BEFORE THE
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
WASHINGTON, D.C. 20559

In Re NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	Docket No. 14-CRB-0005 (RM)

COMMENTS OF NATIONAL PUBLIC RADIO, INC.

National Public Radio, Inc. ("NPR") files these comments on behalf of itself, its member stations, and all stations qualified by the Corporation for Public Broadcasting ("CPB")[1] to receive federal funding (collectively, "Public Radio").

As explained below, Public Radio enjoys the benefit of a settlement agreement which inherently recognizes that Public Radio is different than other licensees that avail themselves of the 114 statutory license. That Agreement relieves Public Radio of certain reporting and recordkeeping requirements, which are at issue in this rulemaking. However, in the absence of a voluntary agreement, Public Radio would be subject to those same requirements. While Public Radio has every reason to believe that it will be able to reach agreement again on rates and reporting and recordkeeping requirements with SoundExchange, these future agreements are not negotiated in a vacuum, as the regulatory scheme here contemplated will constitute the backdrop for the parties' negotiations.

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[1] CPB is a nonprofit organization established by Congress to facilitate the development of the public radio and television system. 47 U.S.C. § 396. CPB receives federal funds on an annual basis which it uses to benefit both public radio and public television. *See id.*

These comments urge the Judges to consider less burdensome regulations in order to facilitate future negotiations. Specifically, once reporting and recordkeeping regulations become too burdensome, they no longer serve as a neutral failsafe for parties to fall back on should the parties fail to reach an agreement. Indeed, the regulations can become a club, which SoundExchange may use to beat the party with reporting and recordkeeping obligations into submission. Reliance on the regulations – in the absence of an agreement – is not an option when the costs of complying with the more complex and detailed regulations dwarf the costs of ceding to unfavorable demands.

This reality is even more probable for a party that has operated under a voluntary agreement for an extended period of time. Such a party cannot just jump back onto the regulatory scheme, where the distance between the regulations and the party's current practices under the voluntary agreement has grown too great, adopting the entire scheme outright likely would be too expensive. (That expense would also be exacerbated by the costs associated with abandoning the system put in place in reliance on the past voluntary agreements.)

Consequently, the regulatory scheme can have a substantial effect on the success of future negotiations of a voluntary agreement. If reporting and recordkeeping regulations are properly restrained, they always will serve as a failsafe in the event the parties cannot reach agreement. A minimized set of regulations do not prevent the parties from negotiating more extensive reporting and recordkeeping terms than the regulations otherwise may require. On the other hand, if regulations are more complex, then they can prove to be burdensome and expensive. Ultimately the threat of more burdensome reporting and recordkeeping regulations can discourage parties from even pursuing future agreements.

Public Radio would like to continue its past and current practice of operating under a voluntary agreement. As explained further below, it has served both SoundExchange and Public Radio well. However, Public Radio's ability to continue under any voluntary agreement through future negotiations will depend on whether adapting to the reporting and recordkeeping regulations in the absence of an agreement remains tenable.[2] Therefore, Public Radio urges the Judges to keep the regulations as minimal and flexible as possible so they permit the parties to operate in the event the parties fail to reach an agreement but they do not prevent voluntarily negotiated agreements.

I. INTRODUCTION

NPR is a nonprofit membership corporation that produces and distributes noncommercial educational programming through more than 900 public radio stations nationwide that reach a combined audience of 27.2 million listeners weekly. In addition to broadcasting award winning NPR-produced programming, such as All Things Considered® and Morning Edition®, NPR member stations are themselves significant producers of local, regional, and national news and educational content, as well as music and other specialized audience programming.

Public Radio largely consists of public broadcasters operating FCC-licensed radio stations and nonprofit entities, such as NPR, which produce, acquire and distribute content to these stations. Public Radio has a mandate to serve listeners by providing educational,

[2] To this end, the Judges should clarify that parties performing reporting and recordkeeping requirements under a voluntary agreement should be entitled to continue to perform these requirements under the previously agreed upon terms until (1) the parties enter into a new agreement with different requirements, or (2) the Judges adopt different requirements for those parties in the context of a contested proceeding. Section 805 of Title 17, providing the general rule to voluntary agreements, read together with Section 803(d)(2), suggests this very result. *See* 17 U.S.C. §§ 803(d)(2), 805.

informational and cultural programming not generally available on commercial stations or that may not have mass market appeal. Public Radio's goal is to reach audiences that might not otherwise be served by commercial radio broadcasters. NPR and its member stations strive to fulfill this public mission by producing and distributing high-quality programming over all types of media that can reach the general public and their listening audiences. While Internet webcasting is an active distribution channel, terrestrial broadcasting remains the fundamental and primary means for audiences to consume the high-quality programming offered by Public Radio.

II. PUBLIC RADIO IS DIFFERENT FROM COMMERCIAL BROADCASTERS AND WEBCASTERS

The special nature of Public Radio, its public mission and the resource limitations of public broadcasters require the Judges to carefully consider the burden that the proposed regulations would have on Public Radio.

A. Public Radio Must Fulfill its Public Mission

As nonprofit entities motivated solely by their public mission, Public Radio must produce and distribute programming subject to financial restraints that are not applicable to commercial broadcasters and webcasters. Commercial broadcasters and webcasters can pay for the costs associated with the use of music, which includes reporting and recordkeeping requirements, through their ordinary financial resources - advertising and subscription revenues. Success in the marketplace determines the heights of these revenues, *i.e.*, attracting the largest possible audience directly and proportionally increases their advertising revenue and/or subscription revenue.

Public broadcasters have limited budgets intended for specific and necessary components to their mission, including program production and acquisition. These budgets are determined by the availability of financial resources from public and private sources. The complex nature of funding sources includes: federal, state, or local governments; colleges; voluntary sponsorship contributions; and individual listener donations. Moreover, public funding is determined by the political process that is largely out of the stations' control. Similarly, corporate sponsorship and donations can also be insecure sources for funding as they are driven by overall economic conditions. Increases in contributions and giving do not necessarily keep pace with upward economic trends. Yet, drops in contributions and giving are readily felt when belt-tightening sponsors and listeners simply do not honor their commitments or pledges. Consequently, successfully fulfilling Public Radio's mission usually does not result in the receipt of any economic rewards that public broadcasters then can draw on to pay for the additional costs of the use of music, which includes costs relating to reporting and recordkeeping requirements.

B. Public Radio's Use of Music Is "Curated"

Through thoughtful curation, NPR, its member stations, and other CPB-qualified stations enrich the nation's cultural life by introducing to their listeners new music genres and non-mainstream artists. Their efforts in this area have been successful, as now-mainstream musical genres—such Celtic, Folk, Bluegrass, and World—were introduced to new audiences by Public Radio. Equally important to Public Radio's mission is providing access to more traditional music genres, such as classical and jazz, that otherwise have very few commercial outlets. Indeed, classical music ranks highest among musical genres in Public Radio's programming, accounting for twenty-five percent (25%) of total broadcast hours on Public Radio stations.

Similarly, Public Radio's mission enables listeners to discover artists and their music that they otherwise would not hear on commercial stations. Not surprisingly, a large part of the music found on Public Radio consists of artists from independent record labels.[3] Again, Public Radio's focus on music curation results in audiences discovering these artists, which ultimately benefits these artists and the public. While this promotional value is an undeniable benefit to the artists, it is merely a byproduct of Public Radio fulfilling its mission to serve the greater good by enriching the nation's cultural life.

III. PUBLIC RADIO'S CURRENT REPORTING AND RECORDKEEPING REQUIREMENTS

Public Radio's present system for reporting and recordkeeping under the statutory license reflects the special nature of Public Radio.

A. The SoundExchange/CPB Agreement Created the Current Reporting System

The present system is the result of settlement agreements between SoundExchange and CPB ("CPB Agreement").[4] That Agreement covers the entire public radio system, and any CPB-qualified station is eligible to make use of the statutory license in accordance with the obligations established under the Agreement.[5]

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[3] *See e.g.*, NPR: Music Sales' Surprising New Secret Weapon, Hollywood Reporter (Jan. 12, 2011) available at http://www.hollywoodreporter.com/news/npr-music-sales-surprising-secret-70867. The article notes:

> But during the past decade, one media outlet has proved to be incredibly effective in connecting a band with its target audience, prompting an instant sales bump and, most important, spreading the word: National Public Radio. Arcade Fire, Florence + the Machine and Vampire Weekend are just some of the indie acts that owe much of their crossover success to the member-supported network ….

[4] On August 12, 2009, the Copyright Office published the current agreement in the Federal Register pursuant to the Webcaster Settlement Act of 2009. *See* Notice of Agreements, 74 Fed. Reg. 40614 (Aug. 12, 2009). The entirety of the CPB Agreement is found at Appendix C.

[5] The eligible entities that are able to avail themselves of the CPB Agreement include any member or affiliate of NPR, any CPB qualified station, American Public Media, Public Radio International, Public Radio Exchange, and the National Federation of Community Broadcasters.

In addition to making the royalty payment on behalf of all the Public Radio licensees, CPB is responsible for collecting and aggregating the reporting of the data from those stations participating under the Agreement. In order to fulfill the reporting obligations, a system had to be put in place, and CPB issued an initial $600,000 request for proposals to build the system negotiated with SoundExchange. NPR Digital Services ("NPR/DS")[6] built the system and maintains the system today, and most importantly, NPR/DS fulfills CPB's reporting commitment under the Agreement.

B. Building Out and Maintaining the System Takes Ongoing Resources and Efforts

The current system took substantial effort to build. Public Radio stations use a variety of play-listing tools and streaming services. NPR/DS had to work with each station to understand the systems that the stations had in place. Some stations subscribe to NPR/DS' playlist tool, *Composer*, and its streaming services. Other stations are using commercial or inhouse tools for playlist and streaming services. These tools or services vary on what information is collected and the format that the information is collected. From these stations NPR/DS had to collect samples to ensure that the reporting service that it was building would be able to process the information provided by the stations.

Even with the reporting system in place, NPR/DS has to dedicate resources to fulfill the reporting requirements. Presently there are about 402 stations operating under the CPB Agreement. The CPB Agreement obligates these stations to produce quarterly ATH Reports along with their playlist logs. NPR/DS has to work with the stations to collect and produce the requisite information. Stations have to upload their playlists and streaming logs. In addition to

[6] NPR/DS is a division of NPR that helps stations to reach their audiences on digital platforms.

the ATH Reports and logs, stations must respond to a semiannual survey, which includes the station, its ATH and the music genre(s) of the station. While the majority of the stations are diligent in timely producing the information, in any given quarter up to fifty percent (50%) of the stations for different reasons require NPR/DS to make a concerted effort to obtain the information from the stations.

C. The Current Reporting System Relieves SoundExchange of Substantial Administrative Costs

Public Radio's obligation to collect and aggregate the reporting information through CPB relieves SoundExchange of the administrative costs of dealing separately with each public broadcaster. Each reporting obligation – the quarterly ATH Reports and logs and the semiannual survey – requires all reporting to be consolidated and made in one delivery. Thus SoundExchange is not receiving 402 separate ATH reports every quarter, but one report, which means SoundExchange receives four deliveries a year, not 1600.

Aggregate reporting shifts the administrative compliance costs to Public Radio. For example, if NPR/DS did not collect and aggregate the reports for all the stations, then SoundExchange would have to interact with each station directly. However, SoundExchange does not ever have to interact with the stations as NPR/DS serves as an intermediary by collecting and aggregating information from the stations. For example, if in any given quarter ten percent (10%) of the stations struggle with timely fulfilling the reporting requirements, then SoundExchange has avoided having to resolve problems with approximately forty (40) different stations. SoundExchange does not have to spend any resources to respond to phone calls or emails from these stations or make any effort to prod stations to produce their data.

IV. PROXY DISTRIBUTION AND SAMPLING PERMITS PUBLIC BROADCASTERS TO EFFECTIVELY REPORT THEIR PLAYLOGS

SoundExchange should have the proposed authority to make proxy distributions. Proxy distribution allows SoundExchange to distribute royalties in the absence of perfect information from licensees. SoundExchange as the collection society is in the best position to determine how the royalties should be distributed. As far as disclosing the distribution method and challenging that method, the *sua sponte* proposals[7] of the Judges seem to be granular oversight of SoundExchange that on the current record seem to be an unwarranted intrusion into SoundExchange's internal affairs.

The CPB payments result in proxy distributions as the majority of Public Radio licensees are providing their play logs through sampling reporting. Stations are readily able to engage in sampling reporting as historically sampling has been the method to compensate the Performance Royalty Organizations (PROs) for the use of the musical work. PROs collect the royalty payment owed for the musical work for the same use of music that SoundExchange collects a royalty for the sound recording. Public Radio simply does not see a sufficient difference between the collection of the two different royalties (the musical work and the sound recording) for the same use of music to warrant public broadcasters having to spend the resources to engage in census reporting. It would be nothing short of devastating to require Public Radio to engage in census reporting.

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[7] NPRM at 25043 ("SoundExchange should have to disclose the methodology serving as the basis for a proxy distribution and afford copyright owners an opportunity to object to the proposed methodology.").

V. THE PROPOSED REGULATIONS WOULD PROVE BURDENSOME FOR INDIVIDUAL STATIONS

Below, Public Radio sets out its specific objections to the regulations proposed in this rulemaking.

A. Report of Use and Statement of Account

1. Consolidation and Matching

Because CPB makes a yearly payment on behalf of all Public Radio licensees, Public Radio does not submit statement of accounts ("SOA"). Requiring Public Radio to submit a statement of account and report of use ("ROU") on an individual licensee basis would be an administrative disaster. It would be a very large developmental task (i) to break out payments on behalf of individual licensees and (ii) to submit a SOA and ROU separately for each participating station.

a) Payments to Be Made at the Enterprise Level

The diversity in Public Radio does not lend itself well to one-to-one relationships. First, reporting at an enterprise level other than at the level of CPB would be difficult to manage due to the variety and often complex nature of the Public Radio licensee/station relationships that exist. For example Minnesota Public Radio has stations in several locations around the country such as WKCP in Florida, KPCC in Southern California and KUOR in Minnesota. Similar coordination efforts would have to be repeated throughout the Public Radio system as public broadcasters interpret for themselves whether they are (or are part of) an enterprise. These individual efforts would challenge the limited resources available to many stations, particularly in more rural areas of the country. However, there is no need for speculation because under the current CPB Agreement, CPB makes one payment for all Public Radio licensees and NPR/DS coordinates the reporting of all licensees in one submission for SoundExchange.

2. Report of Use Headers and Category Codes

The request concerning Report of Use headers and category codes provides another example how reporting all the information through NPR/DS serves SoundExchange. What SoundExchange seeks from all licensees now, NPR/DS has already accomplished on behalf of the approximate 402 reporting stations. Specifically NPR/DS had to educate all the stations in the format that their information should be delivered. Pushing stations to deliver information in uniform fashion permits NPR/DS to more easily aggregate the data from all the stations to produce one report.

Public Radio would, however, caution that changes to the order and formatting would require additional development time. Based on past experience, retraining the stations on any changes to the order and format may take as long as three or four quarters.

Similarly, Public Radio understands the concerns SoundExchange raises with the proposed file encoding requirement. NPR/DS regularly works with the stations to resolve the delivery of corrupted or oddly encoded files. So again, in the absence of the CPB Agreement, this would cause a substantial headache for SoundExchange if stations submitted their reports directly to SoundExchange.

B. Late Fees and Accelerated Delivery of ROUs

In the absence of a CPB Agreement, the imposition of late fees would create a huge financial risk for stations. As previously mentioned, NPR/DS makes a substantial effort to collect the information from stations. Furthermore, noncompliant reports would all but be guaranteed. If the stations were required to report directly to SoundExchange, late fees whether for late submissions or for noncompliant reports would prove to be an additional expense that stations could ill afford. Imposition of late fees would therefore prove far too punitive for stations.

Under the current CPB Agreement, NPR/DS has generally succeeded in making timely delivery of reports to SoundExchange. Late fees for non-compliant reports, however, could be a problem even for NPR/DS. Technical issues can arise, and generally they cannot be planned for. Consequently, Public Radio would object to late fees being imposed on noncompliant reports as technical issues do arise and their occurrence is generally beyond the licensee's control.

Accelerating the deadline would be very challenging for Public Radio. NPR/DS usually has an internal deadline of 30 days knowing that the 45 day deadline provides some leeway for straggler stations and/or technical difficulties. Shortening this deadline would be highly undesirable and may result in the filing of incorrect and/or incomplete reports.

C. Facilitating Unambiguous Identification of Recordings

At the outset, the proposed amendments recognize that requiring licensees to provide ISRCs is not workable. If it were an adequate solution, then there would be no need to also require licensees to submit six fields of data for classical music as this information would be superfluous once the licensee provided the ISRC. However, SoundExchange acknowledges that information may not be available to the licensee as it qualifies its proposal that the licensee is to add the code "(where available)." Ideally the ISRC should be encoded in the CD or mp3. (An ISRC should be found in the ID3 tag of an mp3). However, the ISRC frequently is missing from the medium, and apparently there is no database to readily look up the missing code. If there were such a database, then SoundExchange would be expected to argue that the code is available.

Even if there were a database, Public Radio would still object to the proposal. NPR/DS and the stations would have to re-rip their entire digital libraries. (Many music libraries of Public Radio stations and radio program hosts are not digital but analog. Classical and jazz programming especially rely on vinyl records.) The ISRC would have to be manually matched to the new copy of the recording. This would take countless hours and would be prohibitively expensive. Stations would likely be unable to comply with the requirement until scheduling and automation software permitted the ISRC. Historically, software providers have not captured this information in the scheduling and automation software that they develop for broadcasters.

The proposed additional fields for classical music are problematic. While changing the field formats of reports of use is technology feasible, it would take a substantial amount of time for NPR/DS to incorporate the changes into the current reporting system. Whether those stations that have other commercial or inhouse playlist could accommodate the additional fields in their reporting tools is less clear. Certainly any changes in the reporting format will take substantial effort to educate the stations to include this information in their reports.

More problematic may be the additional field requiring the station to identify the individual movement. Stations simply may not be able to identify the movement accurately. Identifying the correct track to play for the broadcast is not the same as identifying the movement with the precision that SoundExchange seeks. Identifying the movement is even a greater challenge on vinyl records, which is still prevalent in classical music programming. In its current form, this proposal is unworkable and will not result in SoundExchange achieving its stated goal of more accurate distributions.

VI. CONCLUSION

Public Radio urges that the regulations remain as flexible as possible. It cautions that the more detailed and complex reporting requirements are, the more onerous they are likely to be. Such a development could actually discourage the parties from entering into voluntary agreements for fear that they may be irrevocably committed to a practice that deviates too far from the regulatory scheme. Thus, the party as a hostage to its past decision cannot afford to make the changes necessary to comply with the regulatory scheme and no longer has the benefit of the regulation in the event that the parties fail to reach an agreement on rates and terms.

Public Radio has in fact entered into a series of voluntary agreements with SoundExchange. In reliance on these agreements, Public Radio has made substantial investment in building out the current reporting system. That investment has grown significantly due to the ongoing costs to maintain the reporting system. At the same time these costs have a proportional and inverse benefit to SoundExchange. Therefore both parties would benefit under a voluntary agreement consistent with those terms that have been freely negotiated in years past. The viability of any future negotiations will depend on Public Radio's belief that it is an equal partner with SoundExchange. Accordingly, the regulatory scheme contemplated by the Judges should not be stacked against Public Radio.

Date: June 30, 2014

Respectfully submitted,

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