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

In the Matter of	)	
NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	)	Docket No. RM 2008-7

REPLY COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange") is pleased to submit these Reply Comments in response to the Copyright Royalty Judges' Notice of Inquiry published in the Federal Register on April 8, 2009 ("NOI"). 74 Fed. Reg. 15,901 (Apr. 8, 2009).

Other parties' comments in response to the NOI confirm two key aspects of SoundExchange's comments in this proceeding:

- Notice and recordkeeping requirements for pure webcasters, commercial broadcasters that webcast, and non-webcast services are not significantly in controversy. These services' lack of concern about the CRJs' proposed census reporting is evidenced by the fact that, except for a small number of commenters including the National Association of Broadcasters ("NAB"), these services have not deemed it necessary to submit comments in this proceeding.[1] These services pay the lion's share of statutory royalties and are capable of reporting on a year-round census basis. Going forward,

[1] NAB's most recent comments primarily address the question of which broadcasters should be considered small businesses (without suggesting any particular relief that they might receive). While those comments also address certain details of the proposed regulations that are relevant to all broadcasters, they do not indicate fundamental disagreement with the proposed regulations. In fact, as SoundExchange discussed in its initial comments in response to the NOI, NAB has agreed to reporting requirements that require census reporting for all stations that webcast more than 27,777 ATH per year. Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 20 (May 26, 2009). These requirements have been accepted by over 380 broadcasters representing thousands of individual stations and have been proposed for adoption by the Copyright Royalty Judges as a partial settlement of the current webcasting proceeding. Joint Motion to Adopt Partial Settlement, Docket No. 2009-1 CRB Webcasting III, at 2-3, Exhibit A § 380.4(g) (June 1, 2009).

they should be required to report on a census basis so that their royalties can be distributed as accurately as possible.

- There is widespread noncompliance with statutory license requirements, including among college radio stations and other noncommercial broadcasters. These services do not pay very much in royalties, but what they pay may be the only statutory royalties earned by the copyright owners and performers of many obscure recordings. Distributing those payments fairly and efficiently is a difficult problem. However, that problem cannot be solved simply by exempting all or most usage by noncommercial broadcasters from a census reporting requirement without some alternative to permit a fair distribution of royalties (such as the proxy distribution arrangement and associated fee provided under the Webcaster Settlement Act agreements described in SoundExchange's initial comments in response to the NOI).[2]

In these Reply Comments, SoundExchange first addresses the main contested issue in this proceeding – reporting by noncommercial broadcasters. SoundExchange then briefly addresses a number of more detailed issues raised in various parties' comments and concludes with a summary of its position in this proceeding.

I. Reporting by Noncommercial Broadcasters

Most of the comments submitted in response to the NOI were submitted by College Broadcasters, Inc. ("CBI") and other parties addressing college broadcasting issues.[3] These comments paint a consistent picture of noncompliance with notice and recordkeeping requirements, as well as other requirements of the statutory license, that is even more widespread than SoundExchange appreciated:

- A survey by CBI indicates that less than 12% of stations that are currently webcasting are submitting compliant reports of use.[4]

- Some stations do not track their aggregate tuning hours ("ATH"), even though that is the basis for determining their payable royalty.[5]

---

[2] Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 20 (May 26, 2009).
[3] This was apparently the result of an effort by CBI to rally its grass roots. *See* Guide to Submitting Comments in the Webcasting Recordkeeping Proceeding NOI, filed with Comments of WSBF-Clemson, Docket No. RM 2008-7 (May 24, 2009).
[4] Comments of College Broadcasters, Inc., Docket No. RM 2008-7, at 4 (May 26, 2009).
[5] *Id.* at 4-5, 10, 22; *see* 37 C.F. R. § 380.3(a)(2).

- A large proportion of programming is transmitted from original media without capturing and transmitting the basic identifying information that services must transmit to users as a condition of the statutory license.[6]

Such noncompliance with the requirements of the statutory license makes transmissions infringing. *See* 17 U.S.C. § 114(f)(4)(B). Moreover, because SoundExchange distributes royalties "based upon the information provided under the reports of use requirements," 37 C.F.R. §§ 380.4(g)(1), 382.3(c)(1), 382.13(f)(1), noncompliance with the reporting requirements substantially frustrates SoundExchange's mission of distributing the royalties it receives to artists and rights owners.

College and other noncommercial broadcasters present other challenges relevant to this proceeding because these services overwhelmingly pay only the minimum fee of $500. Thus, while this group of licensees is large, the total royalties paid by these services is a small fraction of the total royalty pool. At the same time, however, as they highlight in their comments, they use a diverse repertoire of "music that cannot be heard anywhere else."[7] As a result, the royalties these services pay may be the only statutory royalties earned by the creators of many recordings. Thus, while the royalties paid by these services may seem immaterial when compared to royalties that come from other sources, they could be meaningful to the artists and rights owners whose works are featured mainly on noncommercial and college radio stations.

The comments filed by the services also reveal how important year-round census reporting is to ensuring a fair and accurate distribution of royalties. To maximize diversity in

---

[6] *E.g.*, Comments of College Broadcasters, Inc., Docket No. RM 2008-7, at 12-20 (May 26, 2009); *see* 17 U.S.C. § 114(d)(2)(C)(ix).

[7] Supplemental Comments of Harvard Radio Broadcasting Co., Docket No. RM 2008-7, at 15 (May 26, 2009); *see also* Comments of College Broadcasters, Inc., Docket No. RM 2008-7, at 14 ("listeners will hear music not available from any other station at any time"), 16 ("[o]ur programming is very diverse and seeks to represent artists from myriad genres and media") (May 26, 2009); Comments of the American Council on Education, Docket No. RM 2008-7, at 2 (May 26, 2009) (describing the "breadth of music played each day on college radio").

their playlists, many of these services intentionally avoid playing recordings repeatedly.[8] As a result, no two-week sample of a station's playlist is representative of any other period, and even if services were to submit compliant reports, it would seem that up to about 85% of the recordings used by these stations would be missed by the current two weeks per quarter sampling methodology.[9]

The Copyright Royalty Judges should adopt census reporting as the default rule in this proceeding. The Judges are required by law to "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). "The Judges have determined preliminarily that such reasonable notice of use requires the type of census reporting that [the proposed regulations] mandates." 74 Fed. Reg. 15, 903. As the agency charged with administration of the notice and recordkeeping requirements, the Judges are entitled to use their judgment in adopting a reasonable construction of their statutory mandate. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). In view of the circumstances described above, the Judges' preliminary conclusion concerning the scope of their statutory mandate is clearly reasonable.

Some of the commenters in this proceeding oppose census reporting primarily on the basis of compliance costs, and the relation of those compliance costs to the minimum fee. For example, CBI argues that "[a]ny annual cost of reporting compliance exceeding a fraction of the

---

[8] Supplemental Comments of Harvard Radio Broadcasting Co., Docket No. RM 2008-7, at 15 (May 26, 2009) (WHRB "attempts to never broadcast the same recording in a three year period"); Comments of College Broadcasters, Inc., Docket No. RM 2008-7, at 14 (May 26, 2009) ("[m]any of these songs from these albums may be played only once in several years").

[9] Of 13 weeks in a quarter, a two week sample period is about 15% of the quarter, and the other 11 weeks are about 85%. Thus, if a station's music usage over a quarter is even, and it never repeats a recording, about 85% of recordings will be missed. This is an extreme case, and not representative of webcasters in general, but the college radio comments make clear that at least some college stations strive to achieve this diversity in programming (with the effect of having this lack of representativeness in a sampling methodology).

$500 minimum yearly royalty fee would not be reasonable."[10] These arguments should be rejected. Congress has imposed on the Copyright Royalty Judges two independent obligations – to set royalty rates and terms complying with the relevant rate standard, 17 U.S.C. §§ 114(f)(1), (2), and to establish requirements by which copyright owners will receive notice of the use of their recordings, 17 U.S.C. §§ 114(f)(4). There is no suggestion in the statute, or any other legal basis for concluding, that the royalty rate should in any way limit or otherwise affect notice to copyright owners.

Such a limitation is also factually unwarranted. The $500 minimum fee is indeed very low,[11] but the costs of complying with notice requirements must be viewed in the context of the tremendous value that the statutory license provides to these services. As the comments by broadcasters make clear, music is an integral and essential part of their services, but the royalty represents only a tiny percentage of the overall budgets of many noncommercial services that do not exceed the generous usage threshold. For example, the National Federation of Community Broadcasters indicates that "many" stations have budgets under $300,000 per year,[12] and Harvard Radio suggests that its annual budget is in excess of $130,000 per year,[13] yet it only pays $500 for the rights to all the sound recordings it webcasts. For these stations, the $500 minimum royalty (and the significant amount of usage permitted under it) represents an extraordinary value.[14] It is manifestly unreasonable for noncommercial stations to suggest that a

---

[10] Comments of CBI, Docket No. RM 2008-7, at 21 (May 26, 2009).
[11] The minimum fee was set with an eye toward covering SoundExchange's incremental administrative costs. Final Rule and Order, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,099 (May 1, 2007).
[12] Email from Carol Pierson, President and CEO, National Federation of Community Broadcasters, Docket No. RM 2008-7 (May 26, 2009).
[13] Supplemental Comments of Harvard Radio Broadcasting Co., Docket No. RM 2008-7, at 20 (May 26, 2009) (explaining that $13,024.60 is in some years about 10% of the station's budget).
[14] *Id.* at 21.

fraction of the $500 minimum fee payment should represent a *cap* on what the stations should be required to spend in order to provide reasonable notice of the sound recordings that they use.

Importantly, many of the commenters' problems complying with the recordkeeping requirement are directly related to the commenters' failure to comply with the statutory requirement to identify the sound recording to *users* during the webcast itself. As SoundExchange explained in its initial comments in this proceeding, webcasters are required as a condition of the statutory license to transmit the recording title, album title and featured artist name in text data with every recording they transmit. 17 U.S.C. § 114(d)(2)(C)(ix). The proposed regulations require reporting little additional per-recording information.[15] As noted above, the recent comments by other commenters make clear that many college radio stations do not comply with this statutory requirement, because, so they claim, they do not have the ability to type this basic information into a computer and transmit it to users along with the audio stream. The services proffer a huge range of extreme estimates of the cost of entering this data, and suggest that these costs would be incurred to comply with census reporting requirements.[16] However, the same or roughly the same costs would have to be incurred to comply with the text data requirement already imposed by statute. Services that have chosen to infringe to save the costs of complying with the text data requirement cannot cite preservation of that cost saving as a justification for inadequate notice and recordkeeping requirements.[17] If one treats the costs of

---

[15] Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 6-7 (Jan. 29, 2009).

[16] *E.g.,* Comments of College Broadcasters, Inc., Docket No. RM 2008-7, at 7-9 (May 26, 2009) (estimates of annual compliance costs ranging from $1,500 to $50,000 or even "[P]riceless"); Comments of WTBU, Docket No. RM 2008-7, Part II (May 26, 2009) (estimating cost of compliance at $100,000). These estimates are suspect on their face. Most appear pulled out of thin air, and estimates of the cost of performing a similar task that vary over such a huge range simply cannot be trusted.

[17] Similarly, services plead a lack of technological capability to comply with census reporting requirements. *E.g.,* Supplemental Comments of Intercollegiate Broadcasting Sys., Docket No.

complying with the text data requirement as sunk, the incremental costs of complying with a census reporting requirement should be much less than identified by the services.

The noncompliance amply demonstrated by college radio's own comments explains why SoundExchange believes it is important that any regulations adopted in this proceeding promote greater compliance than in the past. It is for this reason that SoundExchange believes it is important to have a clear deadline for delivery of reports of use and to impose a late fee for late reports of use. NAB suggests that noncompliance is a rare event caused by unavailability of information and minor mistakes such a transcription errors, and that the availability of an infringement remedy should provide all the incentive that services need to comply.[18] However, the facts reported by SoundExchange and the comments from other broadcaster commenters make clear that outright flouting of requirements is commonplace, and the availability of infringement remedies is insufficient to prevent it. When the majority of licensees are failing to report at all, the possibility of expensive infringement litigation against every one of them has not been sufficient to motivate compliance. Services need an additional, immediate incentive to

---

RM 2008-7, at 6 (May 26, 2009). Webcasting in a manner that complies with the requirements of the statutory license requires a certain level of technological sophistication and infrastructure. When the incremental technology that would be necessary for a compliant service to provide census reporting is relatively modest, services that have taken shortcuts in their business practices and system designs should not be heard to argue against census reporting based on their noncompliance.

[18] Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 7-8 (May 26, 2009). The issue of availability of the information required to be reported was explored in detail when the predecessor to the current regulations was adopted, and SoundExchange's predecessor demonstrated that this information is generally available to broadcasters. Comments of the Recording Industry Association of America, Inc., Copyright Office Docket No. RM 2002-1A, at 43-46 (April 5, 2002). Nothing about this proceeding requires revisiting the judgment that services are cable of providing these kinds of information.

comply with the notice and recordkeeping regulations. The possibility of late fees would provide such an incentive.[19]

Notwithstanding the foregoing discussion, in the statutory scheme created by Congress, the notice and recordkeeping requirements that the Judges adopt are not the only permissible reporting arrangement; they function as a default. The participants in a rate proceeding are authorized to negotiate and agree to – and the Judges are authorized to adopt – alternative requirements in settlement agreements. 17 U.S.C. § 801(b)(7)(C). In addition, SoundExchange has had special negotiating authority for notice and recordkeeping requirements under the Webcaster Settlement Act,[20] and might have such authority again.[21] The fair and efficient distribution of the small amount of royalties paid by college radio stations and other noncommercial broadcasters among a large and diverse group of copyright owners and performers is a difficult problem that is best addressed in the flexible manner permitted through such alternatives.

---

[19] NAB identifies possibilities for unfairness if late fees were allowed to accrue without the licensee knowing that SoundExchange views a report it has submitted as deficient. Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 8 (May 26, 2009). This situation is addressed in NAB's agreement with SoundExchange under the Webcaster Settlement Act. 74 Fed. Reg. at 9,301 (§ 4.8). SoundExchange would have no objection to adopting a similar treatment here.

[20] Pub. L. No. 110-435, 122 Stat. 4974 (2008) (to be codified at 17 U.S.C. § 114(f)(5)(A)).

[21] Legislation was recently introduced in Congress to provide such negotiating authority again. *See* Webcaster Settlement Act of 2009, H.R. 2344, 111th Cong. (2009).

II. Other Reporting Issues

In this part of its Reply Comments, SoundExchange responds briefly to a number of arguments made by other commenters.

A. Application of the Regulatory Flexibility Act

The Intercollegiate Broadcasting System submitted comments arguing that the Copyright Royalty Judges are obligated to apply the procedures contemplated by the Regulatory Flexibility Act (5 U.S.C. §§ 601-612) in conducting this proceeding.[22] SoundExchange takes no position concerning that question, because the Regulatory Flexibility Act only prescribes a process that certain governmental entities must follow in certain matters to consider the effects of rules on small businesses,[23] and through the NOI the Judges have already gathered information relevant to completing that process if necessary.

Whether or not the Judges are required to observe more process for consideration of circumstances of smaller webcasters than they have, the Judges are ultimately still required to comply with the provisions of Section 114(f)(4)(A), which requires the Judges to "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). As noted above, "[t]he Judges have determined preliminarily that such reasonable notice of use requires the type of census reporting that [the proposed regulations] mandates." 74 Fed. Reg. 15, 903. Unless the Judges conclude that reasonable notice can be provided by less than census reporting, following Regulatory Flexibility Act procedures ultimately must lead the Judges to census reporting as the default.

---

[22] Supplemental Comments of Intercollegiate Broadcasting Sys., Docket No. RM 2008-7, at 2-4 (May 26, 2009); *see also* Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 2-5 (May 26, 2009).

[23] *See* 5 U.S.C. § 606 (regulatory flexibility analysis requirements "do not alter in any manner standards otherwise applicable by law to agency action").

B. Determination of Who Qualifies as a Small Entity

SoundExchange takes no position on who among statutory licensees is a small entity for purposes of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601(6).

As SoundExchange noted in its initial comments in response to the NOI, it is very difficult to tell which statutory licensees might qualify as small entities, and SoundExchange was ultimately unable to determine an appropriate way of doing so.[24] NAB's most recent comments indicate similar difficulties. However, NAB suggests that the solution is to ignore the widespread common ownership of broadcast stations, the actual revenues of noncommercial stations, and the number of broadcasters that are actually interested in webcasting.[25] The result, according to NAB, should be to treat over 11,000 of the roughly 14,000 broadcast stations in America as small entities affected by the proposed regulations.[26] NAB's position simply ignores reality. To the extent SoundExchange can tell based on the information available to it, it appears that SoundExchange has received 2008 royalty payments covering roughly 2,400 individual commercial broadcast stations, and that at least 90% of them are part of larger station groups. SoundExchange also received payments from about 350 noncommercial broadcast stations, the majority of which appear to be operated by colleges and universities.

If the Judges conclude that the Regulatory Flexibility Act applies, the Judges ultimately must provide "an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available." 5 U.S.C. § 604(a)(3). Such an estimate would be hard to determine with precision. If one is ultimately given, it cannot ignore the statutory definition of the term "small entity" or the facts that a high proportion of commercial

---

[24] Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 11-13 (May 26, 2009).
[25] Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 3-4 & n.9 (May 26, 2009).
[26] *Id.* at 2-3.

broadcast stations are part of station groups; a high proportion of noncommercial broadcast stations are operated by colleges and universities that have high revenues;[27] and most broadcasters apparently do not webcast. Thus, any fair attempt to make the estimate required by the Regulatory Flexibility Act of the number of small entities (as defined in the Act) that might be affected by the proposed regulations must conclude that there are no more than hundreds, rather than thousands, of such entities.

C. SoundExchange's Costs of Processing Reports Would Not Increase in Proportion to the Number of Weeks for Which Usage is Reported.

SoundExchange appreciates the concern some commenters expressed for the effects of census reporting on its administrative costs. However, while expanded census reporting probably would increase SoundExchange's costs, as SoundExchange indicated in its most recent comments, this is not clearly so, particularly in the long run, and it is not so to an extent that causes SoundExchange to believe that any cost increase would not be justified by greater accuracy in distributions.[28]

Contrary to the comments of Harvard Radio,[29] SoundExchange's costs of processing reports of use would not scale linearly with the number of weeks for which usage is reported. First, the number of recordings used by most webcasters does not increase in proportion to the number of weeks for which usage is reported. This is because webcasters typically play certain recordings repeatedly. Thus, the analysis previously described by SoundExchange suggests that, on average, the number of recordings reported under a census reporting regime might be roughly

---

[27] *See* Supplemental Comments of Harvard Radio Broadcasting Co., Docket No. RM 2008-7, at 7 (May 26, 2009) (arguing against "a revenue-based cutoff," seemingly because noncommercial webcasters often would be considered to have substantial revenues from their educational or other operations).

[28] Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 7-8 (May 26, 2009).

[29] Supplemental Comments of Harvard Radio Broadcasting Co., Docket No. RM 2008-7, at 10-13 & n.16 (May 26, 2009).

twice the number reported under a sample model, but that is simply the advantage of census reporting.[30] For college radio stations the increase in the number of recordings reported would probably be higher than average, but 6.5 represents the theoretical maximum multiple for stations that do not use recordings repeatedly (assuming even usage of recordings over a quarter).

Moreover, SoundExchange's computer systems and business processes incorporate substantial efficiencies of scale. SoundExchange performs the manual task of matching unmatched performances on a consolidated basis. Thus, if 100 licensees all reported the same recording that was queued for manual matching, even if they represented it differently in their reports of use, it is likely that all those textual representations of the recording would be matched in one operation. And once matched, those recordings would not need to be matched manually again. If in the future, any service reported that recording in any textual way that SoundExchange had seen before, the new report would be matched automatically. Thus, even if expanded census reporting identified a large number of new recordings that were being used and had never before been reported to SoundExchange – which would be a positive development – and a substantial investment was required to match those recordings initially, SoundExchange's data would be perfected and its costs would drop over time.[31] In fact, as SoundExchange explained in its first response to the NOI, census reporting probably would to some extent improve its efficiency by accelerating the population of its database of repertoire.

---

[30] Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 4-5 (Jan. 29, 2009).

[31] Because of these efficiencies, it would not be meaningful to calculate a processing cost per record for SoundExchange, or to use that kind of metric in the simple linear calculations described by Harvard Radio. Its analysis, based on the experience and systems of a wholly different entity – MediaUnbound – is simply irrelevant. *See* Supplemental Comments of Harvard Radio Broadcasting Co., Docket No. RM 2008-7, at 11-13 (May 26, 2009).

D. NAB's Proposal About the Required Certification Should Be Rejected.

NAB proposes that it work with SoundExchange to develop a new form of certification, and implies that perhaps there should be a change to the current requirement of signature by an "appropriate officer or representative of the service."[32] It would not be practicable for SoundExchange to negotiate its business forms with every trade association of licensees, and in any event such negotiations are unnecessary. NAB's concern about the knowledge of officers is already fully addressed by the reference in the current regulations to representatives. SoundExchange has merely proposed changing the form used for providing certification and that services provide basic identifying information in connection with reports of use.[33]

E. Information to Be Submitted

NAB reiterates its call for access to SoundExchange's database. As SoundExchange previously explained in this proceeding, that is no panacea.[34] The same is clear from NAB's comments. NAB states that even large broadcasters have been unable to realize economies of scale in their own businesses because of the "fundamental problem" of centralizing their own data.[35] Laboriously matching stations' low-quality legacy data to SoundExchange's database would be no easier. One can only suspect that broadcasters are interested in getting access to this data primarily for their own business purposes – perhaps to realize the economies of scale described by NAB – rather than for the purpose of reporting to SoundExchange. Moreover, providing many parties real-time access to a database that is constantly being updated would

---

[32] Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 5-6 (May 26, 2009).
[33] Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 25-26, Exhibit A § 370.4(d)(4) (Jan. 29, 2009).
[34] Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 26 n.22 (May 26, 2009).
[35] Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 7 (May 26, 2009).

require a substantial investment by SoundExchange in systems, security and support. There is no justification for doing so.

F. Syndicated Programming

NAB suggests an exception to the reporting regulations for syndicated programming. Such an exception would eviscerate the regulations. If broadcasters are not motivated to request playlist information from syndicators, no information will be provided to broadcasters and hence no information will be provided to SoundExchange. In fact, this is one area in which the NAB and SoundExchange have negotiated a resolution that takes both parties' concerns into account. SoundExchange's Webcaster Settlement Act agreement with NAB, which has been accepted by over 380 broadcasters representing thousands of individual stations, has provisions that were intended to relax reporting requirements for syndicated programming, but that still ensure that the services provide information about what sound recordings were included in the syndicated programming.[36]

III. Conclusion

As SoundExchange has now illustrated in three sets of comments in this proceeding, there is substantial room for improvement in the current notice and recordkeeping regime.

SoundExchange applauds the Judges' move toward year-round census reporting. It is abundantly clear that a default rule of census reporting would materially increase SoundExchange's ability to make accurate royalty distributions. Five years after the Copyright Office's adoption of the original notice and recordkeeping requirements for webcasters – with a warning to webcasters to prepare for census reporting[37] – the time has come for the regulations to move in that direction.

---

[36] 74 Fed. Reg. 9,301, § 5.3.
[37] 69 Fed. Reg. 11,526 (March 11, 2004).

In its initial comments in this proceeding, SoundExchange suggested and discussed numerous improvements to the proposed regulations. SoundExchange encourages the Judges to adopt those improvements. Many of these are technical, and seem to be noncontroversial. Most of the controversy with respect to SoundExchange's suggestions that has arisen in various parties' comments in this proceeding has surrounded proposed revisions intended to address licensees' noncompliance. The passage of time and other commenters' comments have made clear that noncompliance is even more widespread than SoundExchange understood, and will only grow as an impediment to royalty distribution unless the regulations adopted in this proceeding specifically target that problem. Over the last year SoundExchange has had to hold millions of dollars of royalties for one or more quarters because of late reports of use. For that reason, it is particularly important that the Judges adopt the late fee proposed by SoundExchange. In addition, disputes involving the lack of a clear deadline for submitting quarterly reports of use have been a recurring problem. Thus, the proposal to include a clear deadline in Section 370.4(c) of the proposed regulations is an important improvement.[38]

SoundExchange's prior comments also suggested an additional provision to solve retrospectively the problem of licensee noncompliance. It has become increasingly clear that there are some royalties that were paid to SoundExchange in the past for which the licensees are never going to submit reports of use sufficient to enable distribution. To allow these royalties to be paid to the copyright owners and performers who deserve them, SoundExchange requests that the Judges include in the regulations adopted in this proceeding explicit authority for

---

[38] The proposed regulations attached to SoundExchange's initial comments in this proceeding contained an incorrect cross reference to this provision. In SoundExchange's proposed late fee provision, the reference should be to Sections 370.3(b) and 370.4(c) (not 370.4(d)(3)). *See* Comments of SoundExchange, Inc., Docket No. RM 2008-7, at Exhibit A § 370.5 (Jan. 29, 2009). We have set forth the proposed correction in Exhibit A.

SoundExchange to distribute royalties it has received based on a reasonable proxy when it has not been able to obtain sufficient reports of use from the service within one year after receiving payment. We have included proposed language for such a provision in Exhibit A.

SoundExchange appreciates the Judges' attention to Section 112/114 notice and recordkeeping issues and urges the Judges to adopt the proposed regulations, with the modifications suggested by SoundExchange, as soon as practicable.

Dated: June 8, 2009

Respectfully Submitted,

By: _____

Steven R. Englund (DC Bar No. 425613)
Jared O. Freedman (DC Bar No. 469679)
JENNER & BLOCK LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001
(v) 202-639-6000
(f) 202-639-6066
senglund@jenner.com
jfreedman@jenner.com

Michael J. Huppe (DC Bar No. 455161)
General Counsel
Colin Rushing (DC Bar No. 470621)
Senior Counsel
SoundExchange, Inc.
1121 14th Street, N.W., Suite 700
Washington, D.C. 20005
(v) 202-640-5880
(f) 202-640-5883
mhuppe@soundexchange.com
crushing@soundexchange.com

Counsel for SoundExchange, Inc.

Exhibit A
Revisions to Proposed Regulations

Reference to Reporting Deadline

As described in note 38 of SoundExchange's Reply Comments, Section 370.5 of the proposed regulations appended to its initial comments in this proceeding should be revised as follows:

> § 370.5 Failure to submit compliant Reports of Use on a timely basis.
>
> A Service that fails to submit a compliant Report of Use by the applicable due date set forth in Section 370.3(b) and Section ~~370.4(d)(3)~~ 370.4(c), including a Service that submits a Report of Use that does not comply with the requirements set forth in Section 370.3 or Section 370.4, shall pay a late fee of 1.5% of the corresponding royalty liability per month, or the highest lawful rate, whichever is lower, for any Report of Use not received by the Collective in compliant form until after the due date. Late fees shall accrue from the due date until a compliant Report of Use is received by the Collective.

Distribution of Past Payments Without Sufficient Reports of Use

As described in SoundExchange's initial comments in response to the NOI and in Part III of these Reply Comments, SoundExchange proposes adding the following new subsection (g) to the end of Section 370.6 of its proposed regulations (Section 350.5 of the regulations originally proposed by the Judges):

> (g) *Distribution in the absence of reports of use.* In the case of any royalties received by the Collective as of **[insert date the regulations are issued]**, to the extent that the Collective has not received from the Service within one year after receiving payment sufficient reports of use to enable distribution of the relevant royalties, the Collective is authorized to distribute the relevant royalties based on a reasonable proxy notwithstanding any other applicable regulations.