 7. If SoundExchange already has collected

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<sup>5</sup> A2IM, an organization representing independent record labels, makes similar conclusory statements. *See* Comments by the American Association of Independent Music (June 30, 2014).

<sup>6</sup> In the analogous musical works context, a similar effort to create a database to facilitate the unique identification of such works recently failed, reportedly due to copyright owner and performing rights organizations’ reluctance to support it adequately. *See* Paul Resnikoff, *Global Repertoire Database Declared a Global Failure*, Digital Music News (July 10, 2014), <http://www.digitalmusicnews.com/permalink/2014/07/10/global-repertoire-database-declared-global-failure> (last visited Aug. 28, 2014). This further confirms the problems with requiring services to report information that even copyright owners themselves cannot seem to assemble into a unified database from among their own ranks.

ISRCs and associated them with particular recordings, and is even willing to identify and supply ISRCs to services based on other available information regarding a recording, there is no reason to force services to hunt for, track, and report ISRC information already in SoundExchange's possession. Rather, it would be far more efficient and economical for SoundExchange to match those ISRCs with particular recordings based on other available, reported information about that recording.

In short – and to quote a spokesperson for the very recording industry that SoundExchange represents – “there’s a lot of just legwork that’s involved in tracking all this, and ... making ISRC numbers mandatory in either registration or recordation documents would be burdensome.” Ex. C at 280 (Nashville Tr.). “[T]he [regulations] should be following the industry and not making the industry follow the [regulations]” with respect to ISRC reporting. *Id.* If ISRC reporting is too burdensome for the recording industry, which controls the process of obtaining ISRCs and providing them when they distribute their recordings, it is necessarily far too burdensome for services, who do not have that control.

**b. SoundExchange Failed To Support Its Request for a Late Fee Applicable to ROUs.**

SoundExchange also does not support its request for a late fee covering ROUs. While it claimed that the fee “would be effective at addressing [the] problem [of late or never-delivered ROUs] without being punitive” (SoundExchange Comments at 12), it did not offer a shred of evidence to support that assertion. Nor does SoundExchange support its claim that some 25% of licensees have not filed ROUs (*id.*) with any evidence or describe any communications it has had with such licensees to notify them of these missing ROUs to give them an opportunity to correct any deficiencies. In any event, there is a gaping disconnect between this 25% figure and the far smaller 1.2% amount of total royalties that SoundExchange claimed it was unable to distribute

for the 2010-2012 period due to missing or unusable ROUs. *See* SoundExchange Petition at 28. While all licensees should certainly submit required ROUs, non-submission and purportedly unusable submissions regarding 1.2% of total royalties is a far smaller percentage of non-compliance than the 25% figure used by SoundExchange misleadingly suggests.<sup>7</sup>

**c. SoundExchange Fails To Support Its Request for Artist Access to ROUs.**

SoundExchange also fails to support its request to give featured artists access to ROUs. While SoundExchange claims that Congress's 2002 decision to permit direct royalty payments to featured artists warrants granting such access (SoundExchange Comments at 14-15), it fails to recognize that Congress did not change the key statutory provision regarding who is entitled to receive notice of use of sound recordings – copyright owners. The statute unambiguously states that:

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 section ....

17 U.S.C. § 114(f)(4)(A) (2012) (emphasis added); *see also id.* § 112(e)(4) (2012). Unless and until Congress amends this provision to grant featured performing artists reasonable notice of the use of sound recordings that embody their performances, such artists do not have the right to such notice.

Moreover, featured performing artists have always had the right to 45% of the royalties collected under the statutory licenses since those licenses were created in 1995; this did not

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<sup>7</sup> SoundExchange even resists the imposition of any cap on late fees at all but instead would have them accumulate for two or three years – or even longer – even against a licensee who timely paid all royalties and submitted all required forms if SoundExchange claimed that ROUs were deficient in some respect. *See* SoundExchange Comments at 13. This extreme position further illustrates the unreasonableness of its demand for late fees applicable to ROUs. SoundExchange's position is even more unreasonable when one considers that SoundExchange is not even obligated to notify a service in a timely manner when late fees are accruing and can instead remain silent and allow late fees to mount to exorbitant sums before providing that notice and demanding that they be paid.

change in 2002. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 3, 109 Stat. 336, 342-43 (1995). Rather, Congress merely enabled them to receive that money directly instead of having it go first to the applicable copyright owners. *Compare id.* (providing that “45 percent of the receipts shall be allocated, on a per sound recording basis, to the recording artist or artists featured on such sound recording” by the copyright owner) *with* 17 U.S.C. § 114(g)(2)(D) (2012) (providing that “45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording” by the distribution agent). Particularly given that Congress did not expand the notice provision to include performing artists when it gave this direct payment right, SoundExchange makes far more out of the direct payment provision than that provision can support.

**d. SoundExchange Fails To Support Its Request for a Six-Month Delay in Releasing Its Annual Report, and Its Recently Released Audited 2013 Report Confirms that Such a Delay Is Unnecessary.**

SoundExchange also does not support its request to delay the release of its annual report by six months. While SoundExchange points to the mid-February due date of December monthly payments to request more time (SoundExchange Comments at 17), that deadline only applies to a single month of payments – it still would have received payments for the other eleven months – over 90% of annual royalties – long before then.

SoundExchange’s recent release of its audited 2013 Annual Report confirms that there is no need for delay. That report reveals that not a single 2013 number changed between the unaudited and audited versions in the “Key Financial Statistics” table. *Compare* Ex. D at 4 (SoundExchange’s audited 2013 annual report) *with* Ex. X to Broadcasters’ Comments at 4 (SoundExchange’s unaudited 2013 annual report); *see also* Ex. E (redline of audited and unaudited 2013 annual reports). Rather, the only 2013 number that changed slightly appeared in

a footnote identifying the amount of statutory royalties collected – these decreased less than 0.5% from \$650 million to \$647 million. *Compare* Ex. D at 4 n.2 *with* Ex. X to Broadcasters’ Comments at 4 n.2; *see also* Ex. E.<sup>8</sup> Such an immaterial change does not warrant permitting SoundExchange to suppress its financial information for six additional months. Rather, SoundExchange should continue to be required to publish its annual report by March 31 following the applicable calendar year; it is always able to update that report after its audit is completed.<sup>9</sup> If far larger companies with far more complicated finances are able to submit annual reports within 90 days of the close of their year, there is no reason not to hold SoundExchange to the same standard.

**II. SOUNDEXCHANGE SHOULD NOT BE PERMITTED TO MISUSE THE RULEMAKING PROCESS AND SANDBAG OTHER COMMENTERS BY PROVIDING THE MISSING SUPPORT FOR ITS PROPOSALS IN ITS REPLY COMMENTS.**

SoundExchange states its intent to seek to cure its lack of factual support for its proposed regulatory changes in its opening comments – which it candidly admits “only briefly address a few points” – by “providing more extensive reply comments.” SoundExchange Comments at 1. It should not be permitted to do so. The purpose of reply comments is to enable parties to respond to comments made by others – not to sandbag the agency and interested parties by providing factual support that easily could have been included in opening comments. Permitting new evidence in reply comments would violate the fundamental principle of notice and comment rulemaking discussed in Part I.B above. Moreover, it would be fundamentally unfair to other

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<sup>8</sup> 2011 distributions also increased by about 0.3%, from \$292 million to \$293 million. *Compare* Ex. D at 4 *with* Ex. X to Broadcasters’ Comments at 4.

<sup>9</sup> Broadcasters also note that the final version of SoundExchange’s 2013 annual report contains just as little information as the draft version: both include only four pages of mostly boilerplate statements regarding the statutory licenses and royalty collection and distribution in general. Broadcasters reiterate their request that SoundExchange be required to disclose specific additional information in its annual report. *See* Broadcasters’ Comments Part VII.A.

commenters, as that evidence would be introduced too late into the rulemaking process to enable them to respond to it in writing.

Nor should the Judges overlook SoundExchange's abuse of the rulemaking process by ordering a third round of "surreply" comments. Broadcasters already have devoted significant time and resources to two rounds of comments, and a third round not only would add to these burdens and costs but also would materially interfere with their ongoing preparations for the upcoming Web IV proceeding, in which written direct cases are due in just one month. Any new evidence proffered by SoundExchange concerning its proposals in its reply comments would come too late. It should be disregarded.

**A. SoundExchange Cannot Supply a Factual Basis for Its Proposed Regulatory Changes in Its Reply Comments Because that Is Too Late To Enable Meaningful Commentary by Others.**

SoundExchange made an intentional tactical decision not to provide a basis for its proposals in its opening comments. There should be no further bite at the apple.

Regulatory agencies recognize the importance of an orderly rulemaking process and the importance of a party presenting available supporting evidence in its opening comments. The FCC, for example, has "emphasize[d] that the purpose of reply comments is to permit parties to respond to the original comments" and "stress[ed] the need for interested parties to present their positions fully in their initial comments." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Increase in Page Limits for Comments and Reply Comments on Proposed Rule: Proposed Rule*, 61 Fed. Reg. 22008, 22010 (May 13, 1996). The Copyright Office agrees. *See Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries: Extension of Time To File Comments and Reply Comments; Notice of Hearing*, 73 Fed. Reg. 47113, 47114 (Aug. 13, 2008) ("The purpose of reply comments is to respond to what is said in the initial round of comments."). Reply

comments emphatically do not function to enable parties to introduce new evidence that could have been included in opening comments.

Numerous federal agencies recognize this foundational principle undergirding reply comments by disregarding reply comments that include new information that should have been included in opening comments. For example, the FCC granted a motion to strike reply comments filed in a rulemaking where the petitioner for the rulemaking had “provided new material in its reply.” *See, e.g., In re Amend. of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Lancaster, OH)*, 2 F.C.C.R. 1387, 1387 n.1 (1987). It stated: “[w]e agree that petitioner’s reply comments should not be accepted since they provide new information to which no party could respond in an authorized pleading.” *Id.*; *see also Cable Act of 1992—Program Distribution and Carriage Agreements: Final Rule*, 58 Fed. Reg. 27658, 27658, 27663 (May 11, 1993) (providing that person who files complaint with the FCC regarding an alleged “unfair or discriminatory practice[] in the sale of satellite cable and satellite broadcast programming” “will not be permitted to submit new evidence or allegations in its reply and the reply must be limited to responding to the answer to the complaint”).

U.S. Patent Trial and Appeal Board regulations similarly provide that “[a] reply brief” in an ex parte appeal to the Patent Trial and Appeal Board “shall not include any new or non-admitted amendment, or any new or non-admitted affidavit or other Evidence.” 37 C.F.R. § 41.41(b)(1) (2014). Likewise, Department of Transportation (“DOT”) regulations warn that reply comments to comments opposing DOT applications regarding certain transactions involving motor passenger carriers “may not contain any new evidence, but shall only rebut or further explain matters previously raised.” 49 C.F.R. § 1182.6(b)(1) (2014). “Under [Interstate Commerce] Commission procedures, an applicant [for passenger motor carrier operating rights]

is not allowed to submit evidence on reply other than that which rebuts or further explains matters previously raised, inasmuch as broadening a proceeding at the reply stage to include new evidence without further reply from the protestant is not proper.” *Applications for Operating Authority—Motor Passenger Carriers: Final Rules*, 47 Fed. Reg. 53260, 53263-64 (Nov. 24, 1982).

Federal courts also reject attempts to introduce new material in reply comments. The Fourth Circuit, for example, rejected the Environmental Protection Agency’s argument that a particular document was “a proper part of the record of this proceeding since it was considered by the Agency during rule-making” because the “industry had no opportunity to comment on the document’s findings.” *FMC Corp. v. Train*, 539 F.2d 973, 979 n.7 (4th Cir. 1976). And a federal district court refused to consider a party’s reply submission that “contain[ed] new arguments based on new evidence that [the opposing party] did not have an opportunity to address.” *See Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 771 (N.D. Tex. 2012). The court found that the submitting party “did not seek leave to submit the new evidence or offer an explanation for the untimely submission. Rather than further delaying the resolution of [the pending motion] by permitting additional briefing, the court exercise[d] its discretion to not consider the new arguments and evidence to avoid prejudice to [the opposing party].” *Id.* (citing *Springs Indus., Inc. v. Am. Motorists Ins. Co.*, 137 F.R.D. 238, 239-40 (N.D. Tex. 1991)).

In this case, SoundExchange has had two opportunities spanning many months to provide a factual basis for its proposed regulatory changes – when it first petitioned the Judges to commence a rulemaking and in its opening comments. It deliberately chose not to, however, instead peppering its comments with sweeping conclusory assertions signed only by its attorney. This stands in stark contrast to Broadcasters’ opening comments, which included thirteen

declarations (including eleven from Broadcasters themselves) and numerous exhibits supporting their positions. SoundExchange made a conscious choice not to provide adequate factual support for its proposals and instead to lie in wait to present that support for its proposals at a time when it was too late for other parties to respond. That is improper. Having made a decision not to support its proposals in a timely manner, SoundExchange should not be permitted to provide that support now. Its contested proposals should be rejected.

**B. The Appropriate Remedy for SoundExchange's Choice Not To Provide Timely Factual Support Is To Reject SoundExchange's Contested Proposals, Not To Order Additional Comments.**

The appropriate response to SoundExchange's failure to support its proposals is to reject those proposals without considering any new affirmative material included in SoundExchange's reply comments. The Judges should not give SoundExchange a free pass on its sandbagging by ordering yet another round of comments.

Requiring another round of comments would be highly prejudicial to Broadcasters and other parties. Broadcasters already have devoted significant resources in time, personnel, and money to preparing two rounds of comments to respond to SoundExchange's arguments in favor of its proposals in the ordinary course of this rulemaking. They should not have to prepare a third set of comments when it was SoundExchange's own choice to disable parties from commenting meaningfully on any new affirmative support it now may choose to include in its reply comments.

Apart from the sheer unfairness and burden associated with a third round of comments, the preparation of such comments would directly collide with the rigorous schedule set in the ongoing Web IV proceeding, in which NAB is actively participating. Indeed, written direct cases are due in just one month, and, as the Judges are aware, the schedule in that proceeding is quite demanding thereafter, with no respite. It would be unreasonable, inappropriate, and

prejudicial to require Broadcasters to devote time, money, and personnel to preparing a third set of comments at the same time that Web IV is being litigated because SoundExchange chose not to provide timely support its affirmative proposals.

The appropriate response to SoundExchange's sandbagging tactic is to reject each of SoundExchange's contested proposals. Broadcasters instead urge the Judges to adopt Broadcasters' positions, which Broadcasters did support with an extensive factual basis in their opening comments.

### **III. THE OPENING COMMENTS CONFIRM THAT BROADCASTERS' PROPOSALS SHOULD BE ADOPTED.**

In contrast to SoundExchange's lack of factual support for its own proposals, Broadcasters did support their proposed changes in their opening comments with numerous declarations from persons with firsthand knowledge as well as supporting documents. And with respect to at least some of Broadcasters' proposals, SoundExchange's own comments reinforce that the requested changes are warranted.

#### **A. SoundExchange's Agreement To Relieve Certain Broadcasters from any Reporting and To Accept Sample Reporting from Others Confirms that Such Relief Is Reasonable for Certain Broadcasters.**

The opening comments filed by numerous parties – including even certain admissions by SoundExchange itself – confirm that the census reporting requirements should be relaxed for certain broadcasters. Indeed, the chorus of requests from broadcasters for such reporting relief – either through sample reporting or a reporting waiver – confirms how important such relief is to radio broadcasters in particular. For example, NPR stated that “[i]t would be nothing short of devastating to require Public Radio to engage in census reporting.” NPR Comments at 9.

Numerous other broadcaster commenters in addition to the NAB/RMLC commenters similarly urged the Judges in their opening comments to grant them relief from census reporting.<sup>10</sup>

Even SoundExchange itself acknowledges in its comments that reporting waivers and sample reporting are appropriate in certain instances. Specifically, SoundExchange recognizes that rates and terms that it affirmatively proposed for noncommercial educational broadcasters and webcasters relieve certain of those services from any reporting at all and permit other such broadcasters and webcasters to report on a sample basis. *See* SoundExchange Comments at 3. As SoundExchange admits for 2013, fully 97% of all entities eligible for these rates “elected th[e] reporting waiver, and were not required to provide any reports of use at all.” *Id.* SoundExchange even agrees to enshrine sample reporting for certain of these broadcasters and webcasters in the reporting regulations themselves to give it “indefinite duration,” and it calls such sample reporting “a reasonable deviation” from otherwise applicable census reporting. *See id.* at 4. SoundExchange’s willingness to waive or relax reporting requirements for certain entities confirms that even SoundExchange believes that such relief is reasonable in some circumstances.

Tellingly, SoundExchange’s comments also make clear that it believes that it is able to distribute royalties reasonably and fairly for the small share of performances for which it has not received usable ROUs. Indeed, SoundExchange devotes nearly 25% of the space in its comments to defending its request for standing authority to use proxy data to distribute royalties where warranted as well as its method of proxy distribution. It makes clear that it viewed its

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<sup>10</sup> *See, e.g.*, College Broadcasters, Inc.’s Comment in Response to the Copyright Royalty Board’s Notice of Proposed Rulemaking 5 (June 30, 2014); Comments of Intercollegiate Broadcasting System, Inc. 2 (June 30, 2014); Comments of KBCU-FM 1 (May 22, 2014); Comments of KBHU-FM 1 (May 19, 2014); Comments of KHNC 1 (May 19, 2014); Comments of KUIW 1 (June 2, 2014); Comments of WGSU-FM 1 (June 29, 2014); Comments of WJCU Radio 1 (May 21, 2014); Comments of WKNC-FM North Carolina State University 1 (June 9, 2014); Comments of WRFL-FM 1 (June 25, 2014); Comments of WSDP-FM 1 (June 25, 2014); Comments of WSLX 2 (June 19, 2014); Comments of Seton Hall University (WSOU-FM) 1 (May 28, 2014).

proxy method of distribution as one “that both is likely to be statistically representative of the repertoire probably used by the non-reporting services and will be practicable to process.” *Id.* at

9. It further describes the extreme care it represented that it took in ensuring that its proxy distribution would be “fair and equitable” to all:

Before proposing the 2004-2009 proxy distribution, SoundExchange engaged an economic consulting firm with significant experience in royalty distribution issues affecting copyright collectives to advise SoundExchange concerning the development of its proposal. That firm evaluated the effects of application of the proxy across different service types, years, levels of music usage by services, and artist/copyright owner payment levels. Within each category of service and year, that firm found that the proxy resulted in a percentage distribution of royalties to both higher- and lower-paid artists and copyright owners that was generally consistent with reported usage by services with diverse levels of music usage. It was only after that analytical process that SoundExchange concluded that its proposal would be fair and equitable.

*Id.* at 11 (emphasis added). Given SoundExchange’s own willingness to permit sample reporting and reporting waivers in certain instances and its belief that it is able to distribute royalties fairly and reasonably in a “statistically representative” manner based on proxy data, there is no reason to force entities for whom census reporting is most challenging to continue to provide ROUs on a census basis. Broadcasters therefore reiterate their request that the Judges:

- (a) permit Broadcasters for whom census reporting is not commercially feasible to submit sample reports and
- (b) grant a reporting waiver to Broadcasters who pay only the minimum amount of royalties due.

**B. SoundExchange Agreed in Its Comments To Continue To Use Best Efforts To Search for Copyright Owners and Artists To Pay; this Agreement Should Be Codified in the Regulations, as Broadcasters Have Proposed.**

SoundExchange’s comments also confirm that Broadcasters’ request that SoundExchange continue to use best efforts to locate and pay copyright owners and artists is well-founded. Specifically, SoundExchange expressly acknowledges in its comments that its request to delete the requirement that it use best efforts to locate copyright owners to make ROUs available to

them “does not reflect any desire or intention by SoundExchange to devote fewer resources to locating copyright owners (and artists) who are entitled to payment.” SoundExchange Comments at 15. SoundExchange describes the ways in which it has attempted to locate those copyright owners as follows:

SoundExchange uses not only the Copyright Office public records and published directories of record companies referred to in the last sentence of Section 370.5(d), but collaborative matching exercises with other organizations, crowdsourcing, social media outreach, agent/management contacts, trade shows, placement of news articles and advertisements concerning unclaimed funds, and other means to locate artists and copyright owners who are unregistered.

*Id.* Given SoundExchange’s own professed desire and efforts to locate these copyright owners, it should have no objection to codifying such a search requirement in the regulations, as Broadcasters have proposed. Therefore, Broadcasters reiterate their request that the “best efforts” sentence in 37 C.F.R. § 370.5(d) be modified as follows:

The Collective shall render its best efforts to identify and locate copyright owners and featured artists in order to ~~make available reports of use, and distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both.~~ Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.<sup>11</sup>

### CONCLUSION

For the foregoing reasons and for the reasons set forth in Broadcasters’ opening comments, SoundExchange’s contested proposed changes to the notice and recordkeeping requirements should be rejected, and Broadcasters’ proposals should be adopted. Proposed modified regulations are attached hereto as Exhibits A and B.

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<sup>11</sup> The notice and recordkeeping provisions found in 37 C.F.R. Part 370 are the most appropriate place to house such a provision, as locating copyright owners entitled to receive royalties is the fundamental first step in ensuring that these copyright owners “receive reasonable notice of the use of their sound recordings.” See 17 U.S.C. § 114(f)(4)(A); *see also id.* § 112(e)(4).

Respectfully submitted,

/s/

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Broadcasters*

September 5, 2014

Before the  
**COPYRIGHT ROYALTY JUDGES**  
**LIBRARY OF CONGRESS**  
Washington, D.C.

\_\_\_\_\_ :  
In The Matter Of: :

Notice and Recordkeeping for :  
Use of Sound Recordings :  
Under Statutory License :  
\_\_\_\_\_ :

Docket No. 14-CRB-0005 (RM)

**JOINT REPLY COMMENTS OF**  
**THE NATIONAL ASSOCIATION OF BROADCASTERS AND**  
**THE RADIO MUSIC LICENSE COMMITTEE REGARDING THE**  
**COPYRIGHT ROYALTY JUDGES' NOTICE AND RECORDKEEPING RULEMAKING**

**EXHIBITS A-E**

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September 5, 2014

## **INDEX OF EXHIBITS**

- A. Notice and Recordkeeping Regulations Proposed by the National Association of Broadcasters and the Radio Music License Committee**
- B. Redline Comparison of Current Notice and Recordkeeping Regulations and Notice and Recordkeeping Regulations Proposed by the National Association of Broadcasters and the Radio Music License Committee**
- C. Excerpts from Transcript of United States Copyright Office Music Licensing Study Public Roundtable at Belmont University, Nashville, Tennessee (June 4, 2014)**
- D. SoundExchange's Audited 2013 Annual Report**
- E. Redline Comparison of SoundExchange's Unaudited and Audited 2013 Annual Reports**

**Title 37: Patents, Trademarks, and Copyrights**

**PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES**

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**§370.1 General definitions.**

For purposes of this part, the following definitions apply:

(a) A *Notice of Use of Sound Recordings Under Statutory License* is a written notice to sound recording copyright owners of the use of their works under section 112(e) or 114(d)(2) of title 17, United States Code, or both, and is required under this part to be filed by a Service in the Copyright Office.

(b) A *Service* is an entity engaged in either the digital transmission of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code or both. The definition of a Service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). A Service may be further characterized as either a Preexisting Subscription Service, Preexisting Satellite Digital Audio Radio Service, Nonsubscription Transmission Service, New Subscription Service, Business Establishment Service or a combination of those.

(c) A *Preexisting Subscription Service* is defined in 17 U.S.C. 114(j)(11).

(d) A *New Subscription Service* is defined in 17 U.S.C. 114(j)(8).

(e) A *Nonsubscription Transmission Service* is a service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under section 114(d)(1) of title 17 of the United States Code and are made as part of a Service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the Service is to provide to the public such audio or other entertainment programming, and the primary purpose of the Service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(f) A *Preexisting Satellite Digital Audio Radio Service* is defined in 17 U.S.C. 114(j)(10).

(g) A *Business Establishment Service* is a Service that makes ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code and is exempt under section 114(d)(1)(C)(iv) of title 17 of the United States Code.

(h) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses by determination of the Copyright Royalty Judges.

(i) A *Report of Use* is a report required to be provided by a Service that is transmitting sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code, or both.

**§370.2 Notice of use of sound recordings under statutory license.**

(a) *General.* This section prescribes rules under which copyright owners shall receive notice of use of their sound recordings when used under either section 112(e) or 114(d)(2) of title 17, United States Code, or both.

(b) *Forms and content.* A Notice of Use of Sound Recordings Under Statutory License shall be prepared on a form that may be obtained from the Copyright Office Web site or from the Licensing Division, and shall include the following information:

(1) The full legal name of the Service that is either commencing digital transmissions of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both.

(2) The full address, including a specific number and street name or rural route, of the place of business of the Service. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(3) The telephone number and facsimile number of the Service.

(4) Information on how to gain access to the online Web site or homepage of the Service, or where information may be posted under this section concerning the use of sound recordings under statutory license.

(5) Identification of each license under which the Service intends to operate, including identification of each of the following categories under which the Service will be making digital transmissions of sound recordings: Preexisting Subscription Service, Preexisting Satellite Digital Audio Radio Service, Nonsubscription Transmission Service, New Subscription Service or Business Establishment Service.

(6) The date or expected date of the initial digital transmission of a sound recording to be made under the section 114(d)(2) statutory license and/or the date or the expected date of the initial use of the section 112(e) license for the purpose of making ephemeral phonorecords of the sound recordings.

(7) Identification of any amendments required by paragraph (e) of this section.

(c) *Signature.* The Notice shall include the signature of the appropriate officer or representative of the Service that is either transmitting the sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Notice and by the date of the signature.

(d) *Filing notices; fees.* The original and three copies shall be filed with the Licensing Division of the Copyright Office and shall be accompanied by the filing fee set forth in §201. 3(e) of this title. Notices shall be placed in the public records of the Licensing Division. The Notice and filing fee shall be sent to the Licensing Division at either the address listed on the form obtained from the Copyright Office or to: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE. , Washington, DC 20557-6400. A Service that, on or after July 1, 2004, shall make digital transmissions and/or ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings Under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of the sound recording and prior to the first digital transmission of the sound recording.

(e) *Amendment.* A Service shall file a new Notice of Use of Sound Recordings Under Statutory License within 45 days after any of the information contained in the Notice on file has changed, and shall indicate in the space provided by the Copyright Office that the Notice is an amended filing. The Licensing Division shall retain copies of all prior Notices filed by the Service.

### **§370.3 Reports of use of sound recordings under statutory license for Preexisting Subscription Services.**

(a) *General.* This section prescribes the rules for the maintenance and delivery of Reports of Use for sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by Preexisting Subscription Services.

(b) *Delivery.* Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each month.

(c) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a Preexisting Subscription Service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Preexisting Subscription Services shall post their Reports of Use online on or before the forty-fifth day after the close of each month, and continue to make them available thereafter to all sound recording copyright owners for a period of 90 days. Preexisting Subscription Services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. Preexisting Subscription Services may predicate provision of a password upon:

(1) Information relating to identity, location and status as a sound recording copyright owner; and

(2) A “click-wrap” agreement not to use information in the Report of Use for purposes other than royalty collection, royalty distribution, and determining compliance with statutory license requirements, without the express consent of the Preexisting Subscription Service providing the Report of Use.

(d) *Content.* A “Report of Use of Sound Recordings under Statutory License” shall be identified as such by prominent caption or heading, and shall include a Preexisting Subscription Service’s “Intended Playlists” for each channel and each day of the reported month. The “Intended Playlists” shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

(1) The name of the Preexisting Subscription Service or entity;

(2) The channel;

(3) The sound recording title;

(4) The featured recording artist, group, or orchestra;

(5) The retail album title (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the Preexisting Subscription Service for purchase of the sound recording);

(6) The marketing label of the commercially available album or other product on which the sound recording is found;

(7) The catalog number;

(8) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(9) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(10) The date of transmission; and

(11) The time of transmission.

(e) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the Preexisting Subscription Service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the

Preexisting Subscription Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(f) *Format.* Reports of Use should be provided on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, and should conform as closely as possible to the following specifications, unless the Preexisting Subscription Service and the Collective have agreed otherwise:

- (1) ASCII delimited format, using pipe characters as delimiter, with no headers or footers;
- (2) Carats should surround strings;
- (3) No carats should surround dates and numbers;
- (4) Dates should be indicated by: YYYY/MM/DD;
- (5) Times should be based on a 24-hour clock: HH:MM:SS;
- (6) A carriage return should be at the end of each line; and
- (7) All data for one record should be on a single line.

(g) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Preexisting Subscription Service providing the Report of Use.

(h) *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use.

(i) In any case in which a Preexisting Subscription Service has not provided a Report of Use required under this section for use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, prior to January 1, 2010, Reports of Use for the corresponding calendar year filed by other Preexisting Subscription Services shall serve as the Reports of Use for the non-reporting Service, solely for purposes of distribution of any corresponding royalties by the Collective.

[74 FR 52423, Oct. 13, 2009, as amended at 76 FR 45696, Aug. 1, 2011]

**§370.4 Reports of use of sound recordings under statutory license for Nonsubscription Transmission Services, Preexisting Satellite Digital Audio Radio Services, New Subscription Services and Business Establishment Services.**

(a) *General.* This section prescribes rules for the maintenance and delivery of Reports of Use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by Nonsubscription Transmission Services, Preexisting Satellite Digital Audio Radio Services, New Subscription Services, and Business Establishment Services.

(b) *Definitions.* (1) *Aggregate Tuning Hours* are the total hours of programming that a Service has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of transmissions made pursuant to one or both of the statutory licenses set forth in 17 U.S.C. 112(e) and 114(d)(2), less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a Service transmitted one hour of programming to 10 simultaneous listeners, the Service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the Service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a Service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Service's Aggregate Tuning Hours would equal 10.

(2) A *Minimum Fee Broadcaster* is a Nonsubscription Transmission Service that meets the definition of a broadcaster pursuant to § 380.2(b) of this chapter and the Service's payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114(d)(2).

(3) A *Performance* is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the Service has previously obtained a license from the copyright owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(4) *Play Frequency* is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the reporting period, then the Play Frequency is one. If the sound recording is transmitted 10 times during the reporting period, then the Play Frequency is 10.

(c) *Delivery*. Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each reporting period identified in paragraph (d)(3) of this section.

(d) *Report of Use*. (1) *Separate reports not required*. A Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service or a New Subscription Service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code and makes ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code need not maintain a separate Report of Use for each statutory license during the relevant reporting periods. Notwithstanding the foregoing, a Service that makes transmissions that are subject to different statutory rates shall provide a separate Report of Use for each type of Service, but only where the submission of separate Reports of Use is necessary in order for the Collective to allocate and distribute royalties. When corporate affiliates provide multiple Services of the same type, they shall, if feasible, consolidate their reporting onto a single Report of Use for that type of Service, but Reports of Use that are not so consolidated shall not be deemed noncompliant. Each Report of Use shall, if feasible, cover the same scope of activity (*e.g.*, the same Service offering and the same channels or stations) as any related statement(s) of account, unless the Service and the Collective have agreed otherwise, but a Report of Use that does not cover the same scope of activity as any related statement(s) of account shall not be deemed noncompliant.

(2) *Content*. For a Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for (a) each Performance transmitted by any such Service other than a Business Establishment Service during the reporting periods identified in paragraph (d)(3) of this section and (b) each sound recording transmitted by a Business Establishment Service during the reporting periods identified in paragraph (d)(3) of this section:

(i) The name of the Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service making the transmissions, including the name of the entity filing the Report of Use, if different;

(ii) The category transmission code for the category of transmission operated by the Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service:

(A) For eligible nonsubscription transmissions other than broadcast simulcasts and transmissions of non-music programming;

(B) For eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming;

(C) For eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming;

(D)-(G) [Reserved]

(H) For transmissions other than broadcast simulcasts and transmissions of non-music programming made by an eligible New Subscription Service;

(I) For transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible New Subscription Service;

(J) For transmissions of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible New Subscription Service; and

(K) For eligible transmissions by a Business Establishment Service making ephemeral recordings;

(iii) The featured artist;

(iv) The sound recording title;

(v) For a Nonsubscription Transmission Service or a New Subscription Service except those Services permitted to report under an alternative metric, such as Aggregate Tuning Hours: The actual total Performances of the sound recording during the reporting period.

(vi) For a Preexisting Satellite Digital Audio Radio Service, a Business Establishment Service, or a Nonsubscription Transmission Service or New Subscription Service permitted to report Aggregate Tuning Hours in lieu of Performances: The actual total Performances of the sound recording during the reporting period or, alternatively, the

(A) Aggregate Tuning Hours;

(B) Channel or program name; and

(C) Play Frequency.<sup>1</sup>

(3) *Reporting period.* A Report of Use shall be prepared:

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<sup>1</sup> Broadcasters take no position regarding the appropriateness of this provision with respect to the identified Services.

(i) For each calendar month of the year by all Services other than a Nonsubscription Transmission Service qualifying as a Minimum Fee Broadcaster or a Nonsubscription Transmission Service for which reporting of total actual Performances is not commercially feasible; or

(ii) For a two-week period (two periods of 7 consecutive days) for each calendar quarter of the year by a Nonsubscription Transmission Service for which reporting of actual total Performances is not commercially feasible, other than a Minimum Fee Broadcaster. The two-week period need not consist of consecutive weeks, but both weeks must be completely within the calendar quarter.

(4) *Reporting Waiver.* Given the lower amount of statutory royalties collected from Minimum Fee Broadcasters and the challenges that smaller entities often face in complying with reporting requirements, Minimum Fee Broadcasters shall not be required to provide Reports of Use. In addition to payment of the minimum fee, Minimum Fee Broadcasters shall pay to the Collective a \$100 annual Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(5) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the Service attesting that the information contained in the Report is believed to be accurate and is maintained by the Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Report, and by the date of the signature.

(6) *Documentation.* A Service shall, for a period of at least three years from the date of Service or posting of a Report of Use, keep and retain a copy of the Report of Use.

(7) *Programming Provided by Third Parties.* In the case of programming provided by third parties to a Service that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission, the Service shall make commercially reasonable, good-faith efforts to cause such third parties to furnish the information required in paragraphs (d)(2) of this section subject to the limitations on reporting provided in paragraphs (d)(3) and (4) of this section. If, however, some or all of that information is not provided to the Service, the Service shall not be required to provide the information that it did not receive from the third-party programming provider regarding its Performances for such programming. In all cases, the Service shall be permitted to report Aggregate Tuning Hours and Play Frequency in lieu of actual Performances for such programming.

(e) *Format and delivery.* (1) Electronic format only. Reports of use must be maintained and delivered in electronic format only, as prescribed in paragraphs (e)(2) through (8) of this section. A hard copy Report of Use is not permissible.

(2) *ASCII text file delivery; facilitation by provision of spreadsheet templates.* All Report of Use data files must be delivered in text format, with ASCII or UTF-8 character encoding, or in XML (Extensible Markup Language) format. However, to facilitate such delivery, SoundExchange shall post and maintain on its Internet Web site a template for creating a Report of Use using Microsoft's Excel spreadsheet and Corel's Quattro Pro spreadsheet and instruction on how to

convert such spreadsheets to ASCII text files that conform to the format specifications set forth below. Further, technical support and cost associated with the use of spreadsheets is the responsibility of the Service submitting the Report of Use.

(3) *Delivery mechanism.* The data contained in a Report of Use may be delivered by any mechanism agreed upon between the Service and SoundExchange, or by File Transfer Protocol (FTP), e-mail, or CD-ROM according to the following specifications:

(i) A Service delivering a Report of Use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall maintain on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.

(ii) A Service delivering a Report of Use via e-mail shall append the report as an attachment to the e-mail. The main body of the e-mail shall identify:

(A) The full name and address of the Service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the Report of Use is a file using headers, counting of the rows should begin with row 15. If the Report of Use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iii) A Service delivering a Report of Use via CD-ROM must compress the reporting data to fit onto a single CD-ROM per reporting period. Each CD-ROM shall be submitted with a cover letter identifying:

(A) The full name and address of the Service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the Report of Use is a file using headers, counting of the rows should begin with row 15. If the Report of Use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(4) *Delivery address.* SoundExchange shall publish on the home page of its website (<http://www.soundexchange.com>) its physical and electronic mail addresses where Reports of Use are to be delivered, and Services shall deliver Reports of Use to SoundExchange at one of those addresses or at the address(es) identified in SoundExchange's Notice of Designation as Collective under statutory license pursuant to § 370.5(b). SoundExchange shall acknowledge receipt of each Report of Use by sending a return e-mail to the Service delivering such Report of Use within one business day of receiving the Report of Use. SoundExchange shall forward electronic copies of these Reports of Use to all other collectives defined in this section.

(5) *File naming.* Each data file contained in a Report of Use must be given a name by the Service followed by the start and end date of the reporting period. The start and end date must be separated by a dash and in the format of year, month, and day (YYYYMMDD). Each file name must end with the file type extension of ". txt". (Example: AcmeMusicCo20050101-20050331. txt).

(6) *File type and compression.* (i) All data files must be in ASCII format.

(ii) A Report of Use must be compressed in one of the following zipped formats:

(A) . zip—generated using utilities such as WinZip and/or UNIX zip command;

(B) . Z—generated using UNIX compress command; or

(C) . gz—generated using UNIX gzip command.

(iii) Zipped files shall be named in the same fashion as described in paragraph (e)(5) of this section, except that such zipped files shall use the applicable file extension compression name described in this paragraph (e)(6).

(7) *Files with headers.* (i) If a Service elects to submit files with headers, the following elements, in order, must occupy the first 15 rows of a Report of Use:

(A) Name of Service as it appears on the relevant statement of account, provided, however, that a Report of Use shall not be deemed noncompliant for providing a name that differs from the relevant statement of account;

(B) The account number assigned to the Service by the Collective for the relevant Service offering (if the Service has been notified in writing of such account number by the Collective);

(C) Name of contact person;

(D) Street address of the Service;

(E) City, state and zip code of the Service;

(F) Telephone number of the contact person;

- (G) E-mail address of the contact person;
  - (H) Start of the reporting period (YYYYMMDD);
  - (I) End of the reporting period (YYYYMMDD);
  - (J) Report generation date (YYYYMMDD);
  - (K) Number of rows in data file, beginning with 15th row;
  - (L) Text indicator character;
  - (M) Field delimiter character;
  - (N) Blank line; and
  - (O) Report headers (Featured Artist, Sound Recording Title, etc. ).
- (ii) Each of the rows described in paragraphs (e)(7)(i)(A) through (F) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (e)(7)(i)(G) through (I) of this section should not exceed eight alphanumeric characters.
  - (iii) Data text fields, as required by paragraph (d) of this section, begin on row 15 of a Report of Use with headers. A carriage return must be at the end of each row thereafter. Abbreviations within data fields are not permitted.
  - (iv) The text indicator character must be unique and must never be found in the report's data content.
  - (v) The field delimiter character must be unique and must never be found in the report's data content. Delimiters must be used even when certain elements are not being reported; in such case, the Service must denote the blank data field with a delimiter in the order in which it would have appeared.
- (8) *Files without headers.* If a Service elects to submit files without headers, the following format requirements must be met:
- (i) ASCII delimited format, using pipe (|) characters as delimiters, with no headers or footers;
  - (ii) Carats (^) should surround strings;
  - (iii) No carats (^) should surround dates and numbers;
  - (iv) A carriage return must be at the end of each line;

(v) All data for one record must be on a single line; and

(vi) Abbreviations within data fields are not permitted.

(f) In any case in which a Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service, or Business Establishment Service has not provided a Report of Use required under this section for use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, prior to January 1, 2010, Reports of Use for the corresponding calendar year filed by other Services of the same type shall serve as the Reports of Use for the non-reporting Service, solely for purposes of distribution of any corresponding royalties by the Collective.

[74 FR 52423, Oct. 13, 2009, as amended at 76 FR 45696, Aug. 1, 2011]

**§370.5 Designated collection and distribution organizations for Reports of Use of sound recordings under statutory license.**

(a) *General.* This section prescribes rules under which Reports of Use shall be collected and distributed under section 114(f) of title 17 of the United States Code, and under which reports of such use shall be kept and made available.

(b) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a "Notice of Designation as Collective under Statutory License," which shall be identified as such by prominent caption or heading, and shall contain the following information:

(1) The Collective name, address, telephone number and facsimile number;

(2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and

(3) Information on how to gain access to the online Web site or home page of the Collective, where information may be posted under this part concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE. , Washington, DC 20557-6400.

(c) *Annual Report.* (1) Ninety days following the close of the Collective's fiscal year, the Collective shall post and make available online, for the duration of three years, an Annual Report on how the Collective operates, how royalties are collected and distributed, how disputes among competing royalty claimants are resolved, what the Collective spent that fiscal year on administrative expenses, and any policies and procedures adopted by the Collective regarding any of the foregoing matters. The Annual Report shall include, but not be limited to, the following information and such other information as the board of directors of the Collective may require:

- (i) The identity of the Collective's board members;
- (ii) The identity of every operating committee and subcommittee of the Collective, the identity of each member thereof, and a detailed description of each such committee's and subcommittee's functions and activities;
- (iii) The total amount of license revenue collected in the past fiscal year identified by category of Service, including revenue collected from:
  - (A) commercial broadcasters subject to the statutory rate;
  - (B) commercial broadcasters subject to alternative rates;
  - (C) noncommercial broadcasters subject to the statutory rate;
  - (D) noncommercial broadcasters subject to alternative rates;
  - (E) Nonsubscription Transmission Services other than broadcasters subject to the statutory rate;
  - (F) Nonsubscription Transmission Services other than broadcasters subject to alternative rates;
  - (G) New Subscription Services;
  - (H) Preexisting Subscription Services and Preexisting Satellite Digital Audio Radio Services; and
  - (I) Business Establishment Services.
- (iv) The amount of payments made to registered copyright holders in the past fiscal year;
- (v) The amount of payments made to registered recording artists in the past fiscal year;
- (vi) The amount of money transferred to the control of the American Federation of Television and Radio Artists and the American Federation of Musicians for compensation of session musicians and background singers in the past fiscal year;
- (vii) The amount of any reserve established, previously or in the future, by the Collective to pay future claims, the location of the reserve, and the procedures by which claims against the reserve are proven;
- (viii) A detailed breakdown of administrative expenses, including the amounts spent on royalty allocation and distribution activities, litigating rate-setting proceedings (including both an amortized amount and an actual amount spent during that fiscal year), negotiating licenses, legislative lobbying, other outreach and public relations expenses, personnel expenses, operating

expenses, any other significant expenses, as well as all expenses approved by any governing board that are only chargeable against those copyright owners and performers who have specifically authorized the Collective to act on their behalf but not against any other copyright owners or performers;

(ix) The amount of money subject to any forfeiture for failure to be claimed under current regulations and the location of the escrow accounts for those monies;

(x) A prospective distribution schedule for the following year that discloses approximate dates of payments and the reporting periods to be covered;

(xi) A prospective schedule of all forfeitures for the next year that discloses deadlines, the reporting periods covered by the forfeiture, the number and name of recording artists and sound recording copyright owners affected. The report shall also include an explanation of what actions, if any, the Collective intends to take to publicize the forfeiture;

(xii) A detailed explanation of policies and procedures for identifying, locating, and registering copyright owners and performing artists; and

(xiii) A detailed explanation of the basis for distributing royalty amounts, if any, during the past fiscal year that were based on proxy information rather than sound recording Reports of Use received from the Services.

(2) The annual report shall include a certification from an authorized representative of the Collective that the information provided in the annual report is accurate and that all regulatory requirements regarding forfeitures, including segregation of the funds, have been followed.

(d) *Inspection of Reports of Use by copyright owners.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner, and the copyright owner's written agreement not to utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use. The Collective shall render its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(e) *Confidentiality.* Copyright owners, their agents, and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

(f) *Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Licensing Division of the Copyright Office, the Copyright Royalty Board and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such Service with information identifying the copyright owners it has served.

(g) *Authority to agree to special reporting arrangements.* A Collective and one or more Services are authorized to agree concerning reporting requirements to apply in lieu of the requirements set forth in this part.

### **§370.6 Proxy Distributions.**

(a) *Proxy Distributions.* In any case in which a Collective reasonably determines that it has not been provided with sufficient information from a Service regarding one or more Performances to allow the Collective to distribute the royalties associated with such Performance(s), and the board of directors of the Collective determines that further efforts to seek additional information from the Service regarding such Performance(s) would not be warranted, the Collective may determine that it will distribute the royalties associated with such Performance(s) on the basis of a proxy data set approved by the board of directors of the Collective.

(b) *Disclosure of Proxy Distribution Methodology.* A Collective making proxy distributions pursuant to paragraph (a) of this section shall:

- (i) establish policies and procedures regarding such proxy distributions and publish those policies and procedures online;
- (ii) provide an opportunity for royalty claimants affected by such proxy distribution policies and procedures to object to such policies and procedures;
- (iii) establish a reasonable process for resolving objections; and
- (iv) provide notice of the Collective's intent to make a proxy distribution at least thirty days prior to making such distribution.

**B**

**Title 37: Patents, Trademarks, and Copyrights**  
**PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY**  
**LICENSES**

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**§370.1 General definitions.**

For purposes of this part, the following definitions apply:

(a) A *Notice of Use of Sound Recordings Under Statutory License* is a written notice to sound recording copyright owners of the use of their works under section 112(e) or 114(d)(2) of title 17, United States Code, or both, and is required under this part to be filed by a Service in the Copyright Office.

(b) A *Service* is an entity engaged in either the digital transmission of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code or both. The definition of a Service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). A Service may be further characterized as either a Preexisting Subscription Service, Preexisting Satellite Digital Audio Radio Service, Nonsubscription Transmission Service, New Subscription Service, Business Establishment Service or a combination of those.

(c) A *Preexisting Subscription Service* is defined in 17 U.S.C. 114(j)(11).

(d) A *New Subscription Service* is defined in 17 U.S.C. 114(j)(8).

(e) A *Nonsubscription Transmission Service* is a service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under section 114(d)(1) of title 17 of the United States Code and are made as part of a Service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the Service is to provide to the public such audio or other entertainment programming, and the primary purpose of the Service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(f) A *Preexisting Satellite Digital Audio Radio Service* is defined in 17 U.S.C. 114(j)(10).

(g) A *Business Establishment Service* is a Service that makes ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code and is exempt under section 114(d)(1)(C)(iv) of title 17 of the United States Code.

(h) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses by determination of the Copyright Royalty Judges.

(i) A *Report of Use* is a report required to be provided by a Service that is transmitting sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code, or both.

### **§370.2 Notice of use of sound recordings under statutory license.**

(a) *General.* This section prescribes rules under which copyright owners shall receive notice of use of their sound recordings when used under either section 112(e) or 114(d)(2) of title 17, United States Code, or both.

(b) *Forms and content.* A Notice of Use of Sound Recordings Under Statutory License shall be prepared on a form that may be obtained from the Copyright Office Web site or from the Licensing Division, and shall include the following information:

(1) The full legal name of the Service that is either commencing digital transmissions of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both.

(2) The full address, including a specific number and street name or rural route, of the place of business of the Service. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(3) The telephone number and facsimile number of the Service.

(4) Information on how to gain access to the online Web site or homepage of the Service, or where information may be posted under this section concerning the use of sound recordings under statutory license.

(5) Identification of each license under which the Service intends to operate, including identification of each of the following categories under which the Service will be making digital transmissions of sound recordings: Preexisting Subscription Service, Preexisting Satellite Digital Audio Radio Service, Nonsubscription Transmission Service, New Subscription Service or Business Establishment Service.

(6) The date or expected date of the initial digital transmission of a sound recording to be made under the section 114(d)(2) statutory license and/or the date or the expected date of the initial use of the section 112(e) license for the purpose of making ephemeral phonorecords of the sound recordings.

(7) Identification of any amendments required by paragraph (e) of this section.

(c) *Signature.* The Notice shall include the signature of the appropriate officer or representative of the Service that is either transmitting the sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Notice and by the date of the signature.

(d) *Filing notices; fees.* The original and three copies shall be filed with the Licensing Division of the Copyright Office and shall be accompanied by the filing fee set forth in §201. 3(e) of this title. Notices shall be placed in the public records of the Licensing Division. The Notice and filing fee shall be sent to the Licensing Division at either the address listed on the form obtained from the Copyright Office or to: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE. , Washington, DC 20557-6400. A Service that, on or after July 1, 2004, shall make digital transmissions and/or ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings Under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of the sound recording and prior to the first digital transmission of the sound recording.

(e) *Amendment.* A Service shall file a new Notice of Use of Sound Recordings Under Statutory License within 45 days after any of the information contained in the Notice on file has changed, and shall indicate in the space provided by the Copyright Office that the Notice is an amended filing. The Licensing Division shall retain copies of all prior Notices filed by the Service.

### **§370.3 Reports of use of sound recordings under statutory license for Preexisting Subscription Services.**

(a) *General.* This section prescribes the rules for the maintenance and delivery of Reports of Use for sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by Preexisting Subscription Services.

(b) *Delivery.* Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each month.

(c) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a Preexisting Subscription Service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Preexisting Subscription Services shall post their Reports of Use online on or before the forty-fifth day after the close of each month, and continue to make them available thereafter to all sound recording copyright owners for a period of 90 days. Preexisting Subscription Services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. Preexisting Subscription Services may predicate provision of a password upon:

(1) Information relating to identity, location and status as a sound recording copyright owner;  
and

(2) A “click-wrap” agreement not to use information in the Report of Use for purposes other than royalty collection, royalty distribution, and determining compliance with statutory license requirements, without the express consent of the Preexisting Subscription Service providing the Report of Use.

(d) *Content.* A “Report of Use of Sound Recordings under Statutory License” shall be identified as such by prominent caption or heading, and shall include a Preexisting Subscription Service’s “Intended Playlists” for each channel and each day of the reported month. The “Intended Playlists” shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

(1) The name of the Preexisting Subscription Service or entity;

(2) The channel;

(3) The sound recording title;

(4) The featured recording artist, group, or orchestra;

(5) The retail album title (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the Preexisting Subscription Service for purchase of the sound recording);

(6) The marketing label of the commercially available album or other product on which the sound recording is found;

(7) The catalog number;

(8) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(9) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(10) The date of transmission; and

(11) The time of transmission.

(e) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the Preexisting Subscription Service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the

Preexisting Subscription Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(f) *Format.* Reports of Use should be provided on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, and should conform as closely as possible to the following specifications, unless the Preexisting Subscription Service and the Collective have agreed otherwise:

- (1) ASCII delimited format, using pipe characters as delimiter, with no headers or footers;
- (2) Carats should surround strings;
- (3) No carats should surround dates and numbers;
- (4) Dates should be indicated by: YYYY/MM/DD;
- (5) Times should be based on a 24-hour clock: HH:MM:SS;
- (6) A carriage return should be at the end of each line; and
- (7) All data for one record should be on a single line.

(g) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Preexisting Subscription Service providing the Report of Use.

(h) *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use.

(i) In any case in which a Preexisting Subscription Service has not provided a Report of Use required under this section for use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, prior to January 1, 2010, Reports of Use for the corresponding calendar year filed by other Preexisting Subscription Services shall serve as the Reports of Use for the non-reporting Service, solely for purposes of distribution of any corresponding royalties by the Collective.

[74 FR 52423, Oct. 13, 2009, as amended at 76 FR 45696, Aug. 1, 2011]

**§370.4 Reports of use of sound recordings under statutory license for Nonsubscription Transmission Services, Preexisting Satellite Digital Audio Radio Services, New Subscription Services and Business Establishment Services.**

(a) *General.* This section prescribes rules for the maintenance and delivery of Reports of Use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by Nonsubscription Transmission Services, Preexisting Satellite Digital Audio Radio Services, New Subscription Services, and Business Establishment Services.

(b) *Definitions.* (1) *Aggregate Tuning Hours* are the total hours of programming that a ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment~~ Service has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of ~~eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment~~ transmission transmissions made pursuant to one or both of the statutory licenses set forth in 17 U.S.C. 112(e) and 114(d)(2), less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a ~~nonsubscription transmission~~ Service transmitted one hour of programming to 10 simultaneous listeners, the ~~nonsubscription transmission~~ Service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the ~~nonsubscription transmission~~ Service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a ~~nonsubscription transmission~~ Service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the ~~nonsubscription transmission~~ Service's Aggregate Tuning Hours would equal 10.

~~(2) An *AM/FM Webeast* is a transmission made by an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U. S. C. 114(d)(2).~~

~~(3) A *Minimum Fee Broadcaster* is a Nonsubscription Transmission Service that meets the definition of a broadcaster pursuant to §380.2 380.2(b) of this chapter and the Service's payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114(d)(2).~~

(43) A *Performance* is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the Service has previously obtained a license from the copyright owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(54) *Play Frequency* is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the reporting period, then the Play Frequency is one. If the sound recording is transmitted 10 times during the reporting period, then the Play Frequency is 10.

(c) *Delivery*. Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each reporting period identified in paragraph (d)(3) of this section.

(d) *Report of Use*. (1) *Separate reports not required*. A Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service or a New Subscription Service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code and makes ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code need not maintain a separate Report of Use for each statutory license during the relevant reporting periods. Notwithstanding the foregoing, a Service that makes transmissions that are subject to different statutory rates shall provide a separate Report of Use for each type of Service, but only where the submission of separate Reports of Use is necessary in order for the Collective to allocate and distribute royalties. When corporate affiliates provide multiple Services of the same type, they shall, if feasible, consolidate their reporting onto a single Report of Use for that type of Service, but Reports of Use that are not so consolidated shall not be deemed noncompliant. Each Report of Use shall, if feasible, cover the same scope of activity (e.g., the same Service offering and the same channels or stations) as any related statement(s) of account, unless the Service and the Collective have agreed otherwise, but a Report of Use that does not cover the same scope of activity as any related statement(s) of account shall not be deemed noncompliant.

(2) *Content*. For a Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for (a) each Performance transmitted by any such Service other than a Business Establishment Service during the reporting periods identified in paragraph (d)(3) of this section

and (b) each sound recording transmitted by a Business Establishment Service during the reporting periods identified in paragraph (d)(3) of this section:

(i) The name of the Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service making the transmissions, including the name of the entity filing the Report of Use, if different;

(ii) The category transmission code for the category of transmission operated by the Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service:

(A) For eligible nonsubscription transmissions other than broadcast simulcasts and transmissions of non-music programming;

(B) For eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming;

(C) For eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming;

(D)-(G) [Reserved]

(H) For transmissions other than broadcast simulcasts and transmissions of non-music programming made by an eligible New Subscription Service;

(I) For transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible New Subscription Service;

(J) For transmissions of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible New Subscription Service; and

(K) For eligible transmissions by a Business Establishment Service making ephemeral recordings;

(iii) The featured artist;

(iv) The sound recording title;

~~(v) The International Standard Recording Code (ISRC) or, alternatively to the ISRC, the:~~

~~(A) Album title; and~~

~~(B) Marketing label;~~

~~(vi) For a Nonsubscription Transmission Service or a New Subscription Service except those qualifying as minimum fee broadcasters Services permitted to report under an alternative metric, such as Aggregate Tuning Hours: The actual total Performances of the sound recording during the reporting period.~~

~~(viii)~~ For a Preexisting Satellite Digital Audio Radio Service, a new subscription service, a Business Establishment Service, or a Nonsubscription Transmission Service ~~qualifying as a minimum fee broadcaster~~ or New Subscription Service permitted to report Aggregate Tuning Hours in lieu of Performances: The actual total Performances of the sound recording during the reporting period or, alternatively, the

(A) Aggregate Tuning Hours;

(B) Channel or program name; and

(C) Play Frequency.<sup>1</sup>

(3) *Reporting period.* A Report of Use shall be prepared:

(i) For each calendar month of the year by all Services other than a Nonsubscription Transmission Service qualifying as a Minimum Fee Broadcaster or a Nonsubscription Transmission Service for which reporting of total actual Performances is not commercially feasible; or

(ii) For a two-week period (two periods of 7 consecutive days) for each calendar quarter of the year by a Nonsubscription Transmission Service ~~qualifying as for which reporting of actual total Performances is not commercially feasible, other than a~~ Minimum Fee Broadcaster ~~and.~~ The two-week period need not consist of consecutive weeks, but both weeks must be completely within the calendar quarter.

(4) *Reporting Waiver.* Given the lower amount of statutory royalties collected from Minimum Fee Broadcasters and the challenges that smaller entities often face in complying with reporting requirements, Minimum Fee Broadcasters shall not be required to provide Reports of Use. In addition to payment of the minimum fee, Minimum Fee Broadcasters shall pay to the Collective a \$100 annual Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(45) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the Service attesting, ~~under penalty of perjury,~~ that the information contained in the Report is believed to be accurate and is maintained by the Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Report, and by the date of the signature.

~~(5) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, without consent of the service providing the Report of Use.~~

(6) *Documentation.* A Service shall, for a period of at least three years from the date of Service or posting of a Report of Use, keep and retain a copy of the Report of Use.

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<sup>1</sup> Broadcasters take no position regarding the appropriateness of this provision with respect to the identified Services.

(7) Programming Provided by Third Parties. In the case of programming provided by third parties to a Service that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission, the Service shall make commercially reasonable, good-faith efforts to cause such third parties to furnish the information required in paragraphs (d)(2) of this section subject to the limitations on reporting provided in paragraphs (d)(3) and (4) of this section. If, however, some or all of that information is not provided to the Service, the Service shall not be required to provide the information that it did not receive from the third-party programming provider regarding its Performances for such programming. In all cases, the Service shall be permitted to report Aggregate Tuning Hours and Play Frequency in lieu of actual Performances for such programming.

(e) *Format and delivery.* (1) Electronic format only. Reports of use must be maintained and delivered in electronic format only, as prescribed in paragraphs (e)(2) through (8) of this section. A hard copy Report of Use is not permissible.

(2) *ASCII text file delivery; facilitation by provision of spreadsheet templates.* All Report of Use data files must be delivered in text format, with ASCII or UTF-8 character encoding, or in XML (Extensible Markup Language) format. However, to facilitate such delivery, SoundExchange shall post and maintain on its Internet Web site a template for creating a Report of Use using Microsoft's Excel spreadsheet and Corel's Quattro Pro spreadsheet and instruction on how to convert such spreadsheets to ASCII text files that conform to the format specifications set forth below. Further, technical support and cost associated with the use of spreadsheets is the responsibility of the Service submitting the Report of Use.

(3) *Delivery mechanism.* The data contained in a Report of Use may be delivered by any mechanism agreed upon between the Service and SoundExchange, or by File Transfer Protocol (FTP), e-mail, or CD-ROM according to the following specifications:

(i) A Service delivering a Report of Use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall maintain on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.

(ii) A Service delivering a Report of Use via e-mail shall append the report as an attachment to the e-mail. The main body of the e-mail shall identify:

(A) The full name and address of the Service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the Report of Use is a file using headers, counting of the rows should begin with row 15. If the Report of Use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iii) A Service delivering a Report of Use via CD-ROM must compress the reporting data to fit onto a single CD-ROM per reporting period. Each CD-ROM shall be submitted with a cover letter identifying:

(A) The full name and address of the Service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the Report of Use is a file using headers, counting of the rows should begin with row 15. If the Report of Use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(4) *Delivery address.* SoundExchange shall publish on the home page of its website (<http://www.soundexchange.com>) its physical and electronic mail addresses where Reports of Use shall be delivered, and Services shall deliver Reports of Use to SoundExchange at one of those addresses or at the following address: SoundExchange, Inc., 1121 14th Street, NW, Suite 700, Washington, DC 20005; (Phone) (202) 640-5858; (Facsimile) (202) 640-5859; (E-mail) [reports@soundexchange.com](mailto:reports@soundexchange.com)(es) identified in SoundExchange's Notice of Designation as Collective under statutory license pursuant to § 370.5(b). SoundExchange shall acknowledge receipt of each Report of Use by sending a return e-mail to the Service delivering such Report of Use within one business day of receiving the Report of Use. SoundExchange shall forward electronic copies of these Reports of Use to all other collectives defined in this section.

(5) *File naming.* Each data file contained in a Report of Use must be given a name by the Service followed by the start and end date of the reporting period. The start and end date must be separated by a dash and in the format of year, month, and day (YYYYMMDD). Each file name must end with the file type extension of ". txt". (Example: AcmeMusicCo20050101-20050331. txt).

(6) *File type and compression.* (i) All data files must be in ASCII format.

(ii) A Report of Use must be compressed in one of the following zipped formats:

(A) . zip—generated using utilities such as WinZip and/or UNIX zip command;

(B) . Z—generated using UNIX compress command; or

(C) . gz—generated using UNIX gzip command.

(iii) Zipped files shall be named in the same fashion as described in paragraph (e)(5) of this section, except that such zipped files shall use the applicable file extension compression name described in this paragraph (e)(6).

(7) *Files with headers.* (i) If a Service elects to submit files with headers, the following elements, in order, must occupy the first 1415 rows of a Report of Use:

(A) Name of Service as it appears on the relevant statement of account, provided, however, that a Report of Use shall not be deemed noncompliant for providing a name that differs from the relevant statement of account;

(B) The account number assigned to the Service by the Collective for the relevant Service offering (if the Service has been notified in writing of such account number by the Collective);

(C) Name of contact person;

(D) Street address of the Service;

(E) City, state and zip code of the Service;

(F) Telephone number of the contact person;

(G) E-mail address of the contact person;

(H) Start of the reporting period (YYYYMMDD);

(I) End of the reporting period (YYYYMMDD);

(J) Report generation date (YYYYMMDD);

(K) Number of rows in data file, beginning with 15th row;

(L) Text indicator character;

(M) Field delimiter character;

(N) Blank line; and

(O) Report headers (Featured Artist, Sound Recording Title, etc. ).

(ii) Each of the rows described in paragraphs (e)(7)(i)(A) through (F) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (e)(7)(i)(G) through (I) of this section should not exceed eight alphanumeric characters.

(iii) Data text fields, as required by paragraph (d) of this section, begin on row 15 of a Report of Use with headers. A carriage return must be at the end of each row thereafter. Abbreviations within data fields are not permitted.

(iv) The text indicator character must be unique and must never be found in the report's data content.

(v) The field delimiter character must be unique and must never be found in the report's data content. Delimiters must be used even when certain elements are not being reported; in such case, the Service must denote the blank data field with a delimiter in the order in which it would have appeared.

(8) *Files without headers.* If a Service elects to submit files without headers, the following format requirements must be met:

(i) ASCII delimited format, using pipe (|) characters as delimiters, with no headers or footers;

(ii) Carats (^) should surround strings;

(iii) No carats (^) should surround dates and numbers;

(iv) A carriage return must be at the end of each line;

(v) All data for one record must be on a single line; and

(vi) Abbreviations within data fields are not permitted.

(f) In any case in which a Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service, or Business Establishment Service has not provided a Report of Use required under this section for use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, prior to January 1, 2010, Reports of Use for the corresponding calendar year filed by other Services of the same type shall serve as the Reports of Use for the non-reporting Service, solely for purposes of distribution of any corresponding royalties by the Collective.

[74 FR 52423, Oct. 13, 2009, as amended at 76 FR 45696, Aug. 1, 2011]

**§370.5 Designated collection and distribution organizations for Reports of Use of sound recordings under statutory license.**

(a) *General.* This section prescribes rules under which Reports of Use shall be collected and distributed under section 114(f) of title 17 of the United States Code, and under which reports of such use shall be kept and made available.

(b) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a "Notice of Designation as Collective under Statutory License," which shall be identified as such by prominent caption or heading, and shall contain the following information:

- (1) The Collective name, address, telephone number and facsimile number;
- (2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and
- (3) Information on how to gain access to the online Web site or home page of the Collective, where information may be posted under this part concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE. , Washington, DC 20557-6400.

(c) *Annual Report.* (1) Ninety days following the close of the Collective's fiscal year, the Collective will~~shall~~ post and make available online, for the duration of ~~one year~~three years, an Annual Report on how the Collective operates, how royalties are collected and distributed, and how disputes among competing royalty claimants are resolved, what the Collective spent that fiscal year on administrative expenses-, and any policies and procedures adopted by the Collective regarding any of the foregoing matters. The Annual Report shall include, but not be limited to, the following information and such other information as the board of directors of the Collective may require:

- (i) The identity of the Collective's board members;
- (ii) The identity of every operating committee and subcommittee of the Collective, the identity of each member thereof, and a detailed description of each such committee's and subcommittee's functions and activities;
- (iii) The total amount of license revenue collected in the past fiscal year identified by category of Service, including revenue collected from:
  - (A) commercial broadcasters subject to the statutory rate;
  - (B) commercial broadcasters subject to alternative rates;
  - (C) noncommercial broadcasters subject to the statutory rate;
  - (D) noncommercial broadcasters subject to alternative rates;
  - (E) Nonsubscription Transmission Services other than broadcasters subject to the statutory rate;
  - (F) Nonsubscription Transmission Services other than broadcasters subject to alternative rates;

- (G) New Subscription Services;
- (H) Preexisting Subscription Services and Preexisting Satellite Digital Audio Radio Services;  
and
- (I) Business Establishment Services.
- (iv) The amount of payments made to registered copyright holders in the past fiscal year;
- (v) The amount of payments made to registered recording artists in the past fiscal year;
- (vi) The amount of money transferred to the control of the American Federation of Television and Radio Artists and the American Federation of Musicians for compensation of session musicians and background singers in the past fiscal year;
- (vii) The amount of any reserve established, previously or in the future, by the Collective to pay future claims, the location of the reserve, and the procedures by which claims against the reserve are proven;
- (viii) A detailed breakdown of administrative expenses, including the amounts spent on royalty allocation and distribution activities, litigating rate-setting proceedings (including both an amortized amount and an actual amount spent during that fiscal year), negotiating licenses, legislative lobbying, other outreach and public relations expenses, personnel expenses, operating expenses, any other significant expenses, as well as all expenses approved by any governing board that are only chargeable against those copyright owners and performers who have specifically authorized the Collective to act on their behalf but not against any other copyright owners or performers;
- (ix) The amount of money subject to any forfeiture for failure to be claimed under current regulations and the location of the escrow accounts for those monies;
- (x) A prospective distribution schedule for the following year that discloses approximate dates of payments and the reporting periods to be covered;
- (xi) A prospective schedule of all forfeitures for the next year that discloses deadlines, the reporting periods covered by the forfeiture, the number and name of recording artists and sound recording copyright owners affected. The report shall also include an explanation of what actions, if any, the Collective intends to take to publicize the forfeiture;
- (xii) A detailed explanation of policies and procedures for identifying, locating, and registering copyright owners and performing artists; and
- (xiii) A detailed explanation of the basis for distributing royalty amounts, if any, during the past fiscal year that were based on proxy information rather than sound recording Reports of Use received from the Services.

(2) The annual report shall include a certification from an authorized representative of the Collective that the information provided in the annual report is accurate and that all regulatory requirements regarding forfeitures, including segregation of the funds, have been followed.

*(d) Inspection of Reports of Use by copyright owners.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner, and the copyright owner's written agreement not to utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use. The Collective shall render its best efforts to identify and locate copyright owners and featured artists in order to make available reports of use, and distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

*(e) Confidentiality.* Copyright owners, their agents, and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

*(f) Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Licensing Division of the Copyright Office, the Copyright Royalty Board and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such Service with information identifying the copyright owners it has served.

*(g) Authority to agree to special reporting arrangements.* A Collective and one or more Services are authorized to agree concerning reporting requirements to apply in lieu of the requirements set forth in this part.

#### **§370.6 Proxy Distributions.**

*(a) Proxy Distributions.* In any case in which a Collective reasonably determines that it has not been provided with sufficient information from a Service regarding one or more Performances to allow the Collective to distribute the royalties associated with such Performance(s), and the board of directors of the Collective determines that further efforts to seek additional information from the Service regarding such Performance(s) would not be warranted, the Collective may determine that it will distribute the royalties associated with such Performance(s) on the basis of a proxy data set approved by the board of directors of the Collective.

(b) Disclosure of Proxy Distribution Methodology. A Collective making proxy distributions pursuant to paragraph (a) of this section shall:

(i) establish policies and procedures regarding such proxy distributions and publish those policies and procedures online;

(ii) provide an opportunity for royalty claimants affected by such proxy distribution policies and procedures to object to such policies and procedures;

(iii) establish a reasonable process for resolving objections; and

(iv) provide notice of the Collective's intent to make a proxy distribution at least thirty days prior to making such distribution.

C

PARTICIPANTS:

JOHN C. BARKER, ClearBox Rights / Interested Parties Advancing Copyright (IPAC)

HEATHER BURESH, Music Row Administrators Group

SUSAN CHERTKOF, Recording Industry Association of America (RIAA)

DAN COLEMAN, Modern Music Works Publishing

MARC DRISKILL, Association of Independent Music Publishers, Nashville Chapter

KENT EARLS, Universal Music Publishing Group

DANIEL GERVAIS, Vanderbilt University Law School

TONY GOTTLIEB, Get Songs Direct LLC

BARTON HERBISON, Nashville Songwriters Association International (NSAI)

GEORGE JOHNSON, Geo Music Group / George Johnson Music Publishing

FREDERICK KASS, Intercollegiate Broadcasting System

ROYAL WADE KIMES, Wonderment Records

LEE KNIFE, Digital Media Association (DiMA)

STEVEN MARKS, Recording Industry Association of America (RIAA)

BRUCE McINTOSH,Codigo Music / Fania Records

ROBERT MEITUS, Meitus Gelbert Rose LLP

SAM MOSENKIS, ASCAP

1 functioning in the business, that that is an  
2 appropriate use of government authority in  
3 this case, and it would be an easy way to  
4 apply these standards both prospectively and  
5 retroactively.

6 MR. DAMLE: I do have a second  
7 question but I'll let a few other people sort  
8 of get in before I ask it. Susan, I think you  
9 were next.

10 MS. CHERTKOF: Well, I was going  
11 to answer your question about what the  
12 government should look at in terms of --

13 MR. DAMLE: Sure.

14 MS. CHERTKOF: -- getting into  
15 this. And on the sound recording side, the  
16 equivalent to the ISWC is the ISRC, and  
17 there's a couple issues with that. And you  
18 were just sort of touching on this, which is  
19 the 17 versions of the same recording. And  
20 it's not just necessarily different recordings  
21 but then you have a radio version that's five  
22 minutes long and you have a dance club version

1 that's 10 minutes long and so on and so forth.  
2 And as I understand it, each of those  
3 different versions gets a different ISRC code.  
4 And so you have -- it's one song, so the  
5 underlying song is the same, and the artist is  
6 the same. And many of them might not be all  
7 that distinguishable to, you know, a lay  
8 person but the difference between the versions  
9 are. So you have all these different versions  
10 of a recording of an underlying song that all  
11 have different ISRC numbers. And some of them  
12 get made further on down the road and aren't  
13 even made at the time of release. And so when  
14 you start looking at questions like should  
15 sound recording copyright owners be required  
16 to include ISRC numbers when they register,  
17 some of them don't even exist at the time of  
18 registration. And so you certainly can't say  
19 they all have to be there or somehow you're  
20 dinged for something because it didn't exist  
21 at the time of registration. And beyond that  
22 our members feel very strongly that there's a

1 lot of just legwork that's involved in  
2 tracking all this, and that making ISRC  
3 numbers mandatory in either registration or  
4 recordation documents would be burdensome.  
5 And that this is something that sort of the  
6 Office should be following the industry and  
7 not making the industry follow the Office.  
8 And on the ISWC front, my understanding, and  
9 it's already sort of been said, is that  
10 they're not widely used. Record labels would  
11 love them to be more widely used. Because it  
12 makes it possible in their system to correctly  
13 link a recording to one of those versions of  
14 -- what was the name of the song you gave?

15 MS. BURESH: "Live Life Like You  
16 Were Dying."

17 MS. CHERTKOF: Right. So if  
18 there's 16 versions of the same song, if you  
19 have an ISWC code you can link it correctly.  
20 But the last thing I wanted to say is where I  
21 think the data is most lacking in terms of any  
22 kind of existing publicly available database

**SOUNDEXCHANGE ANNUAL REPORT FOR 2013  
PROVIDED PURSUANT TO 37 C.F.R. § 370.5(c)**

SoundExchange, Inc. ("SoundExchange") is a 501(c)(6) tax exempt organization incorporated in Delaware and headquartered in Washington, D.C. It is overseen by an 18 member board of directors, with half representing sound recording copyright owners and the other half representing featured and non-featured recording artists. SoundExchange was incorporated on September 22, 2003.

The presentation of financial information in this annual report is intended to comply with SoundExchange's requirements under 37 C.F.R. § 370.5(c) and is not intended to be a presentation in accordance with generally accepted accounting principles.

**Royalty Collection**

**Statutory**

Services paying royalties to SoundExchange are generally doing so under rates and terms established by the Copyright Royalty Board or published in the Federal Register pursuant to the Webcaster Settlement Acts.

Services availing themselves of the statutory license are able to do so by operation of law and are not "SoundExchange licensees" even though they are frequently referred to as such. Congress created a statutory regime under which any service complying with the statutory and regulatory conditions may obtain a license via federal statute. This license permits such services to reproduce and transmit sound recordings lawfully released to the public without having to negotiate directly with the copyright owner for the rights to those recordings.

During 2013, SoundExchange was the sole entity designated by the Copyright Royalty Board to collect royalties paid by services operating under the statutory licenses set forth in Sections 112 and 114 of the Copyright Act and the implementing regulations established thereunder. (17 U.S.C. §§ 112 & 114; 37 C.F.R. Parts 370, 380, 382, 383 and 384). The services paying royalties to SoundExchange fall into the following statutorily defined categories:

- Preexisting Subscription Services
- Preexisting Satellite Digital Audio Radio Services
- Eligible Nonsubscription Transmission Services
- New Subscription Services (e.g., subscription webcasters; certain cable or satellite television music distribution services)
- Services exempt from liability for transmissions to business establishments under 17 U.S.C. § 114(d)(1)(C)(iv) but liable for ephemeral phonorecords made to facilitate such transmissions ("Business Establishment Services")

**Royalty Distribution**

In accordance with the applicable regulations, SoundExchange generally allocates a service's royalties on a pro rata basis in accordance with the information provided in the service's reports of use. For example, if the net royalties (after deducting costs) paid by Service A total \$100 for period X and Service A reported 10,000 discrete sound recordings during that period with identical usage reported for each track, then each distinct sound recording would be valued at one cent (\$0.01) ( $\$100 \div 10,000$ ).

Royalties may remain undistributed when there is an ongoing legal proceeding, including appeals, which may alter a previously established rate. Royalties may also remain undistributed if SoundExchange has not received reports of use information, if reports of use are received but have faulty data, or if the Copyright Royalty Board has not approved a proxy in lieu of actual reports of use data.

The royalties paid by a service are allocated on a nondiscriminatory basis. Each sound recording is valued equally. SoundExchange allocates all royalties received for domestic performances equally among **all** featured artists and copyright owners, regardless of whether or not they have executed appropriate membership documents with SoundExchange. Any potential payees must provide appropriate registration documents to SoundExchange prior to receiving any royalties owed to them. There is no fee for registering with SoundExchange.

The performance royalties collected by SoundExchange are allocated according to the percentages set forth in Sections 114(g)(2)(A)-(D) of the Copyright Act. *See* 17 U.S.C. §§ 114(g)(2)(A)-(D).<sup>1</sup> The statute requires that:

- (A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of [the Copyright Act] to publicly perform a sound recording by means of a digital audio transmission.
- (B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians or any successor entity) to be distributed to non-featured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.
- (C) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the Screen Actors Guild-American Federation of Television and Radio Artists (or any successor entity) to be distributed to non-featured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

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<sup>1</sup> In accordance with the statute, SoundExchange distributes 100% of the royalties collected pursuant to 17 U.S.C. § 112(e) for the ephemeral copy of the phonorecord to the copyright owner.

- (D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recordings (or the persons conveying rights in the artists' performance on sound recordings). 17 U.S.C. §§ 114(g)(2)(A)-(D).

Royalties among a "featured artist" are generally allocated on a pro rata basis unless all of the members of a featured artist instruct SoundExchange as to an alternative allocation. By this we mean, for example, that where the featured artist is a band with four members, each member shall be entitled to 25% of the featured artist's share absent their full agreement on different ratios. When the members of a featured artist disagree as to the appropriate allocation of royalties, the amount of royalties in dispute are held pending resolution of the dispute.

Pursuant to the provisions of Section 114(g)(3) of the Copyright Act, SoundExchange deducts from its receipts, prior to their distribution, the reasonable costs incurred in:

- (A) the administration of the collection, distribution, and calculation of the royalties;
- (B) the settlement of disputes relating to the collection and calculation of the royalties; and
- (C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and [section 114], including those [costs] incurred in participating in negotiations or arbitration proceedings under section 112 and [section 114], except that all costs incurred relating to the section 112 ephemeral recordings right [are] only . . . deducted from the royalties received pursuant to section 112. *See* 17 U.S.C. § 114(g)(3).

SoundExchange distributes royalties directly to copyright owners and featured artists when provided with the information necessary to effectuate payment. SoundExchange may also distribute royalties to featured artists and copyright owners pursuant to reciprocal payment agreements with foreign collecting societies when those artists and copyright owners have appropriately authorized SoundExchange to undertake this activity. For example, SoundExchange may pay the Dutch collecting organization all of the royalties due the featured artists and copyright owners who have designated the Dutch organization to collect U.S. statutory royalties on their behalf. As part of that exchange, SoundExchange may also collect from the Dutch organization all the royalties due to featured artists and copyright owners that have designated SoundExchange to collect foreign royalties on their behalf. SoundExchange may also consider paying a featured artist's royalties to a third party under a letter of direction received from a featured artist as an accommodation to such featured artist; provided the third-party is: 1) considered creative personnel credited or recognized publicly for the commercially released sound recording on which the featured artist performs, or 2) is a usual and customary royalty participant in such sound recording.

When SoundExchange is unable to distribute allocated royalties to either a copyright owner or featured artist, those royalties are held for the copyright owner or featured artist pending further attempts to effectuate payment.

SoundExchange expends significant resources to reduce the amount of allocated but undistributed royalties. Under the applicable regulations, SoundExchange retains all such undistributed royalties for not less than three years from the date of the initial distribution of the royalties, and thereafter may release those funds for the benefit of all other copyright owners, featured artists and nonfeatured performers entitled to royalties. During 2013, we released unclaimed funds for distribution years prior to 2009.

### **Key Financial Statistics**

The following table summarizes SoundExchange's operating administrative rates, royalty collections, gross distributions and expenses.

(\$ in millions)	2013	2012	2011
<b>Operating Administrative Rate</b>	4.5%	4.9%	5.3%
<b>Total Royalties Collected<sup>2</sup></b>	\$656	\$507	\$378
<b>Total Gross Distributions</b>	\$590	\$462	\$293
<b>Total Expenses</b>	\$30	\$25	\$20

<sup>2</sup> Statutory royalties in 2013 were \$647M compared to \$502M for 2012, up 29%. The remaining collections represent royalties received from non-statutory services (primarily from foreign performance rights organizations). Statutory royalties are typically paid 45 days following the end of the month in which the liability accrued.

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**SOUNDEXCHANGE DRAFT ANNUAL REPORT FOR 2013  
PROVIDED PURSUANT TO 37 C.F.R. § 370.5(c)**

SoundExchange, Inc. (“SoundExchange”) is a 501(c)(6) tax exempt organization incorporated in Delaware and headquartered in Washington, D.C. It is overseen by an 18 member board of directors, with half representing sound recording copyright owners and the other half representing featured and non-featured recording artists. SoundExchange was incorporated on September 22, 2003.

The presentation of financial information in this annual report is intended to comply with SoundExchange’s requirements under 37 C.F.R. § 370.5(c) and is not intended to be a presentation in accordance with generally accepted accounting principles. The information provided in this presentation is based upon pre-audited financial statements and is therefore subject to revision upon completion of the 2013 audit.

### **Royalty Collection**

#### **Statutory**

Services paying royalties to SoundExchange are generally doing so under rates and terms established by the Copyright Royalty Board or published in the Federal Register pursuant to the Webcaster Settlement Acts.

Services availing themselves of the statutory license are able to do so by operation of law and are not “SoundExchange licensees” even though they are frequently referred to as such. Congress created a statutory regime under which any service complying with the statutory and regulatory conditions may obtain a license via federal statute. This license permits such services to reproduce and transmit sound recordings lawfully released to the public without having to negotiate directly with the copyright owner for the rights to those recordings.

During 2013, SoundExchange was the sole entity designated by the Copyright Royalty Board to collect royalties paid by services operating under the statutory licenses set forth in Sections 112 and 114 of the Copyright Act and the implementing regulations established thereunder. (17 U.S.C. §§ 112 & 114; 37 C.F.R. Parts 370, 380, 382, 383 and 384). The services paying royalties to SoundExchange fall into the following statutorily defined categories:

- Preexisting Subscription Services
- Preexisting Satellite Digital Audio Radio Services
- Eligible Nonsubscription Transmission Services
- New Subscription Services (e.g., subscription webcasters; certain cable or satellite television music distribution services)
- Services exempt from liability for transmissions to business establishments under 17 U.S.C. § 114(d)(1)(C)(iv) but liable for ephemeral phonorecords made to facilitate such transmissions (“Business Establishment Services”)

## Royalty Distribution

In accordance with the applicable regulations, SoundExchange generally allocates a service's royalties on a pro rata basis in accordance with the information provided in the service's reports of use. For example, if the net royalties (after deducting costs) paid by Service A total \$100 for period X and Service A reported 10,000 discrete sound recordings during that period with identical usage reported for each track, then each distinct sound recording would be valued at one cent (\$0.01) ( $\$100 \div 10,000$ ).

Royalties may remain undistributed when there is an ongoing legal proceeding, including appeals, which may alter a previously established rate. Royalties may also remain undistributed if SoundExchange has not received reports of use information, if reports of use are received but have faulty data, or if the Copyright Royalty Board has not approved a proxy in lieu of actual reports of use data.

The royalties paid by a service are allocated on a nondiscriminatory basis. Each sound recording is valued equally. SoundExchange allocates all royalties received for domestic performances equally among all featured artists and copyright owners, regardless of whether or not they have executed appropriate membership documents with SoundExchange. Any potential payees must provide appropriate registration documents to SoundExchange prior to receiving any royalties owed to them. There is no fee for registering with SoundExchange.

The performance royalties collected by SoundExchange are allocated according to the percentages set forth in Sections 114(g)(2)(A)-(D) of the Copyright Act. *See* 17 U.S.C. §§ 114(g)(2)(A)-(D).<sup>1</sup> The statute requires that:

- (A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of [the Copyright Act] to publicly perform a sound recording by means of a digital audio transmission.
- (B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians or any successor entity) to be distributed to non-featured musicians (whether or not members of the American Federation of Musicians) who have performed on sound recordings.
- (C) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the Screen Actors Guild-American Federation of Television and Radio Artists (or any successor entity) to be distributed to non-featured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

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<sup>1</sup> In accordance with the statute, SoundExchange distributes 100% of the royalties collected pursuant to 17 U.S.C. § 112(e) for the ephemeral copy of the phonorecord to the copyright owner.

- (D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recordings (or the persons conveying rights in the artists' performance on sound recordings).

17 U.S.C. §§ 114(g)(2)(A)-(D).

Royalties among a "featured artist" are generally allocated on a pro rata basis unless all of the members of a featured artist instruct SoundExchange as to an alternative allocation. By this we mean, for example, that where the featured artist is a band with four members, each member shall be entitled to 25% of the featured artist's share absent their full agreement on different ratios. When the members of a featured artist disagree as to the appropriate allocation of royalties, the amount of royalties in dispute are held pending resolution of the dispute.

Pursuant to the provisions of Section 114(g)(3) of the Copyright Act, SoundExchange deducts from its receipts, prior to their distribution, the reasonable costs incurred in:

- (A) the administration of the collection, distribution, and calculation of the royalties;
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- (C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and [section 114], including those [costs] incurred in participating in negotiations or arbitration proceedings under section 112 and [section 114], except that all costs incurred relating to the section 112 ephemeral recordings right [are] only . . . deducted from the royalties received pursuant to section 112. *See* 17 U.S.C. § 114(g)(3).

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The following table summarizes SoundExchange's operating administrative rates, royalty collections, gross distributions and expenses.

(\$ in millions)	Pre-Audit 2013	2012	2011
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<b>Total Expenses</b>	\$30	\$25	\$20

<sup>2</sup> Statutory royalties in 2013 were \$650.647M compared to \$502M for 2012, up 29%. The remaining collections represent royalties received from non-statutory services (primarily from foreign performance rights organizations). Statutory royalties are typically paid 45 days following the end of the month in which the liability accrued.