Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC 20559

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

COMMENTS OF TRITON DIGITAL

Triton Digital, Inc. ("Triton"), by its attorneys, hereby submits its comments in the above-referenced proceeding. On May 2, 2014, the Copyright Royalty Board ("CRB") published in the Federal Register the Notice of Proposed Rulemaking ("Notice") in this proceeding proposing changes to the notice and recordkeeping regulations for sound recordings found at 37 C.F.R. Part 370. This rulemaking was prompted by a petition for rulemaking ("Petition") filed by SoundExchange, Inc. ("SoundExchange"), the non-profit performance rights organization that collects and distributes music royalties under the statutory licenses provided by Sections 112(e) and 114 of the Copyright Act. As set forth herein, Triton believes that many issues raised by SoundExchange are better resolved by negotiations between the stakeholders to achieve compromise proposals that are fair to copyright holders and achievable without undue burden by music services. Barring such voluntary agreement, the CRB must carefully weigh any expansion of record-keeping requirements with a careful weighing of the benefits and burdens of any new obligations.

Triton is a leading digital service provider focused on the digital audio industry, offering a complete streaming product line that provides all the tools needed for broadcasters to upload

their content and transmit it online and through mobile applications. As part of its services, Triton provides its clients with a copyright royalty reporting tool that automates the collection of song performance data and generates Reports of Use ("ROUs") for submission to SoundExchange. Many leading audio publishers – including many large radio companies and streaming services (collectively, the "Audio Publishers") – use the Triton platform to enrich their content and deliver it to a global audience via the Internet. As such, Triton has a clear interest in this proceeding.

I. While Some of the Proposed Changes Are Technically Feasible, the CRB Needs to Consider the Regulatory Burden that Changes Would Entail

In its Petition, SoundExchange proposes a number of technical and substantive changes to the manner in which licensees report data regarding performances and sound recordings. As an initial matter, it must be noted that Triton does not itself file reports with SoundExchange. Instead, as a third-party vendor, Triton's function is to provide media delivery-specific infrastructure and support services to webcasters. Triton's systems facilitate Audio Publishers in their need to track the number of sound recording performances that they stream, and it provides an interface that allows Audio Publishers to take the information generated by Triton's systems, analyze and interpret the data, and generate ROUs for submission to SoundExchange. Triton's interface does this by taking the metadata describing the content being streamed and, through server-side analytics, computing how many people are listening to each song or other content feature that is streamed by the Audio Publisher.

The data generated by Triton's systems is only as complete as the data provided to Triton in the metadata it receives from its clients. It is the Audio Publishers that need to provide the metadata for the Triton systems to generate any meaningful reports. Any rules that may be adopted in this proceeding that require the addition of new reporting obligations will create new

burdens on the Audio Publishers to provide the data necessary to make the reports meaningful. Triton, as a good technology company, can technically make changes to its systems to incorporate required changes in reporting requirements if it spends the time and money necessary to do so. But its changes do not matter if the Audio Publishers cannot comply with any new obligations to supply the necessary metadata to make the reports meaningful. The most important point in any analysis is the effect of any changes on the Audio Publishers themselves. Triton must, for the most part, defer to the Audio Publishers that it serves (i.e., its clients) on whether SoundExchange's proposals are feasible from a substantive perspective, as they are the parties responsible for locating and updating the data points that form the basis of the ROUs.[1]

Triton notes that online radio is still a nascent industry in which Audio Publishers continue to have difficulties fully monetizing the programming that they offer. If Audio Publishers are unduly burdened by complex recordkeeping and reporting systems, the industry will need to divert its attention from revenue generation to regulatory burdens, and the opportunities for economic growth and innovation will be limited. With less growth, there is less money to pay royalties. As such, licensees must be allowed to retain maximum flexibility in their reporting as the rules permit.

While Triton defers to the Audio Publishers for concrete information about the burdens that enhanced recordkeeping will impose, it notes that it has observed certain use patterns by Audio Publishers that are relevant to some of the data proposals set out in the Notice. For instance, with respect to the proposal to require reporting on "an enterprise level," Triton questions whether that comports with the way that its clients operate. Its clients pull and sort

[1] To the extent any of these technical proposals are ultimately adopted, Triton requests that CRB adopt a transition period of 18 months or longer, as Triton would need at least this much time to reconfigure its software in order to come into compliance with any new record keeping requirements.

data in a multitude of formats, driven by what best suits their business needs. As SoundExchange itself admits, imposing a one-size-fits-all reporting requirement would be unworkable.

Similarly, the addition of new headers to the ROUs would require the collection and coding of additional data sets, and that would again increase the burden on the Audio Publishers. Triton notes that many of its customers already have difficulty completing the required data fields. Adding new requirements only increases that difficulty. For instance, Triton notes that many Audio Publishers have difficulty finding album titles. Triton has been told that this is because music is not delivered to the Audio Publishers as part of an album, but instead by single tracks, without additional data identifying its source.

Triton also understands that one proposal that would undoubtedly create an enormous regulatory burden on licensees is the requirement that they provide International Standard Recording Codes ("ISRCs") in their ROUs. An ISRC uniquely identifies the recording to which it is assigned - regardless of the format in which it is used and independent of any changes in ownership. While use of ISRCs as a tool to manage digital repertoire sounds attractive and simple enough in theory, the reality is that the ISRC system is not used as widely as portrayed by SoundExchange. Triton itself has no database or other way to determine such codes – that is part of the metadata provided by the Audio Publishers. And, like the album titles, Triton has been told that Audio Publishers have no method of comprehensively ascertaining the ISRC code of any track with any degree of certainty.

Notably, the RIAA itself recently observed in a recent Copyright Office Round Table discussion on music licensing in Nashville, Tennessee (which undersigned counsel attended) that labels should not be required to provide ISRC codes when they register copyrights in the sound

recordings to which they have the rights, as that would impose too much of a burden on the labels.[2] If the copyright holders themselves, who are responsible for obtaining the ISRC codes in the first instance, find this to be too much of a burden, how can the Audio Publishers be expected to provide that information? Before imposing any obligation to provide such information in ROUs, the copyright holders themselves must first provide that information, in a uniform fashion, to the Audio Publishers in connection with the release of all of their music.

In short, in adopting any new obligations on the Audio Publishers, the Copyright Royalty Board must carefully evaluate both the burdens of the collection of information and the benefits that the information will provide. There should be a demonstrable pressing need for information, and a clear path through which the Audio Publishers can comply, before any new burdens are imposed. Triton's proposal for an initial reliance on voluntary negotiations, and requiring only such reporting as necessary to provide copyright owners a basis on which to distribute the royalties that are being paid, is consistent with the statutory obligation that recordkeeping be reasonable, and with the CRB's past precedent.[3]

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[2] The transcript of this testimony is not yet available. Counsel will review the testimony and correct this statement should his recollection of the RIAA testimony described above prove to be different than that reflected in the transcript.

[3] The CRB has previously opined on the standards to be used in arriving at recordkeeping rules. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, Interim Final Rule, 71 FR 59010, 59011 (October 6, 2006). There, the CRB noted the tension between services wanting fewer obligations and copyright holders wanting more:

> Mindful of these cost and efficiency concerns raised by both the services and the copyright owners, the Board identifies a workable minimum or baseline for data reporting that satisfies the required reporting responsibilities of the services without imposing unreasonable processing burdens or obstacles on the copyright owners. The Board is of the view that regulations that establish the baseline requirements for formatting and delivering a report of use—*i.e.* that satisfy the basic requirements necessary to deliver data that can be used to make payments collected under the statutory licenses—are reasonable as contemplated by the statute.

II. The Copyright Royalty Board Should Not Mandate Obligations on Audio Publishers to Provide All Third-Party Data in Response to SoundExchange Audits

One proposal teed up in the Notice that directly implicates Triton is the requirement that Audio Publishers retain all information provided by third-party vendors and provide that information to an auditor if that service is audited by SoundExchange. Triton objects to this proposal, as it would pose an unreasonable burden on Audio Publishers, and lead to misleading audit results. First, much of the information provided by the Triton systems is not stored on the servers of the Audio Publishers, but instead on those of Triton. To the extent that SoundExchange's proposed rules would require that Audio Publishers duplicate that information on their own servers just in case they are ever audited by SoundExchange would create significant, unnecessary duplication of massive data files for no significant benefit.

Moreover, the provision of this raw data is likely to create more issues, not fewer. It has been Triton's experience in working with its clients that SoundExchange audits have been opaque, adversarial and intrusive. In Triton's experience, the sole firm used by SoundExchange to conduct audits has often misinterpreted Triton's own marketing materials in an attempt to make claims that there are issues with Triton reports where none exist. Triton's manual analysis of past audit years indicates that SoundExchange's method of calculating performances overstate actual performances.

For instance, Triton believes that SoundExchange has attempted to claim royalties for extremely short sessions (2 seconds or less) that are inaudible to listeners due to Internet traffic routing. It has also sought to count as multiple performances "rejoined sessions" (i.e., those sessions where the Internet connection was lost but thereafter re-established by the same end user

while the same song is still being delivered). Clearly, in these cases raw data can lead to inaccurate interpretations.

SoundExchange's own comments in this proceeding reflect at least one of these misinterpretations of the rules. It suggests that it believes that any connection to a song creates a "performance," even if that connection is so short that no audible sound ever reaches the intended user. That would be a nonsensical interpretation of the rules, which define a performance as follows:

> *Performance* is each instance in which any portion of a sound recording is publicly performed ***to a listener*** by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc ***to one listener***).[4]

Clearly, this definition compels the conclusion that a transmission must actually reach a listener before it becomes a "performance." Very short connections never reach the listener, given the inherent buffering and the other latencies in the transmission of an Internet audio stream. As these connections never reach the listener, they cannot be performances. To claim otherwise is to attempt to simply inflate the number of performances and the amount of the claimed royalty.

Moreover, the raw data, before being reviewed by the Audio Publisher, can create all sorts of other anomalies capable of misinterpretation. For instance, the Triton system will sometimes count as "performances" any audio segment for which an Audio Publisher provided metadata, which may include commercials, promotional announcements, news segments and other program elements that give rise to no liability to SoundExchange. The raw data provides no meaningful information unless and until the Audio Publisher reviews that material and refines it into a ROU reporting solely on sound recordings.

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[4] 37 C.F.R. Section 380.2 (emphasis added).

Triton does partially understand SoundExchange's concerns that it be able to verify that third-party vendors are accurately counting performances. However, the failure to get that assurance is in many ways SoundExchange's own fault. Triton has been talking to SoundExchange for several years, attempting to negotiate with SoundExchange a procedure whereby SoundExchange could review Triton's methodology to insure its accuracy. Through these discussions, Triton has been seeking to establish with SoundExchange a transparent methodology that all parties, users and copyright holders alike, would deem to be acceptable for royalty reporting purposes. Triton approached SoundExchange with this idea, knowing that some sort of accreditation or transparent, mutually agreeable methodology would be good for the industry, and also good for Triton as it could assure its customers that its systems are working in a manner that is acceptable to the collection agent. SoundExchange, however, has not yet agreed.

Furthermore, Triton has been concerned by SoundExchange's aggressive audit policy, and has wanted to set up an accreditation process for a system going forward that would not raise issues for its clients for any past issues in areas where SoundExchange and Triton had a good-faith difference as to the appropriate methodologies to be used to compute performances. Triton has made numerous proposals for this process, and continues to wait for SoundExchange to offer a response as to how such a process could move forward.

Triton continues to believe that industry collaboration will lead to a far more effective, efficient and transparent method by which to assess the accuracy of licensee reporting than a government-mandated system that is ordered without the technical specifics that can be arrived at by parties acting in good faith in a reasonable business negotiation. Triton continues to hope

that this transparent methodology can be agreed to so that there can be a negotiated solution to the issues that SoundExchange raises, without the need for burdensome regulations.

III. Conclusion

There is no doubt that copyright owners should be properly compensated for the performance of their works, and Triton recognizes that the data provided pursuant to the reporting and recordkeeping requirements under 37 C.F.R. Part 370 is critical to the copyright licensing and royalty ecosystem. However, in adopting any new rules, the burden on webcasters in providing data must be reviewed. Only where the Audio Publishers have a reasonable basis for compliance with any new obligations, and where SoundExchange can show a real need for the data, are new rules appropriate. Triton believes that negotiation between interested stakeholders to establish reasonable recordkeeping goals should be encouraged, as opposed to regulatory decisions that may or may not capture business realities. Accordingly, Triton recommends that the CRB urge the parties to voluntarily address these issues and, only if such negotiations have failed, the CRB should carefully weigh the risks and benefits before imposing any new obligations on Audio Publishers.

Respectfully submitted,

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