

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS

Washington, D.C.

_____)	
)	
In Re:)	
)	
Notice and Recordkeeping for Use of Sound)	
Recordings Under Statutory License)	Docket No. RM 2002-1H
_____)	

COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange"), a nonprofit organization incorporated in the State of Delaware and jointly controlled by representatives of sound recording copyright owners and performers through an eighteen-member board of directors, on behalf of itself and the copyright owners and performers on whose behalf it collects and distributes statutory royalties, respectfully submits these Comments in response to the Copyright Office's Notice of Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1H, published in the Federal Register on April 27, 2005. 70 Fed. Reg. 21704 (the "April 27th NPRM").

SoundExchange represents not only the interests of those sound recording copyright owners¹ and featured performers who have specifically authorized SoundExchange to collect and distribute royalties on their behalf, but also those unaffiliated sound recording copyright owners and featured performers who are entitled

¹ The sound recording copyright owners who authorize SoundExchange to represent their interests do so on a non-exclusive basis. Each sound recording copyright owner retains the right to license directly any copyrighted sound recordings they own or control.

to a portion of the royalties paid by services claiming the benefits of the statutory licenses. As such, SoundExchange represents the interests of the overwhelming majority – over 99% – of all performers and copyright owners entitled to statutory royalties.

I. INTRODUCTION

Recordkeeping regulations are an integral component of the statutory license regime. When Congress granted certain noninteractive services the right to transmit any sound recording lawfully released in the United States pursuant to a statutory license, it deprived copyright owners of the right to withhold a license. In exchange for the statutory license, however, licensees had to agree to certain conditions. These included, *inter alia*, filing a notice of use of sound recordings with the Copyright Office prior to the making of any transmissions, the payment of royalty fees, the completion of a statement of account to calculate royalty fees payable, if any, and the delivery of reports of use.²

For several years statutory licensees have known the royalty fees they are required to pay. See Final Rule and Order in Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394 (May 8, 1998) (codified at 37 C.F.R. Part 260); Final Rule and Order in Docket No. 2000-9 CARP DTRA 1&2 (July 8, 2002) (codified at 37 C.F.R. Part 261); Final Rule in Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA (Feb. 6, 2004) (codified at 37 C.F.R. Part 262). What licensees have not known, however, is how they are to provide copyright owners and performers with reasonable notice of the use of sound recordings transmitted under the Section 114 statutory license. Section 114(f)(4)(A) requires the “[t]he Librarian of Congress . . . [to] establish requirements by

² A report of use of sound recordings provides identification information on sound recordings transmitted pursuant to the statutory license and the volume of activity under the license (e.g., the number of performances or Aggregate Tuning Hours, a method of measuring the amount of time sound recordings were streamed to recipients).

which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.” 17 U.S.C. § 114(f)(4)(A) (emphasis added).³

Statutory licensees could be required to provide each copyright owner whose works are transmitted by the service with direct notice of use under a plain reading of the statutory reporting requirement. As an accommodation to statutory licensees, however, copyright owners and performers – at their own considerable expense – created SoundExchange to handle the collection and distribution of statutory royalties. By undertaking this activity, copyright owners and performers have relieved licensees of a tremendous burden and reduced the royalties they receive, as the deduction of costs from collected royalties reduces the amount available for distribution. This burden shifting – from licensees to copyright owners and performers – should be taken into account in the adoption of final regulations. Statutory licensees should not be permitted to increase further the costs for copyright owners and performers when it is the licensees who are benefiting from SoundExchange’s efforts to handle the allocation and distribution of all statutory royalties.

SoundExchange appreciates the Copyright Office’s efforts to develop comprehensive and workable notice and recordkeeping requirements and the publication of proposed regulations governing how statutory licensees will be required to deliver reports of use. SoundExchange developed its proposal for format and delivery

³ Section 114(f)(4)(A) was amended by the Copyright Royalty Distribution and Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (Nov. 30, 2004). Section 5(c)(4) of the Act inserted “Copyright Royalty Judges” in each place in Section 114(f)(4)(A) where the “Librarian of Congress” appeared. 118 Stat. at 2364.

specifications with the input of several statutory licensees, and a growing number of services are or soon will be providing voluntarily their reports of use under those specifications. In light of marketplace acceptance of the interim regulations adopted by the Copyright Office on March 11, 2004, Interim Regulations for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1E, 69 Fed. Reg. 11515 (the "Interim Regulations") and SoundExchange's development of delivery requirements with input from statutory licensees, SoundExchange believes it would be counterproductive and a step backwards for services to re-litigate these issues.

As the Copyright Office's jurisdiction over recordkeeping ends on May 31, 2005, it is worth noting that many eligible nonsubscription services and new subscription services, among others, have never been obligated to deliver reports of use to SoundExchange even though the Interim Regulations obligate licensees to retain information on their transmissions under the statutory license. See Interim Regulations, 69 Fed. Reg. at 11517 ("The interim regulations announced today apply on a prospective basis, meaning that they apply to uses of sound recordings under the section 112 and 114 licenses occurring on and after the effective date announced above."). Without reports of use or the approval for the use of a distribution proxy for any reporting period after March 31, 2004, however, SoundExchange will be unable to distribute the millions of dollars in royalties that have been collected since that time. SoundExchange hopes that the assignment of responsibility for adopting format and delivery regulations to the Copyright Royalty Judges will not unduly delay the adoption of final regulations that are necessary to distribute statutory royalties paid for any period following March 31, 2004.

II. BACKGROUND ON NOTICE AND RECORDKEEPING PROCEEDING

On May 24, 2001, SoundExchange, then an unincorporated division of the Recording Industry Association of America, Inc. (“RIAA”), petitioned the Copyright Office to establish notice and recordkeeping requirements for the use of sound recordings in certain digital audio services. See RIAA Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings in Certain Digital Audio Services. The Copyright Office commenced a rulemaking proceeding to establish “the requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license and for how records of use shall be kept and made available to copyright owners” on February 7, 2002. Copyright Office Notice of Proposed Rulemaking for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002. 67 Fed. Reg. 5761 (Feb. 7, 2002). Nearly forty parties filed comments in response to the notice of proposed rulemaking. See Comments of the RIAA⁴ in Docket No. RM 2002-1A (Apr. 5, 2002). Over twenty parties filed reply comments to the original comments. See Reply Comments of the RIAA in Docket No. RM 2002-1 (Apr. 26, 2005).

On September 23, 2002, the Copyright Office published a notice requesting written proposals governing data format and delivery for recordkeeping requirements (i.e., the mechanics of how statutory licensees would provide reports of use). Copyright Office Notice Requesting Written Proposals and Announcing Status Conference for Notice and Recordkeeping for Use of Sound Recordings Under Statutory Licenses, Docket No. RM 2002-1B, 67 Fed. Reg. 59573 (Sep. 23, 2002). SoundExchange filed

⁴ As noted above, SoundExchange was originally an unincorporated division of the RIAA. RIAA’s comments in the rulemaking were filed, in part, on behalf of SoundExchange. See Comments of RIAA at 1 (Apr. 5, 2002).

comments in response to the notice on September 30, 2002. A copy of those comments is attached hereto as Exhibit A. In Exhibit A to the September 30 comments⁵, SoundExchange submitted detailed specifications proposing how statutory licensees should deliver electronic copies of reports of use. The Exhibit, titled “File and Reports of Use Delivery Specifications,” included proposals for the delivery of reports, file content specifications, and acknowledgement procedures. Many of the proposals set forth in that Exhibit A were incorporated into the Copyright Office’s April 27th NPRM.

On October 24, 2002, the General Counsel of the Copyright Office sent a letter to SoundExchange requesting clarification of a comment made in footnote six of SoundExchange’s September 30, 2002, comments. The Copyright Office wanted to know how SoundExchange could use Aggregate Tuning Hour (“ATH”) data on a channel-by-channel basis along with separate playlists for each such channel to estimate the number of performances for each sound recording for distribution purposes. SoundExchange responded in writing to the Copyright Office’s inquiry on October 28, 2002.

On October 8, 2003, the Copyright Office issued a Notice of Inquiry seeking comment on “the adoption of regulations for records of use of sound recordings performed pursuant to the statutory license for public performances of sound recordings by means of digital audio transmissions between October 28, 1998, and the effective date of soon-to-be-announced interim regulations.” Notice of Inquiry in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM

⁵ SoundExchange filed a corrected copy of Exhibit A with the Copyright Office on October 3, 2002. The Exhibit A to the September 30, 2002, filing, as corrected on October 3, 2002, is not included as an Exhibit to these Comments in order to avoid confusion as that document is no longer current with Copyright Office regulations.

2002-1D, 68 Fed. Reg. 58054 (Oct. 8, 2003). Because statutory licensees had largely failed to maintain reports of use prior to the adoption of recordkeeping regulations, the Copyright Office sought comment on how SoundExchange should be permitted to distribute royalties for periods prior to the adoption of prospective recordkeeping regulations.

SoundExchange and several other parties filed comments in response to the Notice of Inquiry. See Comments of SoundExchange, Inc. in Docket No. RM 2002-1D (Nov. 24, 2003). Several parties filed reply comments in response to the initial comments. See Reply Comments of SoundExchange, Inc. in Docket No. RM 2002-1D (Dec. 22, 2003).

On March 11, 2004, the Copyright Office issued interim regulations establishing the data elements that services would have to report to SoundExchange for the transmission of sound recordings under the statutory license. Interim Regulations in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1E, 69 Fed. Reg. 11515 (Mar. 11, 2004) (the “Interim Regulations”) (codified at 37 C.F.R. Part 270). The Interim Regulations require services to report, *inter alia*, (i) the featured artist; (ii) the sound recording title; (iii) the International Standard Recording Code (“ISRC”) or, alternatively to the ISRC, the (x) album title; and (y) marketing label. See Interim Regulations, 69 Fed. Reg. at 11530 (codified at 37 C.F.R. § 270.3(c)(2)(iii)-(v)).

On July 13, 2004, the Copyright Office published a Notice of Proposed Rulemaking inviting comments on its proposal to allow SoundExchange to distribute the royalties paid by nonsubscription transmission services, preexisting satellite digital audio

radio services, new subscription services, and business establishment services during any portion of the period October 28, 1998, through March 31, 2004, using the proxy of the reports of use filed by the three preexisting subscription services for those same periods. Notice of Proposed Rulemaking in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1F, 69 Fed. Reg. 42007 (July 13, 2004). The parties filing comments in response to this notice of proposed rulemaking generally supported the use of the proposed proxy. See Comments of SoundExchange, Inc. in Docket No. RM 2002-1F (Aug. 12, 2004).

On September 30, 2004, the Copyright Office published a final rule authorizing SoundExchange to distribute royalties paid for the period October 28, 1998, through March 31, 2004, using the reports of use filed by the three preexisting subscription services as a proxy. Final Rule in Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1G, 69 Fed. Reg. 58261 (Sep. 30, 2004).

Throughout this rulemaking, SoundExchange has sought the adoption of regulations that would require statutory licensees to provide comprehensive reports of use detailing each sound recording transmitted under statutory license or under the exemption set forth in 17 U.S.C. § 114(d)(1)(C)(iv) (so-called “census reporting”) so that the copyright owners of and the performers on transmitted sound recordings could be paid for the use of those recordings. The Copyright Office, when it adopted interim regulations specifying notice and recordkeeping requirements, rejected SoundExchange’s request for census reporting, at least initially. See Interim Regulations, 69 Fed. Reg. at 11522 (Mar. 11, 2004). According to the Copyright Office, “[a]lthough the ultimate goal

is to require comprehensive reporting on each performance a webcaster makes, that goal is not achievable at this time. Therefore, the regulations announced today will not require year-round reporting, but only reporting for certain periods during the year, and the information that webcasters must provide will be less comprehensive than copyright owners desire.”⁶ *Id.* (emphasis added). In adopting sample reporting, however, the Copyright Office acknowledged that there would be an imperfect distribution of royalties depriving both copyright owners and performers of certain royalties. *Id.*

SoundExchange believes that the sample reporting permitted under the Interim Regulations may result in the non-payment of royalties to over thirty percent of the performers entitled to such royalties. *See* Reply Comments of SoundExchange, Inc. in Docket No. RM 2002-1D at Exhibit A (Dec. 22, 2003). Excluding so many performers from the royalties to which they are entitled seems antithetical to the intent of the statutory license, and SoundExchange respectfully requests that any requirements that result in the exclusion of so many performers be corrected with the adoption of final regulations.

III. DISCUSSION OF PROPOSED FORMAT AND DELIVERY SPECIFICATIONS

The Copyright Office has requested comments on a number of issues surrounding the mechanics of data reporting pursuant to the statutory licenses. SoundExchange responds to those questions and several other issues below.

A. Organizing and Formatting the Data

⁶ The Copyright Office stated in the Interim Regulations that “[o]nce final regulations are implemented, year-round census reporting is likely to be the standard measure rather than the periodic reporting that will now be permitted on an interim basis.” 69 Fed. Reg. at 11526 (emphasis added).

1. Electronic Delivery

The Copyright Office has proposed that services be required to provide reports of use to SoundExchange in electronic form. April 27th NPRM, 70 Fed. Reg. at 21706. SoundExchange supports this proposal. The Copyright Office has noted that it would be “cumbersome, expensive, and of little or no value to the royalty distribution process” for SoundExchange to receive reports of use in anything other than electronic format. Id. We agree.

In order for SoundExchange to process the hundreds of millions of performances that are likely to be reported by statutory licensees, SoundExchange must be able to utilize automated, economical data processing systems that facilitate the accurate and efficient distribution of royalties. Without electronic delivery of reports of use, SoundExchange would have to enter manually all of the information contained in the hard-copy reports of use submitted by all statutory licensees. Entering approximately five separate data elements for each sound recording transmitted by each licensee would require SoundExchange to enter millions of data points per reporting period at an enormous cost. These costs would in turn result in fewer royalties being paid to copyright owners and performers as they would be covered by the royalties paid by statutory licensees.

In light of the extraordinary costs and burdens that would be imposed upon copyright owners and performers if services were permitted to deliver reports of use in hard copy rather than electronically, SoundExchange believes that statutory licensees must be required to deliver reports of use electronically.

2. Use of a Spreadsheet

The Copyright Office has proposed that statutory licensees be permitted to complete a report of use using a widely marketed electronic spreadsheet. April 27th NPRM, 70 Fed. Reg. at 21706. SoundExchange originally opposed the use of spreadsheets on three grounds: (1) spreadsheet data is not readily readable by Extraction, Transformation and Loading (“ETL”) software and would therefore create an undue burden on SoundExchange to convert the spreadsheets into useable format; (2) proprietary spreadsheets may lock SoundExchange into proprietary software or a version of software that may not be supported in the future by the manufacturer, potentially requiring SoundExchange to support discontinued software; and (3) the size limitations for spreadsheets could result in the loss of data or the inaccurate recordation of data, and require the submission of multiple reports of use from a licensee for one reporting period. Comments of SoundExchange in Docket No. RM 2002-1B at 6 (Sep. 30, 2002).

SoundExchange interprets the April 27th NPRM as not permitting statutory licensees to submit reports of use in a spreadsheet format. See 70 Fed. Reg. at 21706. Rather, SoundExchange understands the Copyright Office to be proposing that SoundExchange create templates for at least two popular spreadsheet programs, Microsoft’s Excel and Corel’s Quattro Pro, that would enable statutory licensees to record data elements for transmitted sound recordings using a spreadsheet, provided that the licensee then convert the spreadsheet data into an American Standard Code for Information Interchange (“ASCII”) text file that could be submitted to SoundExchange electronically. Id. If SoundExchange’s understanding of the April 27th NPRM is correct,

then SoundExchange does not object to the proposal requiring SoundExchange to post two spreadsheet templates on its Web site.

Following the Copyright Office's publication of the April 27th NPRM, SoundExchange contacted Microsoft to discuss the creation of a software macro for the currently supported release of Microsoft Excel spreadsheets that would facilitate the conversion of spreadsheet data into an ASCII text file. Microsoft has written the macro for SoundExchange and SoundExchange has posted a template spreadsheet file on its Web site. To access the template, a service should go to http://www.soundexchange.com/licensee_home.html and click on the appropriate service category (e.g., "Commercial Webcasters/Simulcasters," "Noncommercial Webcasters/Simulcasters," "Noncommercial Educational Entities," "New Subscription Services," etc.) and then click on the link to "Reporting Requirements."

SoundExchange has not previously licensed or supported Corel's Quattro Pro but will license that software and work with Corel to develop a macro that will similarly enable a statutory licensee to use Quattro Pro to record the data elements required under regulations and then convert the spreadsheet into an ASCII text file. Having never worked with Corel before, SoundExchange cannot make any assurances as to how quickly it may be able to obtain Corel's assistance but it does not foresee any significant delays in being able to develop and post a Quattro Pro template on the SoundExchange Web site.

SoundExchange agrees with the Copyright Office statement that services and not SoundExchange should be responsible for obtaining technical support for the use of spreadsheets. SoundExchange will work with licensees to ensure their prompt and

efficient delivery of reports of use, but it cannot accept an affirmative obligation to provide technical support for spreadsheet software that it neither manufactures nor maintains.

3. Format Specifications

a. Flexibility and Evolving Standards

The Copyright Office has stated that there are no “universal methods of operation or uniform business standards” for the format and delivery specifications for reports of use. April 27th NPRM, 70 Fed. Reg. at 21706. While the Copyright Office’s statement is correct, world-wide reporting standards are developing as a result of the demand by certain services for licenses to make global transmissions. In response to the demands of transmitting entities, the International Federation of the Phonographic Industry (“IFPI”) has been facilitating the development of license protocols that would permit a collecting society in one country to license transmitting entities in that country to make transmissions into the territory of another signatory collecting society. This so-called “world-wide reciprocal agreement” will likely include standards for the electronic delivery of detailed reports of use of sound recordings to the collecting society granting a transmitting entity the right to make extra-territorial transmissions. These standards are likely to require census as opposed to sample reporting, detailed identification information per sound recording, and information on the territory of reception.

SoundExchange is participating in the effort to develop the world-wide reciprocal agreement so that U.S.-based webcasters will be able to make transmissions into foreign territories without risking liability for infringement. If SoundExchange does offer such licenses to U.S.-based webcasters (or non-U.S.-based webcasters who seek a license from

SoundExchange), then SoundExchange will likely be obligated to require reports of use consistent with the specifications established for the world-wide reciprocal agreement, which specifications will likely be more comprehensive than those established in the Interim Regulations or proposed in this notice of proposed rulemaking. SoundExchange is open to discussing the evolving international standards with any interested parties in the event they wish to develop reporting protocols that go beyond what is required under federal regulations.

b. File Naming

SoundExchange agrees with the Copyright Office proposal that file names must be appropriately titled and contain the name of the service followed by a start and end date. Because the Copyright Office's Interim Regulations permit services to report two seven-day periods per calendar quarter, however, SoundExchange believes the dates to be used in a file name should be the dates of the actual period for which sound recording information is being provided versus the start and end date of the relevant calendar quarter. If a service does not report fourteen consecutive days within a calendar quarter, then SoundExchange requests that the service provide two separate reports of use per reporting period.

For example, if a service provided reporting information for the periods January 15-21, 2005, and March 7-13, 2005, then SoundExchange believes it would be insufficient for the service to name a file as "AcmeMusicCo01012004-31032004.txt." SoundExchange would instead request two files titled as follows:

AcmeMusicCo15012005-21012005.txt⁷

⁷ In the sample file name included in Section B.1 of the April 27th NPRM, the Copyright Office used the name AcmeMusicCo01102004-07012004.txt. SoundExchange notes that the date range in this file name is

AcmeMusicCo07032005-13032005.txt

If regulations do not require a statutory licensee to identify the specific dates for which a report of use is being provided, then SoundExchange may have no way of knowing whether a service actually reported fourteen days of data per calendar quarter. If the report of use is titled for a specific week or two weeks, however, then SoundExchange may be able to verify the sufficiency of the report of use by extrapolating from the number of songs transmitted or the volume of usage (e.g., ATH compared to publicly available Total Time Spent Listening figures).

In suggesting that statutory licensees be permitted to provide two reports of use for a reporting period – where the service does not report two consecutive seven-day reporting periods in a calendar quarter – SoundExchange is amending its previous proposal that would limit a service to one report of use per reporting period. See April 27th NPRM, 70 Fed. Reg. at 21707 (“SoundExchange desires only one file per statutory license.”). SoundExchange’s request for one report of use per reporting period preceded the Copyright Office’s adoption of the Interim Regulations, which permitted statutory licensees to report two periods of seven consecutive days for each calendar quarter. Interim Regulations, 69 Fed. Reg. at 11526 (codified at 37 C.F.R. 270.3(c)(3)). If licensees are permitted to submit two seven-day reporting periods that are not contiguous, then SoundExchange respectfully requests that file names include the start and end dates for the period for which sound recording information is being reported instead of the start and end date of the calendar quarter.

October 1, 2004 to January 7, 2004. We suspect that this incorrect date range resulted from the transposition of the one and the zero in the third and fourth places in the first date range. The correct date range is probably 01012004-07012004.

As a new matter, SoundExchange respectfully requests that statutory licensees be required to deliver a separate report of use for each transmission category⁸ under which they operate (e.g., an eligible nonsubscription service and a new subscription service, or a preexisting satellite digital audio radio service and new subscription service). This proposal is necessary because statutory royalties paid by a service (and calculated on discrete statements of account) should be allocated according to the transmissions made pursuant to that category. Without multiple reports of use, however, SoundExchange would be unable to allocate properly the royalties paid per transmission category, even where the sound recordings transmitted under different categories varied greatly.

If a service is operating under multiple transmission categories, then the reports of use delivered by a service should indicate the transmission category in the file name. This will prevent a service from giving multiple reports of use the same name if they are provided for identical seven- or fourteen-day reporting periods. SoundExchange proposes that the transmission category be identified in the file name after the date range, separated from the date range by an underscore (not a space), as follows:

AcmeMusicCo15012005-21012005_H.txt

AcmeMusicCo07032005-13032005_K.txt

SoundExchange is only requesting the identification of the transmission category in a file name where a service makes transmissions in more than one category so as not to burden services already providing reports of use without the transmission category code.

⁸ SoundExchange notes that the transmission categories established in the Interim Regulations do not include a transmission category for preexisting satellite digital audio radio services. See Interim Regulations, 69 Fed. Reg. at 11530 (codified at 37 C.F.R. § 270.3(c)(2)(ii)(A)-(K). This may be the result of SoundExchange and the preexisting satellite digital audio radio services asking the Copyright Office to abstain from adopting recordkeeping requirements for the satellite services, a request the Copyright Office rejected.

However, SoundExchange would prefer if all services reported the transmission category following the end date of the seven or fourteen consecutive day reporting period.

c. File Type

SoundExchange agrees with the proposal to require the delivery of files in ASCII format. As SoundExchange noted in its comments of September 30, 2002, “[t]he ASCII format has been in use since the early 1960s and is one of the most widely adopted formats for the reporting of alphanumeric data. Every computer operating system supports ASCII text files and nearly every database management system supports the import of ASCII text files.” Comments of SoundExchange in Docket No. RM 2002-1B at 5 (Sep. 30, 2002).

SoundExchange has already invested millions of dollars in developing systems that process the reports of use in ASCII format provided by the three preexisting subscription services as well as many other licensees who are providing reports of use voluntarily or under mandatory, non-Copyright Office reporting requirements. If an alternative file type were permitted, then SoundExchange and the copyright owners and performers for whom it collects royalties could be required to spend additional sums to develop a second – and unnecessary – data processing system.

SoundExchange respectfully requests that regulations continue to require the delivery of reports of use in ASCII format.

d. Delivery Mechanism

As a proponent of permitting statutory licensees to elect one of several methods for delivering reports of use that best suits the licensee’s particular needs and capabilities, SoundExchange supports the Copyright Office’s proposal to give statutory licensees four

options for delivering reports of use: File Transfer Protocol (“FTP”), Electronic Mail (“e-mail”), Compact Disk-Read Only Memory (“CD-ROM”), and Floppy Diskette. SoundExchange understands that some services may wish to deliver their reports of use in a method not proposed by the Copyright Office. Although SoundExchange does not support a regulatory expansion of the methods of delivery beyond the four proposed by the Copyright Office for cost reasons, SoundExchange invites statutory licensees to contact it to discuss alternative delivery methods with the understanding that SoundExchange will have sole discretion to decide whether non-mandatory delivery methods will be accepted and supported.

SoundExchange also wishes to note that in at least two instances in the April 27th NPRM the Copyright Office mentions the delivery of data to more than one designated agent. See 70 Fed. Reg. at 21706 (“The Copyright Office is proposing four separate means for delivery of data to receiving and designated agents.”); (“A report of use contained on a floppy diskette . . . should be delivered to the addresses identified for the receiving and designated agents.”). Presently, SoundExchange is the only agent designated by the Copyright Office to distribute royalties paid under the Section 112 and Section 114 statutory licenses. If in the future multiple agents are designated by the Copyright Royalty Judges to distribute statutory royalties, then SoundExchange believes that statutory licensees must be required to deliver their reports of use directly to the receiving agent and each designated agent, and the receiving agent and each designated agent should have no obligation to provide any service’s report of use to any other

designated agent.⁹ Requiring SoundExchange to deliver reports of use to another designated agent, if any, would be unwarranted and, if statutory licensees acting as willing buyers in the statutory license marketplace support multiple designated agents, then they must accept the obligation to deliver their reports of use to each designated agent, whether there are two or two thousand such entities.¹⁰

i. Web Site Delivery of Reports of Use

The Copyright Office has asked for comment on whether delivery of reports of use via Internet Web sites should be permitted. April 27th NPRM, 70 Fed. Reg. at 21706. SoundExchange does not currently support the delivery of reports of use via an Internet Web site, although SoundExchange does support FTP delivery.

SoundExchange has explored a web-based solution that would allow delivery of reports of use via a secure portal offered and maintained by a third party, but the costs for rolling out such a service – including hosting and management – is not something SoundExchange is prepared to incur at this time. SoundExchange would consider such a delivery mechanism if statutory licensees were required to bear the costs for a fifth delivery mechanism, but absent a shifting in the burden of paying for this additional

⁹ See Comments of SoundExchange at 16-19 (Sep. 30, 2002). By noting the Copyright Office's reference to multiple designated agents, SoundExchange in no way admits to the need for or the efficacy of a multiple designated agent system.

¹⁰ SoundExchange has previously stated its belief that statutory licensees and not SoundExchange should bear the burden of providing multiple designated agents with copies of reports of use required under governing regulations:

If SoundExchange is required to make duplicate copies of each report of use, it is also possible that the other Designated Agents may question the integrity of those copies or seek to hold SoundExchange liable for any errors that result from the making of duplicate copies. SoundExchange should not be put in the position of having to certify the accuracy and completeness of any report of use that could just as easily – and more efficiently – be provided by the authoring statutory licensee.

Id. at 18 (Sep. 30, 2002).

option, SoundExchange believes the regulations should not require report delivery through Internet Web sites.

SoundExchange is already incurring the cost to support four methods for data delivery and has previously noted that each time it incurs a cost to facilitate the data reporting obligations of statutory licensees, it reduces the royalties available for distribution to performers and copyright owners. Performers and copyright owners should not have to incur unlimited costs to solve the problems of those entities enjoying the benefits of the statutory license.

ii. File Transfer Protocol Delivery of Reports of Use

The Copyright Office has proposed permitting statutory licensees to deliver reports of use using FTP and that SoundExchange be required to “post on a publicly available portion of its Web site instructions for applying for a username and password and access and delivery instructions for FTP.” *Id.* SoundExchange is already accepting FTP delivery of reports of use from numerous statutory licensees, and supports this Copyright Office proposal. SoundExchange will post on its Web site the necessary information for FTP delivery.

Statutory licensees wishing to deliver reports of use using FTP prior to the Copyright Office’s adoption of regulations need only send a request to reports@soundexchange.com requesting an account and further instructions for delivery.

SoundExchange respectfully requests that the Copyright Office adopt a regulation that grants SoundExchange fifteen (15) business days within which to respond to a written request for a username and password, not simply fifteen (15) days.

iii. Electronic Mail Delivery of Reports of Use

The Copyright Office has proposed allowing statutory licensees to deliver reports of use using electronic mail. Id. SoundExchange supports this proposal provided there is a single report of use per seven-day reporting period less than ten megabytes in size.¹¹

The Copyright Office has proposed that in instances where reports of use are delivered as an e-mail attachment, the service must provide its “full address.” Id. at 21707. Because the Section 114 statutory license is not limited to transmitting entities located in the United States, SoundExchange respectfully requests that regulations require statutory licensees to provide country name as part of a “full address” for non-U.S.-based services.

The Copyright Office has proposed that SoundExchange be required to acknowledge receipt of e-mail delivery of reports of use “as soon as possible through use of an automated reply e-mail to the delivering party.” Id. SoundExchange supports this proposal with the understanding that the acknowledgement of a report of use is not an admission that the delivered report of use is compliant with governing regulations or that the file is not corrupted in any manner. Because a report of use may not be analyzed (through extraction, transformation and loading) by SoundExchange for weeks or months following receipt due to the volume of reporting, the regulations should provide that statutory licensee have an obligation to resubmit a compliant and readable file in the event an acknowledged report is corrupted. Such flexibility should apply to all delivery methods, not simply delivery via e-mail.

¹¹ The Copyright Office’s commentary in the Notice of Proposed Rulemaking suggests that services “may” compress an e-mail attachment. SoundExchange respectfully requests that compression of attachments be mandatory.

iv. CD-ROM and Floppy Diskette Delivery of Reports of Use

The Copyright Office has proposed that statutory licensees be permitted to deliver reports of use using CD-ROMs or Floppy Diskettes. Id. SoundExchange supports this proposal provided that SoundExchange have the right, in its sole discretion, to retain or destroy the physical product on which reports of use are delivered. See Comments of SoundExchange at 9 (Sep. 30, 2002). SoundExchange should not have to incur the additional time and expense of returning product to a statutory licensee when there are product-free delivery methods available to licensees.

SoundExchange also supports the Copyright Office proposal that a service may only deliver a report of use on a CD-ROM or floppy diskette if the entire report of use fits onto a single physical product. As SoundExchange noted previously, “[c]ompiling reports of use for an accounting period from multiple products for one licensee could result in the loss of data and would likely require the allocation of significant time and resources for such an effort.” Id.

v. File Contents

The Copyright Office has proposed that statutory licensees have the option of submitting reports of use with or without headers at the discretion of the service. April 27th NPRM, 70 Fed. Reg. at 21707. SoundExchange prefers the delivery of reports of use with headers but will support files submitted without headers because (1) this is the convention that was adopted for the reports of use provided by the preexisting subscription services and SoundExchange has already developed systems to receive and process reports without headers, and (2) providing non-preexisting subscription services with the option of utilizing products developed for the preexisting subscription services is

a reasonable accommodation to statutory licensees. See Comments of SoundExchange in Docket No. RM 2002-1B at 7-8 (Sep. 30, 2002).

Certain services have objected to the amount of information that must be included in reports of use with headers. See April 27th NPRM, 70 Fed. Reg. at 21707. According to the Copyright Office, these services have “advocate[d] a ‘flexible’ approach to headers that only identifies the fields of data being reported . . . and permits such headers to be embedded in the file as the first line of data or provided in a separate file.” Id.

SoundExchange objects to modifying the proposed format of files with headers because such modifications are unnecessary. As the Copyright Office has noted, those services who find including thirteen rows of information at the beginning of each report of use “unduly burdensome may instead choose to submit their data without headers.” Id. at 21708.

SoundExchange also objects to the proposal to give statutory licensees the right to provide “multiple files of data and require the agent receiving the data to match up, or overlay, the data from one file to another.” Id. at 21707. SoundExchange believes that the Copyright Office has properly identified the problem of allowing licensees to deliver a report of use for a single reporting period in multiple files: “[a]llowing submission of multiple files of data will . . . unduly burden the agent processing the data and likely result in confusion and a high error rate in attempting to overlay the data.” Id. at 21708.¹²

¹² SoundExchange had at one time proposed regulations that would have required statutory licensees to provide two reports of use per reporting period: a “playlist log” and a “listener log.” SoundExchange was prepared to overlay the listener log (a non-user specific log that would identify when someone was receiving a transmission but not the identity of the person or entity receiving the transmission) with a playlist log (a log detailing the identification of each sound recording transmitted). Due to the overwhelming outcry from statutory licensees, however, SoundExchange withdrew this proposal. See Reply Comments of the RIAA at 78-79 (Apr. 26, 2002). It is interesting that certain entities, including those who objected to SoundExchange’s original proposal, are now seeking a regulation that would require SoundExchange to overlay a log of transmission data with playlist information.

Statutory licensees have sole possession of the data they transmitted, and SoundExchange should not have to overlay one file on top of another in the hopes of obtaining accurate information on the sound recordings transmitted and the number of times such recordings were transmitted.

SoundExchange agrees with the Copyright Office that the advocates of the multiple-file option have failed to demonstrate “that such a practice can be done efficiently without significant error and expense” to SoundExchange. *Id.* at 21707. SoundExchange therefore respectfully requests that this option be rejected.

With respect to specific information to be reported in a file with headers, SoundExchange notes the following:

- **Address Information** – the fourth row of a report with headers should include the city, state, zip code and country name of the service submitting the report of use. As the Section 114 statutory license is not limited to entities located in the United States, the exclusion of the country name would provide SoundExchange with an incomplete mailing address for non-U.S.-based licensees.
- **Start of reporting period** – as noted above, SoundExchange recommends that the seventh row of a report with headers contain the beginning date of the seven or fourteen-day period being reported and not simply the first day of the calendar quarter for which the report of use is being provided.
- **End of reporting period** – SoundExchange recommends that the eighth row of a report with headers contain the ending date of the seven or fourteen-day period being reported and not simply the last day of the calendar quarter for which the report of use is being provided.
- **Text indicators** – the eleventh row of a report with headers is for the identification of the text indicator, the one-character symbol that must be unique and never found in a report’s data content. In order to avoid any confusion, SoundExchange respectfully requests that any final regulations make clear that text indicators should be used to delineate the beginning and end of a text field, which may include the name of the service, the transmission category, the artist, the song title, the album, etc., even if such names are comprised of numbers only or contain numbers (e.g., 3 Doors Down).

- **Field delimiters** – the twelfth row of a report with headers is for the identification of the field delimiters, the character that delineates the end of a data field. In order to avoid any confusion, SoundExchange requests that any final regulations make clear that if a tab is used as the delimiter, the word “TAB” should be used in the twelfth row.
- **Table summarizing the first thirteen rows of a file with headers** – SoundExchange respectfully requests that any table included with the publication of an order establishing format and delivery specifications for reports of use be updated to reflect the comments identified above and not include periods at the end of an entry in the “Example” column. SoundExchange is concerned that the inclusion of periods in a summary table may cause certain statutory licensees to similarly include periods at the end of each of the first thirteen rows of data in a report with headers.

With respect to the specific information to be reported in a file without headers,

SoundExchange notes the following:

- **Carets** – SoundExchange respectfully requests that the statement “Carets (^) should surround strings” should be clarified to say “Carets (^) should be used as the text indicator, surrounding alphanumeric data elements such as service name, transmission category, channel name, artist, song title, album. Text indicators should be used to delineate the beginning and end of a text field, which may include the name of the service, the transmission category, the artist, the song title, the album, etc., even if such names are comprised of numbers only or contain numbers (e.g., 3 Doors Down).”
- **Abbreviations** – in order to avoid confusion in the reporting of alphanumeric data, SoundExchange respectfully requests that final regulations indicate that the use of an underscore in regulations represents a space unless otherwise indicated, but the underscore should not be in reported data. For example, a space should appear between a first and last name, and the performer Jennifer Lopez should be reported as “JENNIFER LOPEZ” in a report of use even if the draft regulations use the convention “JENNIFER_LOPEZ” where the “underscore” signifies a space.

e. Reporting Actual Total Performances
or Aggregate Tuning Hours

In the Interim Regulations, the Copyright Office gave statutory licensees the option of reporting either “[t]he 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.” Interim Regulations, 69 Fed. Reg. at 11530 (Mar. 11, 2004) (codified at 37 C.F.R. 270.3(c)(2)(vi)). SoundExchange respectfully requests that the regulations clarify that whichever reporting method is selected (e.g., actual total performances or ATH), that option must be used throughout a report of use and, preferably, for an entire year.¹³ If statutory licensees are permitted to report Aggregate Tuning Hour information for the transmission of some sound recordings and actual total performances for other sound recordings in the same report of use, SoundExchange’s royalty distribution system would not be able to accurately apply and allocate royalties received for those various performances.

B. Exhibits

To assist statutory licensees in data reporting, SoundExchange has updated its File and Reports of Use Delivery Specifications document originally submitted as Exhibit A to the Comments of SoundExchange dated September 30, 2002. The updated File and Reports of Use Delivery Specifications document is attached hereto as Exhibit B.

SoundExchange has also created the Excel template requested by the Copyright Office. A printout of that template is attached hereto as Exhibit C.

SoundExchange also suggests minor revisions to the proposed regulations included in the Copyright Office’s notice of proposed rulemaking, 37 C.F.R. Part 270. The proposed revisions are noted in Exhibit D. A clean version of SoundExchange’s proposed regulations is included as Exhibit E.

¹³ Certain eligible nonsubscription services and new subscription services were required to make an election covering an entire License Period when they chose among per performance, ATH or percentage of revenue options for calculating statutory liability. See 37 C.F.R. § 262.3(b). The License Periods were 2003-2004 for eligible nonsubscription transmission services and 1998-2004 for new subscription services. See Final Rule in Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA, 69 Fed. Reg. 5693 (Feb. 6, 2004).

SoundExchange will gladly make an electronic version of these comments or its Exhibits available upon request.

IV. CONCLUSION

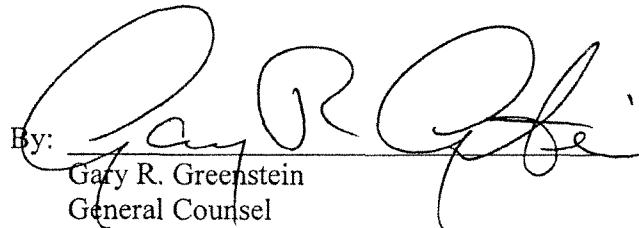
SoundExchange appreciates the Copyright Office's efforts to adopt recordkeeping regulations that meet the statutory requirement that licensees provide copyright owners (and performers) with reasonable notice of the use of sound recordings under statutory license. The electronic delivery of reports of use by statutory licensees in a standardized format is essential if copyright owners and performers are to receive a substantial percentage of the royalties paid by licensees undiminished by the costs of royalty collection and distribution. Without standardized and robust reporting requirements, there is simply no economical way to ensure that those performers and copyright owners whose works have been performed will be compensated for those performances.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

SoundExchange looks forward to working with the Copyright Royalty Judges and statutory licensees on the implementation of final regulations consistent with the format and delivery specifications proposed by the Copyright Office.

Respectfully submitted,

SOUNDEXCHANGE, INC.

By: 

Gary R. Greenstein
General Counsel
SoundExchange, Inc.
1330 Connecticut Avenue, N.W.
Suite 330
Washington, D.C. 20036
Phone: 202.828.0126
Fax: 202.833.2141

Dated: May 27, 2005