

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

_____)
In the Matter of)

)
Notice and Recordkeeping for Use of)
Sound Recordings Under Statutory)
License)
_____)

Docket No. 14-CRB-0005 (RM)

COMMENTS OF SIRIUS XM RADIO INC.

I. SIRIUS XM AND ITS INTEREST IN THE PROPOSED RULEMAKING

Sirius XM Radio Inc. (“Sirius XM”) currently offers four different services subject to the various statutory licenses provided at 17 U.S.C. §§ 112 and 114: a satellite digital audio radio service; an Internet webcasting service; a business establishment service; and a service providing music channels to television subscribers via the DISH Network satellite television service. In that capacity, Sirius XM provides Reports of Use to SoundExchange pursuant to 37 C.F.R. § 370.4 and thus has extensive experience with the implementation of (and challenges created by) the current reporting regulations. We do not respond here to every proposed change, but only those where we have a particular interest or concern. (Our silence as to other proposals does not mean that we necessarily endorse the proposed change.)

Before we address specific proposals identified in the Notice of Rulemaking, we note one common thread that runs through our comments: the need for a regular and systematic error-correction and fee-adjustment process between SoundExchange and licensees. Such a process would permit errors in Reports of Use to be promptly identified and rectified and ensure that payments are calculated correctly, copyright owners paid correctly, and errors eliminated in future reports. This sort of adjustment or reconciliation process – which for years has been a regular feature of reporting under the ASCAP and BMI per-program licenses, and is handled largely in an automated, computerized fashion – will become especially important in light of recent innovations by the Judges that may become increasingly prevalent: namely, the ability of licensees to reduce payments on account of directly licensed material and pre-1972 recordings. Such deductions create the need properly to identify the recordings that fall into each category so that the deduction percentages can be calculated accurately and corrected promptly as necessary.

SoundExchange’s proposal contains no such adjustment process, and Sirius XM has had great difficulty in its attempts to establish one voluntarily with SoundExchange since it began reporting such deductions at the beginning of 2013. SoundExchange’s proposal instead simply allows it to levy penalties on services that file reports that are not “fully compliant” (a term that is nowhere defined), without any opportunity for adjustment or correction. This is a tool for

potential abuse, and one that, by not providing any specific feedback to the licensee, will not solve any of the data errors within that service's Reports of Use.

We discuss such a process in more detail in section 5 below. Should the Judges be amenable to a reconciliation process, Sirius XM would be pleased to submit a more formal proposal for notice and comment, or to work with SoundExchange to develop a mutually workable solution.

1. ISRC Reporting

SoundExchange proposes that 370.4(d)(2)(v) be amended to require both the ISRC (where available) as well as the album title and label name. (The current regulation requires either the ISRC or the album title and label.) Sirius XM accepts this proposal as long as it is explicitly limited, as SoundExchange appears to propose, to instances where the ISRC code and album title/label name are actually available to the licensee. ISRC codes commonly are not available even for published sound recordings. For example, a main source for our sound recording library in recent years is promotional copies provided to Sirius XM by record label promotional departments, which often are delivered without accompanying ISRC information (especially when the delivery is an mp3 or other form of digital download of a single song). ISRC information is definitely not available for certain other types of recordings that Sirius XM plays regularly, for example, live recordings made at Sirius XM's studios, self-produced recordings by independent artists, and the like.

Live recordings, singles, and self-produced recordings may likewise lack an album title and/or a label name, and the regulations should not require such information (and subject the licensee to potential penalties for non-compliance) where it does not exist. To the extent published recordings do have an ISRC assigned, and that information is in SoundExchange's possession, Sirius XM would support a regulation requiring SoundExchange (or its members) to make that information available to licensees in a format allowing licensees easily to ingest it into their internal databases of sound recording information.

2. Classical Music Reporting

SoundExchange proposes that 370.4(d)(2)(v) be amended to require six new data elements for classical music: ensemble name, conductor, and soloist (rather than featured artist); and composer, title of overall work, and title of movement (rather than sound recording title). We appreciate the difficulties that can arise with respect to classical recordings, and agree that providing information necessary properly to identify a particular work is appropriate.

Sirius XM does have two concerns with this suggestion. First, each of those six fields may not exist with respect to every classical piece, and the regulations should make clear that the information is required only where available to the licensee. Services should not be in the position of being accused of failing to submit compliant reports where such information is not available.

Second, adding six new fields of data will create a tremendous amount of work and expense. In Sirius XM's case, we currently have approximately 11,000 classical titles in our

existing music library. We would need to manually enter 66,000 data fields (and amend the data from current “featured artist” and “title” fields, which, for reasons pointed out in the Notice, have not squarely aligned with classical music naming conventions). If the Judges impose the new data requirements, there should be a suitable sunrise provision providing services with at least 12-18 months to update their databases. In addition, given the burden and expense involved, and the level of precision requested, SoundExchange and/or its members should be required to make their own metadata associated with their classical recordings freely available to licensees, which will have the added benefit of more accurate Reports of Use and payments by SoundExchange to the proper copyright owners.

Finally, it is not clear from the Notice whether the new information is intended to be placed in the existing “featured artist” and “title” fields, or comprise new fields in the Reports of Use. To avoid confusion and restrictions on data field length, the regulations should make clear these are new, separate fields for classical reporting.

3. Reporting of Non-Payable Tracks.

SoundExchange proposes that statutory licensees provide data in its Reports of Use on all recordings used by the service, even those that it is not licensing or paying for under the statutory license. As SoundExchange notes, in certain instances this is necessary information. For example, because Sirius XM pays on a percentage-of-revenue basis, it needs a way to allocate between performances compensable under the statutory license and those (such as pre-1972 recordings and directly licensed recordings) that are not.

But reporting on all sound recordings is not always necessary, and certainly is not warranted. In Sirius XM’s situation, for example, every voice break, interstitial, introduction, and the like is logged on Sirius XM playlists. It would make no sense to include those, and doing so would only complicate the calculation of the above-described deductions, which are based on performance counts of sound recordings.

Nor is there any need for a service that pays on a per-performance basis to include performances that are not licensed under the statutory license. Candidly, that is none of SoundExchange’s business; its statutory mandate is to collect royalties for performances made under the statutory license, not to keep tabs on a service’s performances that are otherwise licensed. SoundExchange suggests it wishes to ensure the “accuracy” of the services’ payments, but there is a separate audit provision for that. SoundExchange should not be in the position of policing a service’s Reports of Use on an ongoing basis to see what non-statutory performances the service is making, especially when SoundExchange does not appear willing to engage in an ongoing adjustment or reconciliation process of the kind we described above to actually *fix* any errors that are identified.

4. Use of Proxies for Distribution of Funds

SoundExchange proposes that it receive standing authorization in the regulations to use proxies to make payouts. Sirius XM understands that SoundExchange may need to use a proxy to distribute royalties paid by certain services with incomplete information. We also agree,

however, with the Judges' stated concern about the open-ended, detail-free approach advocated by SoundExchange, and the need for notice to affected parties of how, in a given distribution, SoundExchange intends to implement a specific proxy. In this respect, it should be recognized that when a proxy is used, that inevitably means that some copyright owners will be paid for performances that did not actually occur on the service, and some artists and copyright owners whose works were played will not be paid. To the extent the proxy used for payment is a more mainstream or popular site, for example, major labels may be overrepresented in the payout, and niche or independent artists underrepresented. In addition, any proxy distribution necessarily results in an overpayment to known payees at the expense of unknown payees; if SoundExchange has too much leeway in its use of proxies, it could weaken its incentive to invest the resources necessary to identify and locate unknown copyright owners and performers.

As a result, Sirius XM recommends that if SoundExchange intends to use a proxy to distribute royalties paid by a particular service, it should at the least have to give public notice, through its website, of (a) its intention to do so; (b) the licensees whose funds are subject to proxy distribution; and (c) a reasonable description of the methodology it wishes to use to distribute the funds. Parties should have 30 days to submit comments, and affected licensees should have a period of 60 days to rectify the errors in their reporting that have created the need to use a proxy. This will also serve the salutary purpose of notifying the service of issues with its reporting, so that it can work to rectify the problems for future reports and ensure that the artists actually played on the service are the ones who receive the payouts.

5. Late fees for Reports of Use

SoundExchange proposes a late fee for Reports of Use, including where such reports are not "fully compliant." It is important to consider that the current regulations already provide for a significant late fee (currently 1.5% per month) where a satellite radio service is late either in making its royalty payment or delivering its Statement of Account (SOA). 37 C.F.R. 382.13(d). Notably, where both the payment and SOA are delivered late, but on the same date, the regulations, as interpreted by the Judges in the *Satellite I* rate determination, do not permit a separate late fee for each to be assessed. *See* 73 Fed. Reg. 4100 (identifying separate late fees as "onerous"). If the Judges determine that a late fee for Reports of Use is warranted, the same reasoning should apply: *i.e.*, there should be no "stacking" of multiple late fees (which could add up to 4.5% per month, or a usurious 54% per year) when a service delivers the report, SOA, and report of use late but on the same day.

Just as important, the Judges should reject SoundExchange's request that it be able to assess late fees for Reports of Use that are not "fully compliant." First, when services routinely report hundreds of thousands, or millions, of performances each month, there will surely be some small errors in those reports. As the Judges rightly observed in *Webcaster II* and reiterated in *Satellite II* with respect to Statements of Account, "inconsequential good-faith omissions or errors should not warrant imposition of the late fee." *Id.* Second, SoundExchange does not even define what it means by "fully compliant," thus creating a tool for abuse: SoundExchange should not be in a position unilaterally to assess an onerous late fee penalty for non-compliance on account of such errors, however small, especially without a corresponding obligation to identify

what those errors are and to provide the service the opportunity to cure them within some reasonable amount of time (say, 60 days).

As discussed in the introduction, the regulations should encourage SoundExchange to work with services to *identify and correct* errors so that payments are made properly and the same errors do not recur in later reports.¹ Sirius XM would be pleased to work with SoundExchange to develop a good-faith adjustment and dispute resolution process – much of which, in our experience, can be handled electronically and be automated – whereby errors can be flagged and corrected. SoundExchange’s ability to challenge deficiencies in Reports of Use should be predicated on its willingness to engage in such a process. Being able to assess non-compliance fees without such a process will simply penalize services without any benefit to the accuracy of payments.

6. Report of Use Delivery in 30 Rather than 45 Days

SoundExchange proposes revising the current 45-day deadline for Reports of Use to 30 days. Sirius XM strongly opposes this proposal on simple practical grounds: in our experience, providing complete, accurate reports even in the current 45-day window is extremely challenging, at least for a service like Sirius XM that offers, across its various platforms, 70-plus music channels operating 24 hours a day, 7 days a week – thus generating millions of performances to report. (We also carry certain programming produced by third parties, so we must await delivery of reports of use from those third parties before we even begin to incorporate it into our own reports to SoundExchange.) The challenge has become even greater for reasons noted earlier: the fact that, as part of Sirius XM’s reporting, it needs to identify which of its performances are directly licensed, and which constitute pre-1972 sound recordings. To compile and error-check such reports in 30 days is simply unreasonable, especially when SoundExchange is at the same time proposing a fee for late and/or not “fully compliant” reports – something that could be more likely, rather than less, if services need to rush out their reports in 30 days.

For these reasons, SoundExchange’s own stated rationale for the change -- that it will give SoundExchange “more time for data quality assurance” – actually supports keeping the longer 45-day period. The job of ensuring accurate data falls not only on SoundExchange, but on the services whose reports it processes; those reports will be more accurate if services have a reasonable time to process them.² Reflecting this reality, Sirius XM’s 100+ direct licenses with record companies provide for a 45-day reporting window – not the 30 days that SoundExchange claims is “common” in the industry.

¹ For example, recordings subject to a direct license (and thus not payable to SoundExchange) may subsequently fall out of the direct license if the licensor label transfers them to a third party by sale or transfer. The licensee may not find out about the sale or transfer until well after the fact, and SoundExchange may learn of the transfer before the licensee. Whether SoundExchange or the licensee learns of the transfer first, an adjustment process would make sure that all interested parties receive the information as quickly as possible.

² Given that SoundExchange has typically distributed funds a year or more after receipt, it is difficult to see how receiving Reports of Use 15 days earlier will have a measurable effect on (must less “expedite”) SoundExchange’s distribution of royalties.

7. 90-Day Limit on Restatements/Corrections to Statements of Account

SoundExchange proposes that a service's ability to restate or correct its statements of account (SOA) downward should be cut off after 90 days. While Sirius XM agrees that some deadline is appropriate, six to nine months is more reasonable.

There are two reasons for this. First, SoundExchange and its members should not get to keep undeserved funds, nor should artists and copyright owners be deprived of funds to which they are rightfully entitled. (Most of Sirius XM's past restatements have resulted in additional royalties being owed to SoundExchange.) Second, a 90-day window would effectively prevent the sort of adjustment and reconciliation process that Sirius XM has proposed above. Whatever deadline is set, it should provide ample opportunity for SoundExchange and licensees to work together to identify and correct errors in the reports, especially when the statement of account (and payment due) depends on deductions for pre-1972 recordings and directly licensed performances. That cannot be done in 90 days. (The ASCAP and BMI adjustment processes under the per program licenses allows for at least several months.)

There are also two cautions that the Judges should keep in mind. First, the adjustment limitation, which SoundExchange appears to make applicable only to "downward" adjustments and credits, should go both ways: just as the service will be cut off at some point from claiming a credit, SoundExchange should be cut off at that same time from claiming the service owes additional royalties. Second, it should be clear that this regulation does not impact the separate audit provision: *e.g.*, if an audit reveals that the licensee over-paid, the service should be credited in the amount of the overpayment, regardless of any SOA restatement deadline.

8. Duty to Retain Source Logs

SoundExchange seeks to require services to retain "source logs" for three years. The obvious implication is that SoundExchange intends to conduct audits into whether what a service reports on its Reports of Use is an accurate rendering of what appears in the underlying server data. But the Judges have in the past rejected SoundExchange's request to "transform the . . . verification process into what it calls 'technical audits,'" and instead required the auditor be a certified public accountant. 72 Fed. Reg. 24,109. That decision was correct when made and should be maintained. Technical audits are not commonly allowed in music licensing agreements – ASCAP and BMI, for example, can only audit our "books and records of account" – and allowing SoundExchange to do so puts yet another tool for abuse in SoundExchange's hands. Sirius XM has been the target of multiple SoundExchange audits, and we have witnessed first-hand (even under the current regulations) attempts by the retained auditors to conduct intensive, onerous, and time-consuming audits into the technical workings of our systems.

9. Elimination of Performance/ATH Reporting for SDARS

The current regulations require Sirius XM to report sound recording performances or aggregate tuning hours (ATH) for its satellite radio service. 37 C.F.R. 370.4(d)(2)(vii). In *PSS/Satellite II*, Sirius XM provided sworn testimony from its CFO that such reporting is not

possible because Sirius XM's satellite radio service is “one way,” meaning that Sirius XM does not receive information back from subscribers’ radios as to which channels its subscribers are listening to, or for how long. Sirius XM also offered testimony that SoundExchange, in recognition of that technological limitation, had voluntarily excused Sirius XM from the performance/ATH reporting requirement in the past, but had recently attempted to revoke that agreement – thus exposing Sirius XM to a regulation with which it was impossible to comply. Accordingly, Sirius XM proposed removing the requirement from the regulations so that Sirius XM was not forced into non-compliance by a reporting requirement that the basic technology of satellite radio delivery made impossible.

The Judges declined to do so. *See* 78 Fed. Reg. 23,054, 23,074 at n.50. When Sirius XM pressed the point on rehearing, the Judges again declined to do so, stating that Sirius XM, despite having a voluntary agreement in place with SoundExchange excusing it from the reporting requirement, nonetheless should have objected to the requirement during the notice and recordkeeping rulemaking conducted by the CRB in 2009. *See* Docket No. 2011-1 CRB PSS/Satellite II, Order Denying Motions for Rehearing (Jan. 30, 2013). The Judges suggested, however, that they would be willing to consider requests for a “reasonable exception” to the regulations if the issue were raised in a separate notice and recordkeeping proceeding, which they invited the parties to propose. *Id.* at 8 n.4.

That separate rulemaking proceeding is now before us. The facts remain the same as presented by Sirius XM in the *Satellite II* proceeding: Sirius XM is still unable to report sound recording performances or ATH for its satellite radio service, and there is no reasonable prospect of its being able to do so at any time soon: the tens of millions of satellite radios installed in cars across the United States, which will be the primary mode of reception of Sirius XM's service for years to come, remain (and will remain) “one way” devices as described above.

In light of this reality -- a reporting regulation that is a technological impossibility for the sole service subject to it -- Sirius XM proposes that the performance/ATH requirement be eliminated for SDARS. There is no reason to continue to penalize Sirius XM (or expose it to possible non-compliance penalties). Moreover, doing so will not prejudice or harm anyone else, as Sirius XM cannot comply with the regulation as written in any event. The only purpose served by the current regulation is as a tool for SoundExchange to threaten Sirius XM with allegations of non-compliance and copyright infringement (and thus to seek concessions on other points of dispute between the parties).³

³ SoundExchange hypothesized, in opposing Sirius XM's rehearing motion, that Sirius XM might be able to develop technology in the future to comply with the requirement. While that is unlikely for reasons stated above, the regulation could be revisited and revised if and when Sirius XM is able to track such information at a reasonable cost using then-current technology. But there is no reason to maintain the regulation now on the speculation that such technology might become available in the future.

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Respectfully submitted,

By: /s/ Cynthia Greer
Cynthia Greer
Sirius XM Radio Inc.
1221 Avenue of the Americas
New York, New York 10020
Tel: (202) 380-4000
cynthia.greer@siriusxm.com

Counsel for Sirius XM Radio Inc.