

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

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

COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. (“SoundExchange”) is pleased to submit these 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).

I. Introduction

SoundExchange appreciates the Judges’ efforts to inquire into the complex issues surrounding reports of use of sound recordings under statutory licenses and their use in royalty distribution. These are difficult issues, but important ones for the tens of thousands of copyright owners and recording artists represented by SoundExchange. The Judges’ attention to these issues has the potential to make a significant difference in the distribution of royalties.

There is substantial room for improvement in the current notice and recordkeeping regime – including both the details of the regulations and, probably more important, the level of compliance by licensees. As the Judges’ questions and the answers thereto in these Comments make clear, the dual goals of accuracy and efficiency of distributions are not entirely aligned. And requiring a level of reporting that theoretically would permit greater accuracy, without simultaneously doing more to motivate compliance by licensees, may just compound the current

problem of poor reporting. Thus, the approach ultimately taken by the Judges in this proceeding will necessarily need to depend upon a balancing of these goals.

With respect to the Judges' continuing consideration of census versus sample reporting, SoundExchange has always supported the census methodology. For clarity, SoundExchange defines census reporting as reporting of all recordings used year-round, whether on a per-performance, aggregate tuning hour ("ATH") or other basis. Thus, an alternative to census reporting is some kind of sample-based reporting, like the approach adopted in the current regulations for all types of services other than preexisting subscription services. SoundExchange continues to advocate expanded census reporting as the "default" rule under the regulations because it allows significantly more accurate allocation of royalties to copyright owners and performers than the current sample-based reporting system. Census reporting is particularly appropriate for the larger services that generate the highest usage and, therefore, the largest proportion of the royalties paid to SoundExchange.

However, growth in the number of webcasters – particularly radio stations webcasting on a small scale – has increasingly meant that a large number of webcasters pay only a low level of royalties. Any reporting of usage (census or sample) by the lowest-paying webcasters carries costs to both licensees and SoundExchange that are relatively higher, in comparison to the royalties involved, than in the case of higher-paying webcasters and other classes of licensees. SoundExchange fully expects that technology making census reporting easier and more affordable for all licensees will increasingly become more widely adopted. In the interim, and as a transitional measure, SoundExchange has reached agreements with small commercial webcasters and the National Association of Broadcasters ("NAB") concerning special alternative notice and recordkeeping provisions for the least-intensive users of music (called "microcasters")

and “small broadcasters,” respectively) under the authority provided by the Webcaster Settlement Act of 2008.¹ Accordingly, while SoundExchange still believes that census reporting on a per-performance basis should be the default reporting required under the notice and recordkeeping regulations, SoundExchange has recognized that limited transitional exceptions responsive to the needs of certain well-defined groups could appropriately be recognized through negotiation.

It might be tempting to consider adopting a similar approach in regulations for some set of the lowest-paying licensees, if the Judges were to conclude that it would be worth sacrificing some accuracy in royalty allocation in order to save costs of reporting and of processing reports. However, SoundExchange does not endorse such an approach at this time. Regulations are, by their nature, less tailorable than agreements, making them not the ideal means for addressing the transitional needs of specific subgroups of licensees. SoundExchange believes that tailored exceptions from a default rule of census reporting can best be achieved through settlements of rate proceedings, *see* 17 U.S.C. § 801(b)(7)(C), or under special negotiating authority such as the Webcaster Settlement Act if available.²

SoundExchange has always worked diligently to distribute royalties accurately and efficiently within the regulations adopted by the Judges or their predecessors, and other applicable law (such as tax law). But as we explained in our initial Comments, SoundExchange’s royalty distributions have long been impeded by many licensees’ reporting inaccurate, incomplete or improperly formatted data, and often simply failing to provide reports

¹ *See* 74 Fed. Reg. 9,293-9,307. In these Comments we use the term “intensive” use of music to refer to the quantity of music usage by a service, whether the service reports on a per-performance, aggregate tuning hour or play frequency basis.

² Legislation was recently introduced in Congress to provide such negotiating authority again. *See* Webcaster Settlement Act of 2009, H.R. 2344, 111th Cong. (2009).

of use altogether.³ SoundExchange identified several proposed changes to the proposed regulations that it believes would enhance reporting by services. In addition to numerous suggestions for improving data quality and ease of processing, our suggestions for improving compliance included monthly reporting due at the same time as the monthly statement of account,⁴ late fees for late reports⁵ and more meaningful certification.⁶ Because of the widespread noncompliance by licensees, and the effects of that noncompliance on SoundExchange's ability to make distributions as contemplated by the regulations, SoundExchange believes that these kinds of improvements are important to promote compliance and fair distribution within the current sample-based reporting regime, and would be even more important in a census based regime.

There is one additional provision beyond those identified in SoundExchange's initial Comments that SoundExchange urges the Judges to adopt at this time.⁷ SoundExchange had hoped that its efforts to promote compliance by licensees and to bring licensees into retroactive compliance through Webcaster Settlement Act agreements would mostly solve the problem of licensee noncompliance. However, while the Webcaster Settlement Act agreements will help, and reporting has improved somewhat over time, 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

³ Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 19-20, 30-32 (Jan. 29, 2009).

⁴ *Id.*, at 22-23.

⁵ *Id.*, at 30-32.

⁶ *Id.*, at 25-26.

⁷ We originally contemplated requesting this relief in a subsequent petition. Given the Judges' interest in SoundExchange's operations, as reflected in the NOI, we now believe this is the appropriate time to raise this request.

the Judges include in the regulations adopted in this proceeding authority for 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. At this time, SoundExchange only seeks this authority for past periods, but reserves the right to seek similar proxy authority in the future.

In these Comments, SoundExchange endeavors to answer the various questions posed in the NOI, particularly those specifically directed to SoundExchange. In responding to the Judges' questions, these Comments (1) describe in Part II why census reporting would be the most accurate and equitable means to distribute royalties; (2) discuss in Part III characteristics of the entities that are currently paying royalties, including those that make the least intensive use of recordings, and their reporting; (3) discuss in Part IV SoundExchange's allocation and distribution methods, including how reporting on an ATH or per-performance basis affects those processes; and (4) answer in Part V the Judges' technical or software-related questions to the extent SoundExchange is able to do so.

II. Census Reporting Is the Most Accurate Option

As the Judges have noted, sample reporting cannot lead to an optimally accurate distribution of royalties. This is particularly true where the sample period is relatively short – two weeks out of every thirteen⁸ – and chosen with no regard to ensuring the representativeness of use during the period. Sample reporting will invariably under-compensate copyright owners and performers whose recordings are under-represented in the sample, and over-compensate copyright owners and performers whose recordings are over-represented in the sample.

⁸ 37 C.F.R. § 370.3(c)(3).

SoundExchange's quantitative analysis of this potential problem suggests that this effect can be significant for copyright owners and performers whose works are used relatively little, because it appears that those works can be easily missed in samples.⁹ At the same time, such artists receive a disproportionately greater payment when their music is captured during the sample period. Given the hit-driven nature of the music business, however, and the short time that individual recordings typically enjoy hit status, even top-selling recordings can be over- or under-represented in a sample depending on the chance of timing. Seasonal differences can also have a significant impact on the accuracy of distributions based on sampling, at least for certain types services. For example, because of normal seasonal variations in consumer tastes, and in the playlists of religious and other broadcasters, one would expect a two-week sample around Christmas, or even to some extent holidays such as Independence Day, St. Patrick's Day, Easter and Halloween, to reflect materially different usage for many services than a two-week sample in another part of the quarter.

It might be possible to design a sample reporting methodology based on statistically-valid sampling techniques that would be less susceptible to these problems than the current sample reporting methodology. But SoundExchange is not aware that anyone has proposed such an approach.¹⁰ Moreover, the design of such an approach would not be trivial. Such an approach

⁹ SoundExchange reviewed that analysis in its opening Comments in this docket. Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 4-5 (Jan. 29, 2009).

¹⁰ Various commenters advocated use of a sampling methodology without meaningfully addressing the issues described above. Some pointed to use of sample reporting by ASCAP and BMI as evidence of the reasonableness of sampling. *E.g.*, Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 12 (Jan. 29, 2009). However, as the comments note, ASCAP and BMI collect data from other sources as well, which when combined with data provided by licensees, would obviously provide a better basis for distributions than licensee-supplied sample data alone. SoundExchange believes that the royalties should be based to the extent possible on the actual transmissions made by the services, and the services are in the best position to provide that information.

might have to be implemented in particular ways specific to each licensee, and it is not clear that such an approach would be easier for licensees to implement than census reporting.

The fact that census reporting allows for the most accurate royalty allocation and distribution possible – and is significantly more accurate than the current sample-based reporting system – has led to SoundExchange’s consistent support for that methodology. But we should be clear that SoundExchange supports census reporting because of its accuracy, not because of any clear cost savings or efficiency improvement. 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), SoundExchange’s processing of more data likely would not cost less (assuming a comparable data quality, distribution methodology, and other circumstances).

Although SoundExchange has not at this point found a satisfactory way to quantify the relative costs of processing census versus sample-based reports, SoundExchange believes that its incremental costs of processing otherwise comparable census versus sample reports are only modestly higher. This is because, in SoundExchange’s experience, it has not been necessary to devote significant extra resources to processing census reporting when the reporting is provided in the proper format. Rather, it is the quality of the reporting that in large measure contributes to added costs. The largest category of cost associated with the processing of reports of use is personnel time. The staff effort to receive, log, allocate and load reports, determine compliance with applicable requirements and resolve exceptions depends more on the number of reports processed and on the general quality of the data in each report than on the number of lines of data in a report or the number of performances or ATH reported on each line.

In addition, SoundExchange's experience suggests that licensees that implement processes for census reporting are generally more diligent about the quality of the data they report than licensees who report on a more ad hoc basis. Expanded census reporting probably would generate some other marginal efficiencies as well, such as allowing SoundExchange to identify and confirm more of a new artist's or copyright owner's repertoire at once. Thus, it is possible that requiring expanded use of census reporting would result in cost savings that would in whole or in part offset any increases in costs associated with the larger volume of data.

Below, we review the types of reporting currently provided by different types of licensees and address various reporting alternatives.

III. Statutory Licensees and Their Reporting

The NOI reflected considerable interest by the Judges in the circumstances of statutory licensees and the reports they provide. In particular, the Judges appear concerned about small entities and the reporting issues they may face.

Section 112 and 114 licensees are a diverse group – including not only webcasters, but also satellite digital audio radio services (“SDARS”), preexisting cable/satellite TV services, cable/satellite TV new subscription services, and business establishment services. In addition, licensees differ widely in the size of the corporation providing the service (traditionally viewed in terms of revenues or employees) and in the intensity of their music use and size of the associated royalty payments. Importantly, the intensity of the music use is not always directly related to the number of employees that a service has or the revenues that the service generates – a fact that reflects the relatively low barriers to entry for webcasters. Because revenues and employees are often poor proxies for the actual use of the music, SoundExchange believes that actual usage is the more meaningful statistic for purposes of this proceeding.

In this part of these Comments we first describe the range in the royalty payments made by services and the problems in considering “small” licensees in light thereof. We then turn to various issues respecting the reports of use made by services and alternative methods of reporting.

A. Statutory Royalty Payments Are Overwhelmingly Made by a Minority of Usage-Intensive Services, While a Large Number of Webcasters Pay Relatively Little in Royalties

Understanding the controversy over notice and recordkeeping requirements requires understanding in at least general terms the payment patterns of statutory licensees. This is because the controversy is principally about determining what level of resources must be applied to distributing accurately the relatively small amount of royalties paid by the lowest-paying webcasters.

According to the records SoundExchange maintains in the ordinary course of its operations, 590 payor services – representing thousands of individual channels and stations – have paid SoundExchange statutory royalties for 2008.¹¹ The vast majority of them – 576 – are webcasting services.

¹¹ All data concerning the 2008 licensee population is as of May 7, 2009. In calculating the numbers provided herein, we have considered a payor service to be a corporate entity paying royalties for a service in one rate category, regardless of how it actually reports and pays. Some corporations, or groups of affiliated corporations, offer different types of services (e.g., a webcast and non-webcast service). For the purpose of this calculation, each of those services is considered a different payor service. In addition, payor services differ in their reporting and payment preference. For example, some corporate enterprises (e.g. radio station groups) pay and report in a consolidated manner on behalf of all of their affiliates, while other affiliates of other enterprises pay and report separately for each station or for distinct subsets of stations (for example, on a regional basis). Taking these differences into account, SoundExchange actually receives separate reporting, and in some cases separate payment, from over 1,200 different services, accounting for several thousand channels and stations. While one could potentially count payors and services in different ways and get different results, the approach we have taken here – reflecting a corporate entity paying royalties for a service or services in one rate category – seems to fairly reflect the general phenomenon of diversity in the licensee population, and in particular the marked difference in payment patterns between webcast and non-webcast services.

The differences in the pattern of payments by webcast and non-webcast services are dramatic. While the webcasters with the most music use are well-represented among the top ten payor services, webcasters overwhelmingly comprise the ranks of the lowest-paying licensees. In 2008, more than half of webcaster payor services paid only the \$500 minimum fee, and about 75% of webcasters paid less in royalties than the lowest-paying non-webcast service.

Notice and recordkeeping requirements for non-webcast services have seldom generated much controversy, as evidenced by the fact that no such service filed initial comments in this proceeding. In view of the payments involved and the business commitment to music use under the statutory license represented thereby, that is not surprising. These services could operate under the notice and recordkeeping regulations proposed by the Judges in their Notice of Proposed Rulemaking, or the modifications thereto proposed by SoundExchange in its initial Comments.

The initial round of comments in this proceeding was almost exclusively focused on webcasting services. The pattern of webcasting royalty payments makes clear why that is so. It is not unreasonable to ask what level of licensee and SoundExchange resources it would be desirable to expend in distributing accurately the last few hundred thousand dollars – or even the last few million dollars – in webcasting royalties. But for the copyright owners and performers whose only statutory royalty payments may come from the royalties paid by the lowest-paying webcasters, accurate distribution of those royalties is a very important issue, and receiving the “notice of the use of their sound recordings” required by statute, 17 U.S.C. § 114 (f)(4)(A), may require census reporting. It is for this reason that SoundExchange agrees with the Judges’ preliminary conclusion that the reasonable notice for which the Judges are to provide requires census reporting. 74 Fed. Reg. at 15,903. That is also why SoundExchange has continuously

supported census reporting and continues to do so as the default means of reporting under the applicable regulations.

B. Defining “Small” Entities

With that background concerning the licensee population, we turn to the Judges’ questions concerning the effects of notice and recordkeeping requirements on small entities. While the differences in music use and royalty payments by the diverse group of licensees are dramatic, SoundExchange does not believe that the licensee population should be classified on a traditional “small entity” basis. Many of the services reporting the lowest music usage and paying the lowest royalties are provided by universities with very significant resources or affiliates of larger corporate enterprises. They just wish to minimize application of those resources to accounting for what is for them a small expense item. By contrast, some of the licensees that make substantial use of music and pay larger amounts of royalties, and account for their music use by reporting good quality data, would probably not generally be considered large corporations. Thus, SoundExchange believes that “small entity” status is not as relevant to the issues presented in this proceeding as the amount of a service’s intensity of music usage and its corresponding royalty payment.

Footnote 1 of the NOI indicates that an entity should be considered small if it “is independently owned and operated and is not dominant in its field of operation.” SoundExchange tried diligently to apply this definition to the licensee community. However, SoundExchange ultimately found it impracticable to do so for several reasons.

First, it is not clear to SoundExchange which licensees are independently owned and operated. The huge majority of services that report to SoundExchange are terrestrial broadcasters, and many of those are part of station groups or of colleges and universities.

SoundExchange does not believe that such stations would be considered independently owned and operated within the meaning of the definition provided by the Judges. Moreover, SoundExchange understands that many other webcasters are affiliated with other large companies. However, information about ownership, and circumstances from which judgments about independence of operations could be made, is not reported to SoundExchange. In trying to assess independent ownership and operation on a comprehensive basis, SoundExchange generally has only the information required to be provided under the regulations – if that. From that information, some payors are immediately recognizable as large corporate entities or colleges and universities, but many may be part of larger enterprises even though that is not apparent from their names and other available information.

In addition, it is not clear what “dominant” means in this context, or who is dominant in which field. Although the least usage-intensive webcasters are presumably less dominant in the field of webcasting as a whole, some of them might be considered dominant in particular niche markets. This group also includes some payors that may be significant broadcasters, and therefore dominant providers of their programming, at least regionally, if not nationally. At the same time, some self-identified “small” webcasters are, according to internet radio rankings, among the top 20 webcasters nationwide.

This determination was also not evident for the non-webcast rate categories, all of which include only a handful of payor services. While SoundExchange has information concerning their revenues from the particular services provided, it does not know their corporate revenues (except where that information is publicly reported), and it found no clear way to draw a line to distinguish dominant from non-dominant services of similar types, or among music services generally. This proved particularly difficult where corporate entities SoundExchange knew to be

among the larger payors of royalties in total were among the smaller payors of royalties among a group of services targeting a particular market segment.

The Judges' definition appears to be based on Section 3(a)(1) of the Small Business Act. *See* 5 U.S.C. § 632(a)(1); *see also* 5 U.S.C. § 601(3), (4). SoundExchange considered trying to apply the Small Business Administration size standards, but did not have access to sufficiently comprehensive revenue and employee information to be able to do so.¹²

In any event, entity size, independence and dominance seem, at best, only indirectly related to royalty payments and the ability to provide comprehensive and high-quality data. The NOI suggests that certain services may lack reporting capabilities because of a lack of resources or technological sophistication. However, some smaller independent webcasters have reported good data for years, and the relatively few higher-paying "pure" webcasters (*i.e.*, those SoundExchange understands to be stand-alone companies rather than affiliates of broadcasting station groups or other major corporations) would probably not generally be considered large corporations. Conversely, while SoundExchange could not classify all of the lowest-paying services by entity size, as described above, it is apparent that many of the lowest-paying payors are large educational institutions with vast financial and technological resources, and others are affiliated with large corporate enterprises. This suggests to SoundExchange that any lack of resources for reporting, or the failure to acquire necessary technology, is simply the result of choosing not to apply the level of resources required.

¹² SoundExchange's agreement under the Webcaster Settlement Act for "eligible small webcasters" defines those entities with reference to having annual revenues under \$1,250,000. *See* 74 Fed. Reg. at 9,306. Twenty-six licensees have indicated to SoundExchange that they wish to be subject to that agreement, but SoundExchange does not know how many other licensees might meet the same revenue standard.

Finally, based on the initial round of comments, the primary issues with respect to reporting capabilities seem to arise from systems that make it hard to count actual performances as opposed to ATH for at least some programming. Based on the data that is currently reported to SoundExchange, it appears that many broadcasters of a wide variety of sizes and ownership status employ such systems. In other words, there are smaller or newer services that are able to report on a per performance basis because they designed their systems with those requirements in mind, while some larger or older services often claim to have a more difficult time meeting the requirement to provide per-performance details. Indeed, as the NAB's comments reflect, some of the larger services that have been using automated playlists for years have had to design modifications to their webcasting systems to accommodate the requirement to report on a per performance basis. Moreover, SoundExchange understands that many services face per-performance reporting issues for a subset of their programming – for example, syndicated programming or programming that does not originate from their computer playlist – and for that reason, the NAB agreement published under the authority of the Webcaster Settlement Act allows a certain percentage of reporting to be made on an ATH basis. *See* 74 Fed. Reg. 9,301. Thus, special treatment based on entity ownership or size would be an imperfect solution to these problems.

We stress that SoundExchange does not support defining in the regulations a class of licensees who may report less comprehensively than proposed in the Notice of Proposed Rulemaking. However, if the Judges are inclined to try to identify such a class, SoundExchange respectfully suggests that actual usage and royalties paid would be far better metrics than anything else suggested in the NOI. By focusing on usage, the resource commitments of both SoundExchange and “smaller” licensees would be more proportional to the money at stake.

C. Reporting by Licensees Today

The state of reporting by licensees today is decidedly mixed. A bright spot is that, as SoundExchange explained in its initial Comments, SoundExchange estimates that over 75% of the royalties it now receives are associated with census reports of use.¹³ This is very important for enabling accurate distributions, and is an important indication that licensees are capable of providing the year-round census reporting proposed by the Judges. However, SoundExchange's royalty distributions are impeded by poor reporting, and sometimes an utter failure to report, by many licensees. Indeed, approximately 60% of licensees who have made payments for performances in the first quarter of 2008 have failed to provide a corresponding report of use. Such failures prevent SoundExchange from allocating royalties, 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). Such failures also hampered SoundExchange in answering some of the Judges' specific questions. The staff effort that is necessary to try to track down missing reports of use, and to try to obtain replacements for defective and unusable reports of use, is a significant cost for SoundExchange. While reporting has generally improved over time, and SoundExchange hopes that decisions by the Judges, settlements and this rulemaking will ultimately lead to greater compliance by licensees, noncompliance remains a significant problem today.

The Judges asked for further information concerning that statement in SoundExchange's initial Comments that over 75% of the royalties SoundExchange receives now are associated with census reports of use. This statement reflects that SoundExchange receives census reports from a number of higher-paying licensees, who collectively pay a large percentage of the royalties paid, as well as some lower-paying licensees. Licensees currently required to provide

¹³ Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 6 (Jan. 29, 2009).

year-round census reports of use include the SDARS, preexisting subscription services and certain of the most use-intensive commercial webcasters. For the first quarter of 2008, and using the definition of payor service described above, the services providing census-based reports of use include 13 of the top 20 payor services and approximately 30 payor services that paid less than \$250,000 in total royalties for 2008.¹⁴ The licensees providing census reports constitute only a small percentage of payors, but because SoundExchange receives census reporting from many of the highest paying licensees, over 75% of payments are associated with such census reports. Going forward, SoundExchange expects to receive census reports of use from the hundreds of commercial broadcasters who have elected to take advantage of SoundExchange's agreement with NAB under the Webcaster Settlement Act and have not elected small broadcaster status (which would eliminate reporting obligations, as described below), as well as 26 small commercial webcasters that have indicated to SoundExchange that they wish to be subject to the Webcaster Settlement Act agreement and have not elected microcaster status (which likewise would eliminate reporting obligations).

The Judges asked specifically what percentage of *songs* are reported on a census basis. Many recordings reported on a sample basis by one licensee may also be reported on a census basis by another. Thus, at the recording level there is significant overlap between the reporting methods. Moreover, in SoundExchange's royalty allocation system, royalties are traceable to licensees and reports of use, but SoundExchange does not generally associate its records of the royalties that have been accrued for each recording with information regarding the basis on which the relevant royalties were reported. In addition, royalties will not generally be allocated to a report of use until it is loaded into SoundExchange's system, and defective reports of use –

¹⁴ Unfortunately, even census reporting is occasionally defective and therefore unusable without additional follow up by SoundExchange.

for example, reports that are missing key fields of data – are generally not loaded unless and until it appears that the service is not going to provide a replacement log.¹⁵

In connection with the preparation of these Comments, SoundExchange conducted an analysis of the lines of data reported to it on reports of use for the first quarter of 2008, whether or not royalties have yet been allocated to them. Generally speaking, a line of data corresponds to a recording used by a service.¹⁶ Services that report on a census basis tend to report more lines of data than services that report on a sample basis for similar usage, reflecting the broader coverage (and hence more accurate allocations made possible) by census reports. When looking at all the reports for a quarter in the aggregate, one popular recording might be represented on hundreds of lines (reflecting its use by hundreds of services).

The vast majority of the lines of data that were considered in the analysis were reported on a census basis, and indeed, a mere handful of the larger webcasting services that report on a census basis and have very diverse playlists represented a large proportion of the lines of data that were considered in the analysis. This indicates it is quite likely that the majority of the unique recordings reported to SoundExchange are identified as having been used because at least one service reporting on a census basis reported them. It also suggests that SoundExchange's ability to allocate royalties accurately to the copyright owners and performers whose works are

¹⁵ When SoundExchange receives a defective report of use, it generally tries to obtain replacement logs from the service. Given widespread noncompliance, this is a massive and ongoing task.

¹⁶ Services sometimes identify the same recording on multiple lines of the same report. For example, some services provide a time-stamped playlist, meaning that a sound recording is listed each time it is played. For purposes of this analysis, SoundExchange attempted to consolidate multiple references to the same sound recording in one report into a single line. In addition, some services that provide census reporting provide a report each month, while others provide a single report for each quarter. To be conservative, and minimize over-counting the number of songs reported on a census basis, SoundExchange included only a single log from each service per quarter in the analysis.

used depends substantially on receiving year-round census reporting from services with diverse playlists.

This phenomenon is not unique to larger services, although the economic impact of larger services is obviously most pronounced. Some of the least usage-intensive licensees have playlists that are relatively diverse, or are directed to independent music or niche genres, and so provide an outlet for music that otherwise might not generate statutory royalties. Thus, while the amounts of royalties paid by these services are not large, taking into account the full diversity of their playlists may be the only way that some copyright owners and performers receive statutory royalties.

The Judges also inquired concerning the percentage of entities reporting on a sample basis that are small or nonprofit entities. For the reasons explained above, we cannot provide a specific percentage of such entities that may be considered “small.” Impressionistically though, one would have to say that smaller or nonprofit entities overwhelmingly report on a sample basis when they report at all, and a large percentage of entities reporting on a sample basis are smaller or nonprofit entities. We do, however, know that 26 services that have indicated to SoundExchange that they wish to be subject to the small commercial rates available under the Webcaster Settlement Act agreement have committed to report on a year-round census basis.¹⁷ As for noncommercial entities, approximately 90% of the noncommercial licensees reporting for Q1 2008 did so on a sample basis. Unfortunately, however, SoundExchange has to date received reports from only a small percentage of these services.

¹⁷ See 74 Fed. Reg. at 9,305.

D. Reporting by the Least Usage-Intensive Webcasters

Other commenters have indicated that college radio stations and other nonprofit broadcasters have difficulty complying with reporting requirements. Those groups are disproportionately represented among the least usage-intensive webcasters. Of the webcasters paying only a single-channel minimum fee of \$500 per year, nearly 80% designate themselves as noncommercial. Just by examining the payor name, to determine whether it includes the name of a school, it appears to SoundExchange that approximately 50% are associated with colleges, universities and other educational institutions. Religious and other noncommercial webcasters make up the remainder.

Although SoundExchange disagrees with some of these entities' inflated estimates regarding the costs of compliance with reporting obligations, it is undeniable that costs for licensees to report a small amount of usage (on either a sample or census basis) are by definition higher relative to the royalties involved than in the case of a much more usage-intensive licensee. The same is true of SoundExchange's costs to process those reports, because it has become apparent that the least usage-intensive licensees often provide reports of use with poor quality data, which requires additional staff time to resolve processing problems. Furthermore, much of the effort required for SoundExchange to receive, log, allocate and load reports, determine compliance with applicable requirements and resolve problems depends more on the number of reports processed than the length of each report, making it more efficient to complete those steps for a single large report rather than many smaller ones.

SoundExchange has been and remains prepared to incur those costs in the interest of making accurate distributions to copyright owners and performers. Nonetheless, in order to address licensee concerns, provide an incentive for very small webcasters to become licensed

and pay royalties, and minimize the resources that SoundExchange must expend addressing exceptions in reports covering a very small fraction of total statutory royalties, SoundExchange recently agreed to special notice and recordkeeping provisions for microcasters and small broadcasters in its agreements with small commercial webcasters and NAB under the Webcaster Settlement Act of 2008. For these purposes, a “small broadcaster” is, broadly speaking, defined as a broadcaster that has annual ATH less than 27,777. *See* 74 Fed. Reg. at 9,299.

“Microcasters” are broadly defined as commercial webcasters with annual revenues of less than \$5,000, annual expenses less than \$10,000, and annual ATH less than 18,067.¹⁸ *See* 74 Fed. Reg. at 9,304-06.

As a purely transitional matter, small broadcasters and microcasters may elect the option to provide no reporting at all, but pay an additional \$100 fee, which will be used by SoundExchange (along with very basic usage information provided in the election form) to develop a proxy royalty allocation model taking into account the diverse playlists that such licensees typically employ. *See* 74 Fed. Reg. at 9,301, 9,304-05. It must be emphasized that the reporting accommodations in these agreements are explicitly transitional, and that SoundExchange in fact agreed to the accommodations for the smaller stations as part of a package whereby other services taking advantage of these Webcaster Settlement Act agreements agree to provide full census reporting – even though the current regulations only require reporting on a sample basis. *See* 74 Fed. Reg. at 9,301, 9,305.

SoundExchange believes that this kind of arrangement, granted on a transitional basis only, is, on balance, better than any other alternative form of relief for low-paying services: services may delay the costs of developing their reporting infrastructures (while sample reporting

¹⁸ The different ATH limits are intended to reflect approximately equivalent music use, but take into account that broadcasters typically perform fewer recordings per hour than other webcasters.

would have some cost); SoundExchange is spared the cost of processing a relatively high volume of reports of use (sample or otherwise) covering small payments and that historically have included poor quality data; and it hopefully will result in a fairer distribution of this small amount of money than if each service had submitted a non-representative sample of its playlist. Thus, if the Judges were to conclude that census reporting by the lowest-paying services was unreasonable, and that it is worth sacrificing some accuracy to save costs, these agreements illustrate an alternative that seems promising.

It should be noted, however, that adopting this kind of approach on too wide a scale has risk. It is likely that in designing the proxy to be used to distribute small broadcaster and microcaster royalties, SoundExchange will evaluate its representativeness with reference to actual usage reported by some group of services considered to have usage sufficiently similar to the small broadcasters and microcasters. Thus, designing the proxy depends upon having enough current actual usage data. If an exception to reporting requirements was extended broadly enough to relieve from reporting most of the services with the most diverse playlists, it probably would not work as currently envisioned.

To be clear, SoundExchange views this approach as an experiment, and hopefully a transitional arrangement. It is also a complicated arrangement, and SoundExchange has not yet designed the proxy. Accordingly, SoundExchange believes it would be premature to enshrine such an arrangement in regulations. Instead, SoundExchange believes that the better approach is to provide a default rule of census reporting in the regulations, and to recognize that any appropriate relief therefrom can best be worked out in settlements of rate proceedings, *see* 17 U.S.C. § 801(b)(7)(C), or under special negotiating authority such as the Webcaster Settlement Act if available.

E. ATH Versus Per-Performance Reporting

The Judges asked a number of questions about reporting on an ATH basis rather than a per-performance basis. On this subject it is important to understand that reporting on an ATH or per-performance basis is a separate question from reporting on a census or sample basis. Reports of use covering either all recordings (*i.e.* census reporting) or merely a sample of recordings could potentially be provided on an ATH or per-performance basis.

We also should be clear what it means to report on an ATH basis. ATH is a measure of listening to a channel for the time period in question. 37 C.F.R. § 370.3(b)(1). When used, ATH always must be reported together with the channel name and play frequency for each recording. 37 C.F.R. § 370.3(c)(2)(vi). This form of reporting is attractive to some services, principally broadcasters, because they have systems that can track listenership to a channel on a time basis over the course of a broadcast day, but at least sometimes reportedly have difficulty associating that information with the specific recording being played on that channel at any moment. Accordingly, while ATH is reported for each recording, every recording played on a particular channel is reported as having the same ATH (the ATH for that channel for the period). In effect, ATH is a way to assign weight to a service's various channels based on listenership, and play frequency is then used to assign weight to the recordings played on a channel. It follows that if a service has only one channel (as is the case for many webcasters), then ATH itself is useless as a means of weighting tracks played, and play frequency is the only variable that matters.

Reporting of either performances or ATH and play frequency provides a basis for distributing a licensee's payments among the recordings used. SoundExchange believes that, on balance, reporting of performances leads to fairer results, because ATH-based reporting divorces royalty allocations from actual listenership. Each play of a recording on a channel is given equal

weight, no matter what the day of the week or the time of day it is played, even though one would expect listenership to vary widely. For example, a service might have one listener at midnight, and 100 listeners at noon. Under the ATH reporting regulations, however, that service would report the same ATH for a track played at midnight as a track played at noon – meaning that those tracks are weighted the same even though the track played at midnight only had 1% of the audience of the track played at noon.

Reporting on a per-performance basis is also most consistent with the per-performance rate structure. Under a per-performance rate structure, recordings played at peak times generate the greatest contribution to the total royalty paid by a service, while recordings played at off hours to a tiny audience generate only a small contribution to the total royalty paid by a service. Yet if usage is reported on an ATH basis, the total royalties must be distributed without regard to listenership at particular points in time. Thus, a portion of the royalties earned by the copyright owners and performers of the recordings played at peak times end up being paid to the copyright owners and performers of the recordings played at off hours. In the example given above, actual distributions would depend on audience fluctuations and all the recordings used over the whole reporting period, and if recordings are used multiple times at different times of the day payments would tend to even out. However, one can see how, in effect, perhaps half of the royalties earned by the copyright owners and performers of the recording played at noon would end up being paid to the copyright owners and performers of the recording played at midnight, and the copyright owners and performers of the recording played at midnight would end up receiving perhaps something like 50 times the royalties earned by their recording.

Permitting reporting on an ATH basis under a per-performance rate structure also means that reports of use cannot be reconciled with the statements of account to which they correspond.

Even a census report on an ATH basis allows only rough estimates of the number of total performances involved.

The Judges specifically asked what proportion of the total *songs* performed in the first quarter of 2008 were reported on a per-performance versus ATH basis. As in the case of reporting on a census versus sample basis, many recordings reported on an ATH basis by one licensee are also reported on a per-performance basis by another, and, as discussed above, it is difficult to provide a precise response.

However, the proportion is certainly very large, because the majority of the most usage-intensive webcasters report on a per-performance basis; the SDARS, cable/satellite subscription services and business establishment services now report play frequency only (not ATH or total performances); and many services do not report at all. As described above, SoundExchange analyzed the lines of data reported on reports of use for the first quarter of 2008, where each line roughly represents a unique recording used by a service.¹⁹ This analysis indicated that about 78% of the lines of data considered in the analysis reported use of a recording on a per-performance basis, and about 21% reported use on a play frequency basis (that is, by the various non-webcast subscription services). Just over 1% of lines reported ATH only and just under 1% reported both ATH and performances. Similarly, and consistent with these numbers, all the royalties for usage in the first quarter of 2008 that SoundExchange has distributed to date were reported on a per-performance or play frequency basis and not an ATH basis.

IV. Processing of Reports of Use and Distribution of Royalties by SoundExchange

The Judges also inquired about SoundExchange's distribution and allocation methodology.

¹⁹ As discussed above, the number of lines considered in this study is only an approximation of the number of times some recording is reported by a service. *See supra* n.16.

A. Description of Methodology

Because the music business is extremely complex, and both royalty payors and payees are large and diverse groups with many specialized issues, the process of distributing royalties is quite complex. It would not be practicable to describe every detail of the process in these Comments. However, at a high level and generally speaking, the essential steps in the process are as follows:

- Receipt of Payment. When SoundExchange receives payment from a payor, that payment is logged into SoundExchange's licensee database. If the licensee operates services in multiple rate categories, the royalty payments are allocated among the applicable rate categories based on the statements of account. Similarly, block payments by a parent corporation covering corporate subsidiaries (e.g. by a radio station group covering individual radio stations) are allocated among the subsidiaries if the parent provides the subsidiary information.
- Loading of Reports of Use. Reports of use are associated with a service's payments and statements of account for a particular period and loaded into SoundExchange's system.²⁰ If a report does not conform to the required format and delivery specifications, it may not load without substantial manual intervention. Instead, SoundExchange staff must review the reports, identify the kinds of corrections that need to be made, work with the service to obtain a corrected report from the service, and then attempt again to load the report into the system.²¹
- Matching. SoundExchange's systems seek to match the recordings reported in licensee reports with information in SoundExchange's database concerning known recordings and their copyright owners and performers. A reported recording might not match a known recording if, for example, the service has performed a recording by an unsigned band, or a very new, old, foreign or other obscure recording that has not previously been reported to SoundExchange, or if the service has provided incomplete or incorrect identifying information. To the

²⁰ Royalty Logic asks to receive copies of all reports by email at this point in the process. Comments of Royalty Logic, LLC, Docket No. RM 2008-7, Part II.C-E (Jan. 29, 2009). That would be impracticable and inappropriate. Large amounts of data are involved; services have historically considered that data confidential; and because Royalty Logic has never demonstrated that it represents more than a handful of copyright owners or performers, it has no valid interest in seeing the vast majority of the data it seeks, and is not situated differently than perhaps hundreds of artist managers and attorneys who might want similar access if it were given to Royalty Logic.

²¹ This type of review has proven to be among the most costly activities SoundExchange must undertake, and is directly attributable to the poor quality of data received from some licensees.

extent a reported recording does not sufficiently match a known recording, SoundExchange personnel will research the recording in an effort to determine whether it should be added to SoundExchange's database or whether it is in the database under different identifying information.²²

- Account Assignment. SoundExchange then assigns reported sound recording performances to accounts belonging to copyright owners and performers. Performances for which a copyright owner or artist account is not identifiable (e.g., because the recording reported has not yet been matched to a recording known to SoundExchange) are assigned to a "suspense" account for later review and research.²³ (Performances assigned to suspense accounts are processed through the steps that follow as soon as identification is made, with the associated royalties being released in the next scheduled distribution.)
- Royalty Allocation. Once account assignment has occurred, a service's royalty payments for a given distribution period are allocated to sound recordings used by that service during that period and to SoundExchange's costs deductible under Section 114(g)(3) (sometimes referred to as SoundExchange's "administrative fee"). Minimum fees are prorated to the period for which they apply. If the service has reported on a per-performance basis, each sound recording's allocation is determined by dividing the number of performances of the recording for the period by the total number of reported performances. If the service has reported on the basis of ATH, the allocation is a bit more complex. A weighing factor for each sound recording is determined by multiplying play frequency by ATH on a channel-by-channel basis and summing the results. Allocable royalties are then assigned to recordings in proportion to their weighing factors.
- Adjustment. Once allocations are completed, it is sometimes necessary to adjust particular accounts to rectify reporting and other errors that occurred in prior distributions. Adjustments are also made from suspense accounts to copyright

²² Some commenters repeat the old canard that if only SoundExchange would make its database of recordings available to licensees all reporting problems would cease. *E.g.*, Comments of the National Association of Broadcasters, Docket No. RM 2008-7, at 10 (Jan. 29, 2009); Comments of Harvard Radio Broadcasting Co., Docket No. RM 2008-7, at 24-26 (Jan. 29, 2009). These commenters forget that SoundExchange's database depends on *input* from the services – particularly to identify the constant stream of new repertoire being used by services. Thus, the reports of use are the foundation of SoundExchange's database, and providing access to the database would not avoid the need for services to report to SoundExchange repertoire not previously known to SoundExchange. In any event, these commenters are essentially asking for the opportunity to perform the matching function already performed by SoundExchange. Yet if services cannot simply report accurately the information contained on the recordings they have in hand – a relatively minor burden given the extraordinary grant of rights in the statutory license – there is absolutely no reason to think that they would go through the additional process of accurately matching the recordings they have to a SoundExchange database.

²³ Again, this is often the result of poor-quality data received from licensees – another illustration of how poor quality data impedes the allocation and distribution of royalties in a timely fashion.

owner and artist accounts based on registrations received during the period between distributions.

- Distribution. This quarterly process begins with consolidating allocations across licensees' performance logs within a license category according to earning entity (typically the copyright owner or artist who "earned" the money for tax purposes), which are then assigned to copyright owners, artists, or certain other payees (such as a producer who an artist directs SoundExchange to pay) based on the payment instructions for each. SoundExchange generally provides each royalty-earning entity with an electronic or hard copy statement reflecting the performances – and the licenses under which the sound recordings were performed – for which the royalty payment is made. When there is a payable balance in a payee's account, a check is mailed or funds electronically transferred.

The foregoing shows that whether reports are provided on a census or sample basis does not fundamentally affect SoundExchange's methodologies. In the case of year-round census reporting, the matching, assignment and allocation processes simply involve data about more recordings and uses than in the case of sample reporting, leading to an allocation that more accurately reflects actual usage. Census reporting can sometimes expedite the account assignment process, because more of a new artist's or copyright owner's repertoire is likely reported sooner, therefore allowing SoundExchange staff to complete an account during a single account assignment, rather than going back to that account each time a sample picks up a newly-performed recording in that repertoire. Likewise, whether usage is provided on an ATH or per-performance basis does not affect the fundamental process – at the allocation stage, either the reported performances or reported ATH and play frequency can be used to allocate payments to performances.

The Judges asked specifically about the proportion of revenues received for songs performed in the first quarter of 2008 that have been distributed to date. As of SoundExchange's last quarterly distribution in March 2009, over 69% of such revenues had been allocated, and approximately 48% of such revenues had been distributed or applied to SoundExchange's costs.

SoundExchange works hard to pay through as high a percentage of its receipts as possible, as fast as possible, and wishes these percentages were higher. To some extent, this is just a function of ordinary lag in the painstaking processes of working with services to identify recordings used, confirming new repertoire and registering new copyright owners and performers. These numbers continue to creep upward. By way of comparison, for calendar year 2007, over 75% of revenues have been allocated, and approximately 58% of revenues have been distributed or applied to costs. For calendar year 2006, almost 84% of revenues have been allocated, and about 68% of revenues have been distributed or applied to costs.

Of particular relevance to this proceeding, a major reason these numbers are not higher is that SoundExchange's ability to allocate and distribute royalties depends to a large degree upon the cooperation of licensees in complying with their payment and reporting obligations on a timely basis, and among services there is widespread noncompliance with the Judges' regulations. Unfortunately, many services have not historically and still do not regularly provide reports of use or have submitted defective reports of use. Without reporting, SoundExchange cannot make timely allocations or distributions, 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). In addition to missing or defective reports of use, many services fail to provide the required statement of account or other necessary documentation with their payments, or are paying at an improper rate. As a result of this lack of cooperation – including in particular the chronic lack of reports of use that comply with the regulations (or the lack of reports of use altogether) – it is unfortunately not infrequently the case that a service's royalties cannot be distributed more than a year (or even longer) after they have been paid to SoundExchange.

SoundExchange is hopeful that the situation will improve in the near term. The recent Webcaster Settlement Act agreements have provided certainty about rates for a large proportion of payees and established reporting standards that were the subject of arms-length negotiation and should improve compliance by services that have elected to be subject to these agreements.²⁴

There are several reasons that royalties may be allocated but not distributed. Royalties may be allocated to new or otherwise unmatched repertoire but, until that repertoire is assigned to the correct payees, the associated royalties cannot be distributed. In this respect, SoundExchange's efforts are hampered to a large degree by poor reporting by services. If a service reports a sound recording erroneously, the sound recording may not match to SoundExchange's records, and if the service fails to report a required field (such as the marketing label or ISRC), SoundExchange may need to manually research that information to assign the track to the correct payees.

Even if a sound recording is reported accurately by a service, SoundExchange's ability to distribute royalties depends upon the cooperation of copyright owners and performers in providing necessary payment and tax information. SoundExchange cannot distribute royalties that have been allocated to a sound recording for which the artist or the rights owner or both have failed to register with SoundExchange. Inexplicably, even when SoundExchange contacts artists about unpayable royalties, some of them fail to submit the proper registration information to enable payment. This is a particular problem for recordings of foreign origin, and

²⁴ An additional reason why royalties might not be allocated is that out of caution, SoundExchange will often reserve a certain percentage of royalties pending resolution of appeals of the Judges' decisions, including, for example, the rates for webcasting and ephemeral recordings. This is necessary because if rates were reduced and SoundExchange had to refund payments to services under Section 803(d)(2)(C), that money would have to come from somewhere, and it would not be practicable to claw back thousands of small payments.

SoundExchange has thus far been able to mitigate that problem only in part by reciprocal arrangements with foreign collecting societies.

In addition, many artists change address frequently, and it is not uncommon that an artist SoundExchange has previously paid will move but fail to inform SoundExchange of his or her new address. SoundExchange is then unable to distribute royalties to that artist until he or she can be located. If artist group members cannot agree to the splits among them for their repertoire or if there are multiple claims against the same repertoire (as with two foreign collecting societies claiming the same sound recording), those payments will be placed on hold, pending resolution of the dispute. SoundExchange also generally waits to make a payment until the payment to be made to a payee reaches a minimum threshold level. Every payee with a balance greater than \$10 receives at least an annual distribution. Payees with balances less than \$100 receive more frequent distributions only if they have opted to be paid by electronic funds transfer rather than by check.

B. Performance Metrics

The Judges also asked about the metrics SoundExchange uses to measure its effectiveness. In general, and as described above, SoundExchange strives to achieve a high percentage of total royalties allocated and distributed, while understanding that inaccurate and incomplete data from licensees to some extent impedes allocation and distribution.

SoundExchange considers a number of metrics, including the following:

- The pay through rate (*i.e.*, the percentage of allocated royalties that are distributed to specific payees), and changes in the pay through rate, for both artists and rights owners
- The number of new artists and rights owners registered with SoundExchange

- The number of performances processed
- The number of unique tracks processed
- The nature of unpayable royalties (e.g., foreign, artists who fail to register)

In addition, SoundExchange has also recently begun measuring compliance by services, including by tracking the following:

- The number of services that miss monthly payments
- The number of problems with payments and statements of account that prevent appropriate allocation, and the time spent to remedy these issues
- The number of services that fail to provide reports of use for particular periods

SoundExchange hopes that the Webcaster Settlement Act agreements as well as recent enforcement efforts will result in increased service compliance.

C. The Need for the Regulatory Provisions Requested by SoundExchange to Promote Compliance by Services

The persistent problems of late reporting, non-reporting and poor quality reporting by services, and their concomitant effects on SoundExchange's ability to allocate and distribute royalties, underscore the need for some of the regulatory provisions proposed by SoundExchange in its initial comments. In particular, the regulations should provide a clear due date for reports of use – which SoundExchange believes should be the same as the deadline for providing monthly statements of account²⁵ – and should provide late fees for late reports.²⁶ Currently, the absence of a clear deadline for delivering reports of use, and the lack of remedies for noncompliance (other than a costly and time-consuming lawsuit for copyright infringement)

²⁵ See Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 22-23 (Jan. 29, 2009).

²⁶ See *id.*, at 30-32.

have contributed to a climate of noncompliance. Adopting these measures would likely improve compliance by services materially.

D. Distribution of Old Unallocable Payments

As SoundExchange has been working hard to reduce the unallocable royalties it holds, and completed a process of trying to bring licensees into retroactive compliance through Webcaster Settlement Act agreements, it has become increasingly clear that there are some royalties that were paid to SoundExchange in the past for which it is never going to be able to obtain sufficient reports of use from the licensees.

Accordingly, for all royalties received as of the date that the reporting regulations are issued, SoundExchange hereby requests that the Judges include in the regulations adopted in this proceeding authority for 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.

Notably, SoundExchange is seeking this authority on a retrospective basis only. SoundExchange hopes that with a clear deadline for the submission of reports – and especially with the added incentive of late fees (a remedy short of infringement) that SoundExchange seeks – services will be more forthcoming with reports and compliant in the future. As a result, we are not seeking prospective proxy authority at this time.

V. Answers to the Judges' Technical Questions

The Judges asked some additional, specific technical questions, which we answer in the remainder of these Comments.

A. Template Reports of Use in an Open Source Spreadsheet Format

The Judges asked a number of questions about open source spreadsheets, apparently because of the comment from Harvard Radio Broadcasting Company suggesting that the OpenOffice.org spreadsheet also should be supported.²⁷

Licensees are welcome to use any spreadsheet software they like to generate a compliant report of use in the required ASCII text format. *See* 37 C.F.R. § 370.2(g). And many licensees do not use any spreadsheet software at all, because their reports of use are generated automatically by specialized software. Templates provided by SoundExchange are simply an aide for services that choose to use them.

Because Microsoft Excel dominates the spreadsheet market and is, for all intents and purposes, an industry standard, SoundExchange believes that, going forward, it would be a waste of SoundExchange's resources – and thus copyright owners' and performers' resources – to continue to provide and support templates in a format other than Excel. SoundExchange's management team is not aware of genuine licensee demand for a template report of use in anything other than Excel format.

Although it is not conceptually difficult to prepare an additional report of use template, doing so would require SoundExchange to acquire the necessary software, and new versions of that software going forward, learn how to use it, construct a template with appropriate format limitations, maintain multiple templates online, ensure that licensees using such alternative software have the correct version of the template, and provide technical support to licensees unfamiliar with the alternative software who are trying to use the template. This would require a commitment of staff resources that cannot be quantified in specific dollar amounts because it

²⁷ Comments of Harvard Radio Broadcasting Company, Docket No. RM 2008-7, at 22-23 (Jan. 29, 2009).

would depend on the spreadsheet used and the degree to which it is used, and would potentially be spread over a long period of time. But whatever the commitment that would be required, it cannot be justified on the basis of a passing reference to someone's favorite program and absent a concrete showing of significant licensee demand.

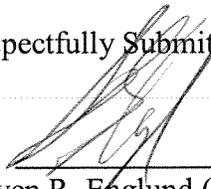
B. Automated Generation of Playlists and Reports of Use

In its opening Comments, SoundExchange provided the information it had about services and technologies available for compliance with reporting obligations.²⁸ SoundExchange has no further information about such solutions or their use by licensees to provide at this time, but reserves the right to comment further based on information provided by licensees.

²⁸ Comments of SoundExchange, Inc., Docket No. RM 2008-7, at 9-12 (Jan. 29, 2009).

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