

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

In the Matter of)	
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)	
Notice and Recordkeeping for Use of)	Docket No. 14-CRB-0005 (RM)
Sound Recordings Under Statutory)	
License)	
)	

COMMENTS OF MUSIC REPORTS, INC.

Music Reports respectfully submits the following comments to the Copyright Royalty Board (“CRB”) in response to the Notice of Proposed Rulemaking published in the Federal Register, Volume 79 Number 85 (Friday, May 2, 2014) (the “NPRM”) regarding Notice and Recordkeeping for Use of Sound Recordings Under Statutory License (Docket No. 14-CRB-0005 (RM)).

Music Reports limits its comments to the issues raised by the petition of SoundExchange, as identified in the NPRM, whereby SoundExchange requested substantial modifications to the notice and recordkeeping provisions codified at 37 CFR Part 370 in connection with the Section 112 and 114 statutory licenses (the “Statutory Licenses”).

I. Background on Music Reports and Its Interest in The NPRM

As the Copyright Royalty Board (“CRB”) is aware, Music Reports is an independent music rights administration company and technology platform. The company, which is majority owned by the private equity firm ABRY Partners, is based in Woodland Hills, California, and employs approximately 100 employees.

From its inception in 1995, Music Reports has taken a technology-centric approach to music rights administration, leading it to develop innovative systems and applications which facilitate accuracy, transparency, and accountability in all aspects of music licensing and royalty reporting. Historically, the company’s clients have primarily been music users, such as television, cable, radio and satellite radio broadcasters, digital music and video services, wireless carriers, and consumer products companies. However, the company’s position as a leading technology platform for the administration of music licenses across all right types on a worldwide basis has led music rights owners, in addition to users, to engage Music Reports to support their administrative needs. As such, the company’s clients now include record labels, music publishers, and digital music aggregators.

Music Reports provides administrative services to digital music services as well as radio and satellite radio broadcasters (collectively, “Services”) in connection with the Section 112 and 114 statutory licenses. The Services may engage Music Reports on their behalf to: (i) ingest, normalize, and store Service playlist data; (ii) format and prepare Statements of Account (“SOAs”) and Reports of Use (“ROUs”) under the Statutory Licenses; (iii) format and prepare SOAs and ROUs under voluntary licenses, in the event that the Service chooses to enter into voluntary licenses in lieu of reliance on the Statutory Licenses; (deliver ROUs and SOAs to SoundExchange (in connection with the Statutory Licenses) and/or directly to record labels (in connection with voluntary licenses); (iv) calculate and pay royalties to SoundExchange (in connection with the Statutory Licenses) and/or directly to record labels (in connection with voluntary licenses); identify and exclude non-payable recordings from ROUs under Statutory Licenses and/or voluntary licenses.

Music Reports submits that administration of the Statutory Licenses is intertwined with, and inseparable from, administration of voluntary licenses. This is because royalty payment for a particular performance when made directly to the copyright owner necessarily requires an exclusion from royalty payment to SoundExchange. Services and record labels are increasingly choosing to enter into voluntary licenses in lieu of reliance by the Service solely on the Statutory Licenses. As such, Music Reports submits that consideration must be given to the impact of the notice and recordkeeping provisions of the Statutory Licenses on administration of voluntary licenses, so as to foster efficiency, transparency, accountability, timeliness, and accuracy of royalty payment under both kinds of licenses.

II. Music Reports’ General Comment Regarding an Important Issue Not Raised Directly by the NPRM: the Need for a Systemic Adjustment Process

Many of SoundExchange’s proposals indirectly highlight the need for a fully automated ROU/SOA adjustment process between licensees and SoundExchange¹. Systemic processes to correct errors in ROUs/SOAs and adjust fees accordingly are necessary to ensure proper payment to royalty recipients and eliminate errors in future ROUs and SOAs. Such processes are critical where record labels and Services engage in voluntary licensing and/or where Service playlists may otherwise include non-payable performances.² Indeed, given the fact that copyright ownership information and the data related to it is not static, adjustment is an absolute necessity. For example, a particular recording (or catalog of recordings) which falls under a voluntary license may later be licensable under the Statutory Licenses (or vice versa), if the record label which entered into the voluntary license transfers the recording (or catalog of recordings) to

¹ Music Reports’ comments herein when directed to SoundExchange should be construed by the CRB to apply equally to any subsequent entity or entities which may be designated by the CRB to perform the role of the Collective.

² An adjustment process would also be desirable where a Service is not engaging in voluntary licensing and/or exclusion of non-payable performances of recordings from ROUs, to address those situations where the Service concerned needs to re-submit ROUs and SOAs to take into account information which was not available (or which was incorrectly ascertained by the Service) at the time of original submission.

another label or distributor through a sale or transfer of administrative rights, as is very common in the recorded music industry. Control of administrative rights may even be subject to dispute between record labels and/or distributors. Other issues highlighted by SoundExchange, such as those described in its description of the need for unambiguous identification of recordings, could also be addressed as part of an adjustment process.

Similar systemic processes for adjustment have been in place for many years in the television industry and the background music industry as a normal part of reporting performances of musical compositions, where voluntary licensing by these industries is now an established and mature practice.³ In Music Reports' experience, a cooperative adjustment process between an agent-administrator for copyright owners and performers (like SoundExchange) and an agent-administrator for Services like Music Reports, is more likely to result in efficient and accurate administration of a blanket license, because the resources of both agents are brought to bear on the administrative process.⁴

The development of an automated and transparent adjustment process is highly technical and is best conceived of, and implemented by, experienced data processing professionals. Music Reports would welcome the opportunity of meeting with SoundExchange to conceive of adjustment protocols which could then be submitted to the CRB for consideration.

III. Music Reports' Specific Comments in Response to Issues Raised by SoundExchange's Petition in the NPRM.⁵

A. Consolidation, Matching and Identification of SOAs") and ROUs

³ For example, Music Reports, on behalf of many television broadcasters, worked with ASCAP, BMI, and SESAC (the "PROs"), to develop and implement fully-automated systems for reporting use activity and reconciliation of royalty payments among the PROs and musical work copyright owners who have chosen to license rights directly to music services. The reporting/reconciliation systems identify all performances (including non-payable performances) and enable prompt and automated reconciliation of payment issues with full transparency. The systems and protocols provide that when a PRO disagrees with the information in a submitted report, the PRO will provide the same electronic report back to Music Reports with an additional field containing a code identifying any issues the PRO has with the report. The PRO is required to supply documentation supporting its claim in the reconciliation process.

⁴ Like SoundExchange, Music Reports aggregates sound recording copyright ownership information in a database and dedicates substantial manual and systemic resources to identifying, locating, and paying royalties to sound recording copyright owners and performers.

⁵ Where Music Reports offers no comments in response to issues from the SoundExchange petition which were raised by the Judges in the NPRM, the Judges may assume that Music Reports either has nothing to add at this time to the SoundExchange proposal concerned, or that Music Reports favors it.

SoundExchange proposes that services be required to provide an account number/identification number assigned by SoundExchange on both the SOA and ROU in order to properly match payments.

Music Reports proposes in addition that where a licensee utilizes the services of a common agent⁶ to administer reporting requirements under the statutory licenses, SOAs and ROUs should also identify the common agent so that the Collective (along with any copyright owners or performers entitled to receive access to the SOAs and ROUs) can identify and directly communicate with the party preparing reports in order to quickly resolve any issues with the SOAs and ROUs.

B. Direct Delivery of Notices of Use

As SoundExchange notes, rightsholders do not have easy access to NOUs filed with the Licensing Division of the Copyright Office. The Collective and rightsholders themselves (both copyright owners and performers) need to know the identity of services that are operating under a statutory license for some or all of the services' offerings. The NOU contains information enabling a rightsholder to determine the type of service (e.g., Webcasting, BES, etc.) and whether payment can be expected from SoundExchange. Rightsholders may also use the NOU to determine whether the service may be offering functionalities which are not covered by the statutory license (so that such functionalities might require voluntary licenses directly from the copyright owner).

Therefore, if SoundExchange is given the right to receive NOUs directly from statutory licensees, SoundExchange, which has been designated by the CRB as the sole Collective on behalf of all statutory royalty recipients, should be required to post such NOUs promptly after receipt to a publically available website for inspection and download by copyright owners and performers and/or their common agents. SoundExchange, having been granted an effective monopoly on statutory license transaction processing for all rightsholders, must be held to the highest standard of transparency and cooperation with rightsholders and their representatives.

C. Facilitating Unambiguous Identification of Sound Recordings

Music Reports is well aware of the sound recording performance identification issues raised by SoundExchange. Indeed, such issues are regularly faced by all rights administrators who process music usage information in high volume.

⁶ The use of common agents by both licensees and royalty recipients is explicitly established in sections 112(e)(2) and 114(e)(1-2), for the purpose of paying, receiving and remitting royalty payments. These functions constitute the administrative backbone of the statutory licenses, as well as the related voluntary licenses which are authorized under section 114(f)(3). Furthermore, as the CRB has recognized in the Web III proceeding, section 114(g)(3) gives copyright owners the right to use the services of a designated common agent for receipt of statutory royalties in order to avoid cost deductions by the Collective.

The reasons for these problems are many and varied, and resolution of these problems is often not controlled by licensees. For example, different recorded performances of the same song by the same artist can be owned by different record label copyright owners. There is also confusion between labels and their distributors over the specific right types which are assigned to the distributor under the distribution agreement. Moreover, many copyright owners make recordings available to services with minimal metadata attached to the digital file (often only “title” and “artist” fields). More artists are choosing to remain independent of record labels, and a vast amount of new recorded music is being created and made available in a “singles” format with no ISRC code and minimal accompanying metadata. Data standards, codes and registrations may be perceived by independent creators to be unnecessary costs which hinder dissemination and promotion of their recordings.

For the reasons stated above, the data SoundExchange requests, such as ISRC, is often not available to services at the time programming decisions are made by them.⁷ Therefore, reporting standards must be flexible enough to allow for reporting with data which is “reasonably” available to the licensee. Such standards must also accommodate the absence of data which is simply not applicable. Examples include recordings which are created: (i) as a work for hire with no featured artist; (ii) independently without a record label; and (iii) as a “single” with no album.

D. Reporting of Non-Payable Tracks

If the Judges adopt SoundExchange’s proposal that ROUs be delivered with an additional field flagging non-compensable performances, then there is an additional requirement which should be imposed on SoundExchange: if it disputes the non-compensable identification by the licensee for any reason, then it should be required to return to the licensee an electronic file in the same format, with a code identifying the performances which it disputes and the reasons for the dispute. If the original file was prepared by a common agent of the licensee, then the response file should be returned by SoundExchange to the agent, since as between the licensee and the agent, the agent is in the best position to resolve the dispute.

E. Late fees

The proposed regulations should define, with greater specificity, what constitutes an “unusable” ROU for which a late fee can be assessed. As suggested above, SoundExchange should be required to perform an initial file integrity check upon receipt of an ROU and notify a licensee within a specific timeframe of any data formatting errors which would inhibit processing. Late fees should only apply thereafter if errors in ROUs which render the ROUs

⁷ Because such information may become available over time, after initial programming, there is a need, as discussed above, for an adjustment process to accommodate submission of such information which later becomes available.

“unusable” originate from licensees and are not corrected by the licensee within a specified timeframe.)⁸

F. Proxy Distributions

Proxy distributions tend to favor larger, identified rightsowners and performers at the expense of the smaller, unidentified rightsowners. Blanket authority to distribute royalties based on proxies would create a perverse incentive to divert resources away from resource-intensive processes which are necessary to identify payable parties. If SoundExchange is going to resort to proxies for distribution, then objective standards should apply to define when such a distribution is appropriate, and those standards must be disclosed fully.

If SoundExchange intends to use a proxy to distribute royalties from a Service, then it should be required to provide notice to the Service beforehand and afford the Service a reasonable opportunity to rectify any reporting issues which has give rise to the need for the proxy. SoundExchange should also be required to post notice of the proposed proxy distribution to a publicly available website, well in advance of the distribution.

Lastly, SoundExchange should not be allowed to alter the regulatory proxy distribution rules through its “membership” agreements with copyright owners and performers. As the Judges may be aware, SoundExchange proactively “affiliates” owners and performers with membership agreements which alter and in some respects expand the discretion which SoundExchange has over distributions, as well as the deductions which it may take from those distributions. Without careful oversight, an uneven playing field could be created whereby certain (more favorable) rules apply to SoundExchange “members” and other (less favorable) rules apply to non-members.

G. Accelerated Delivery of ROUs

Most reporting in the music industry occurs on a quarterly cycle with payment and statements due 45 days after the end of each calendar quarter. The Statutory Licenses already require accelerated monthly payment and accounting. However, 45 days after the end of the accounting cycle is absolutely necessary to enable a service to compile the information necessary to calculate fees and report properly. Given the added data requested by SoundExchange in its petition and underlying data issues which SoundExchange itself raises, a 45 day period remains absolutely necessary. If one of the purposes of the proposed rulemaking is to provide more complete information to SoundExchange, shortening the time to prepare and deliver ROUs is counter-productive.

H. Inspection of ROUs

⁸ This was the approach successfully taken by the PROs and Music Reports in automating adjustment processes for the television industry.

Music Reports agrees with SoundExchange that the right to inspect ROUs, which is already accorded to copyright owners and their designated agents,⁹ should be extended to featured artists as well. Music Reports further agrees that SoundExchange should not be required to track down and deliver ROUs to recipients who are not asking for them. However, SoundExchange, as the sole Collective, should be obligated to promptly provide copies of ROUs (or online access thereto) directly to the copyright owners or featured artists (or their designated common agents) that do ask for them.

The ability to review ROUs is critical to many royalty recipients who may seek to independently determine if recordings have been properly identified or if a licensee has complied with requirements of the Statutory Licenses. Meaningful inspection may reduce or even eliminate a copyright owner's need to audit a service or the Collective. However, the approach which SoundExchange proposes in its petition is inadequate and merely serves to guarantee that no copyright owner or performer will ever take advantage of the right to inspect.

ROUs are voluminous data files that can be easily transferred but cannot simply be "inspected" at the office of SoundExchange during normal business hours. ROUs must be processed in sophisticated data management systems, outside of SoundExchange, using defined software queries, in order to make any "inspection" meaningful and cost-effective. A copyright owner—who is in the best position to identify unclaimed or unidentified performances in ROUs—needs to process the full ROU containing all performances made by a licensee (not just the performances attributed by SoundExchange to the copyright owner). Visual inspection, or any other non-computerized approach, is useless given the vast amount of data to be inspected in an ROU. To the extent that owners and performers designate common agents to represent them for purposes of inspection, then the same right of meaningful review should be extended to such agents. Indeed, the ability to process such data files and identify performances in them may be the best reason why an owner or performer would choose to affiliate with a common agent.

Access should be provided to ROUs in the same format and with the same data as supplied to SoundExchange. Such ROUs would be subject to the existing confidentiality obligations currently imposed on copyright owners and their designated agents as described in 37 CFR 370.5 (e).

The above requirements would not be burdensome for SoundExchange. For example, ROUs received by SoundExchange could be posted to an FTP site for download and review by common agents and could be made subject to the same confidentiality obligations as those which apply to SoundExchange.¹⁰ Alternatively, the regulations could provide that licensees be required, on notice, to deliver SOAs and ROUs directly to a designated common agent of copyright owners at the same time as those SOAs and ROUs are provided to SoundExchange.

⁹ See Generally 37 CFR 370.5(c and d)

¹⁰ If the CRB has concerns about a multiplicity of such requests, the regulations could limit electronic access and download to common agents that have demonstrated the ability to process such information in high volume with a high degree of integrity, through regular, internal process auditing or some other measure.