Before the
United States Copyright Royalty Judges
Library of Congress

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

REPLY COMMENTS OF SOUNDEXCHANGE, INC.

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SoundExchange, Inc. ("SoundExchange") is pleased to provide these Reply Comments in response to the Copyright Royalty Judges' Notice of Proposed Rulemaking ("NPRM") concerning notice and recordkeeping issues under the statutory licenses provided by Sections 112 and 114 of the Copyright Act. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 79 Fed. Reg. 25,038 (May 2, 2014).

I. Introduction

SoundExchange appreciates the Judges' attention to the issues raised in this proceeding. While notice and recordkeeping issues are highly technical, and have often been controversial, the Section 112/114 statutory license system depends upon having a coherent notice and recordkeeping system that results in timely delivery by licensees of useful data that accurately represents their usage of sound recordings. The Judges have time and again determined that SoundExchange should distribute statutory royalties to artists and copyright owners "based upon the information provided under the reports of use requirements." 37 C.F.R. § 380.4(g)(1); *accord* 37 C.F.R. §§ 380.13(i)(1), 380.23(h)(1), 382.4(d)(1), 382. 13(f)(1), 384.4(g). Thus, it is only when the "reports of use requirements" yield useful usage data that SoundExchange can best carry out the royalty distribution function that the Judges have entrusted to it.

In considering possible adjustments to the notice and recordkeeping requirements, the Judges should keep in mind the purpose of the statutory licenses and the role of reporting within the statutory license system. The statutory licenses do not exist for the benefit of artists and copyright owners. The statutory licenses are a deviation from the usual exclusive rights under copyright, and prevent artists and copyright owners from commercializing their works through the usual free market negotiations. Instead, the statutory licenses were intended "to create fair and efficient licensing mechanisms." H.R. Conf. Rep. 105-796, at 79-80 (1998). That is, relative to the usual requirement to obtain licenses on a negotiated basis, the statutory licenses provide licensees the significant benefit of being able to obtain the right to use all commercial recordings through a single process under terms (including, for this purpose, reporting provisions) determined by the Judges.

When the Section 114 license was first enacted, it assumed that licensees would account directly to the copyright owners of the works they used, just as would be the case under voluntary licenses. *See, e.g.,* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 342-43 (providing in Section 114(g)(2) that copyright owners would perform the function of allocating royalties to artists that SoundExchange now performs). However, services wanted a more convenient arrangement. To simplify the process of accounting for their usage "the Services urged the Office to designate a single Collective." *Notice and Recordkeeping for Digital Subscription Transmissions*, 63 Fed. Reg. 34,289, 34,293 (June 24, 1998). SoundExchange itself, and the current procedures for paying royalties and accounting through SoundExchange, are the result of those services' calls to make administration of the statutory licenses easier for them.

Under any license – voluntary or statutory – the licensee must inform the licensor about the use that the licensee makes of works subject to the license. This is because, as a general matter, only the licensee knows what it is doing in its service. Indeed, in voluntary licenses negotiated between digital music services and record companies, services are typically required to engage in more extensive reporting than that required by the notice and recordkeeping regulations. The technical details of such reporting, such as the specific data fields that must be provided and the delivery format, are routinely negotiated by the staff of licensors and licensees. With a voluntary arrangement, a licensor is generally able to process reports provided by services in a straightforward manner, because it receives copious, relatively high-quality data that it matches against only its own repertoire to account to its artists.

By contrast, the Judges and Congress have tasked SoundExchange with a daunting data processing challenge. Under the statutory licensing system, licensees have the privilege of using any commercial sound recording ever distributed. Thus, reports of use ("ROUs") identify a much broader range of recordings than would be covered under any voluntary license. And while SoundExchange expects to have good information concerning approximately 14 million known recordings when it completes its next database update this month, no matter how good that information is, only the licensee can tell SoundExchange which of those recordings it used, and how it used them. ROUs are the vehicle for licensees to provide that essential information. Matching the usage reported on ROUs to the repertoire known to SoundExchange (or, in some cases, using the reported usage to discover new repertoire previously unknown to SoundExchange) is the critical step that makes allocation of royalties to artists and copyright owners possible.

Unfortunately, ROUs are currently a weak link in the statutory royalty distribution chain. To be sure, some large commercial music services provide usage data of very high quality – such high quality that for some services, more than 99% (and sometimes very nearly 100%) of their lines of reported usage data can be automatically matched by SoundExchange to known repertoire. Not surprisingly, those services did not file initial comments this proceeding. Those services have made it a priority to try to report their usage properly and accurately, and recognize that SoundExchange's Petition sought relatively modest adjustments to the overall reporting regime.[1]

The problem is that the number of services providing high-quality data is small. Many other services report poor quality data, when they report data at all, and the broadcasters that have been so outspoken in this proceeding are among them. This is a much bigger problem than NAB/RMLC suggest in their comments. NAB/RMLC Comments, at 2, 17, 64. For 2013, approximately two-thirds of licensees required to deliver ROUs still have failed to deliver one or more required reports, and about one quarter of such licensees have not delivered any such reports at all. In 2013, lateness in delivering ROUs affected approximately $203 million in royalties (about 31% of statutory royalties), and ROUs that SoundExchange received late were, on average, delivered about 90 days late. For a small percentage of usage, ROUs are never received at all.

Even when licensees submit their ROUs, hopefully on time, the problems do not end there. Out of all of the useable ROUs received last year, an average of about 29% of the lines of

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[1] *See* Notice and recordkeeping for use of Sound Recordings Under Statutory License, 74 Fed. Reg. 52,418, 52,420 (Oct. 13, 2009) ("the fact that many of the largest commercial Webcasters and other intensive users such as satellite radio have not filed comments in this proceeding clearly indicates an absence of controversy among more intensive users").

data ingested by SoundExchange could not be matched automatically to known repertoire, with the vast majority of the issues due to data quality problems.[2] Those lines of data correspond to about 23% of all statutory royalties received last year. Only by investing substantial resources in painstaking efforts to clean up licensee-provided data has SoundExchange been able to obtain and process data sufficient to distribute with reasonable accuracy and deliver royalty payments for all but a very small percentage of those payments. Notwithstanding that effort, the delay means that tens of millions of dollars of statutory royalties are held up for months, and in some cases years, in the process. SoundExchange, along with the artists and copyright owners it represents, believe that it is not good enough.

The proposals that SoundExchange made in its Petition were intended to represent relatively modest adjustments in the overall reporting regime to address specific observed problems and clean up a few historic anomalies. The 274 pages of comments filed by NAB/RMLC[3] vigorously oppose almost every proposal that SoundExchange made, and the 22 other comments filed by broadcasters and broadcaster groups likewise oppose many of SoundExchange's proposals. Broadcasters, however, accounted for almost 17% of total webcasting royalty collections in 2013 (almost 11% of total statutory royalties), and represent a

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[2] New repertoire that is reported without an ISRC is not matched automatically. However, given that some services regularly maintain a match rate greater than 99%, SoundExchange believes that such new repertoire typically accounts for about 1% of the lines of data in ROUs.

[3] Parts of the comments filed by NAB/RMLC are styled as "declarations" by certain individuals. However, this is an "informal rulemaking" as that term is understood in administrative law, and accordingly, the NPRM solicited "comments." 79 Fed. Reg. at 25,038. Because this is not a "formal rulemaking," styling comments as "declarations" is unnecessary and confers upon those comments no special status. *Compare* 5 U.S.C. § 553 *with* 5 U.S.C. §§ 556 & 557. The Judges' rule at 37 C.F.R. § 350.4(e) also indicates that "[s]ubmissions signed by an attorney for a party need not be verified or accompanied by an affidavit." Accordingly, SoundExchange has not styled any part of its comments as a declaration. Counsel for SoundExchange have, however, made a sufficient inquiry to make the certification contemplated by Section 350.4(e).

disproportionate share of the few percent of statutory royalties that ultimately cannot be allocated based on usage. The thrust of the lengthy and numerous broadcaster comments is that they should not have to do the things that other licensees are already doing to provide the sort of high-quality data that enables timely and efficient distribution of royalties to artists and copyright owners. Instead, those broadcasters propose less comprehensive reporting of fewer data elements, and no meaningful consequences for non-reporting. That is not reasonable.

The Judges have consistently recognized that licensees' providing reasonable notice of the recordings they use is essential to the statutory license scheme. As the Judges have observed time and time again, "[b]efore [SoundExchange] can make a royalty payment to an individual copyright owner, they must know the use the eligible digital audio service has made of the sound recording." *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 73 Fed. Reg. 79,727, 79,727-28 (Dec. 30, 2008). Before responsibility for notice and recordkeeping regulations was transferred to the Judges, the Copyright Office observed that inadequate record keeping by licensees is simply "unacceptable." *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 69 Fed. Reg. 11,515, 11,516 (March 11, 2004). Then, just as here, the Office was confronted by embellished protests that, for some services, requiring accurate recordkeeping and notice would be "too great a burden." *Id.* at 15,521. The Office rejected those claims, however, explaining that even if some services were not presently capable of reporting data, they could reasonably be expected to make themselves capable:

> Transmitting a sound recording to the public is not something that accidentally or unknowingly happens. It takes a significant amount of decision making and action to select and compile sound recordings, and a significant amount of technical expertise to make the transmissions. It is not unreasonable to require those engaged in such a sophisticated activity to collect and report a limited amount of data regarding others' property which they are using for their benefit. While making and reporting a record of use is

> undoubtedly an additional cost of transmitting sound recordings to the public, it is not an unreasonable one.

Id. at 15,521 n.12. Almost 20 years after the enactment of the Section 114 license, and more than 15 years after its extension to webcasting, now is the time for broadcasters finally to do the things necessary to enable accurate and timely distribution of the statutory royalties they pay.

With that background, we turn to the specific issues raised in the NPRM and initial comments. Part II addresses the Joint Petition. Part III addresses the issues raised in SoundExchange's Petition. Part IV addresses new issues raised in the initial comments.

II. Joint Petition

The NPRM proposes modifying the definition of Minimum Fee Broadcaster in Section 370.4(b) to extend the sample-based reporting provisions in Section 370.4(d)(3)(ii) to a broader set of webcasters. 79 Fed. Reg. at 25,039-40. As SoundExchange explained in its initial comments, SoundExchange does not oppose that change, although it suggested some technical corrections and a more accurate term to refer to the expanded group of services. SoundExchange Comments, at 2-3 & n.2.

In their initial comments, noncommercial educational webcasters ("NEWs") ask for something much broader – incorporating in the notice and recordkeeping regulations their preferred parts of the terms in Section 380.23, which were the result of a settlement of the *Webcasting III* proceeding between SoundExchange and CBI. Specifically, the NEWs would like to include in the notice and recordkeeping regulations the outright reporting waiver and play frequency reporting provisions of Section 380.23(g), but not the late fee for ROUs provided in Section 380.23(e) or the server log retention provisions of Section 380.23(i). *E.g.*, CBI Comments, at 3-4, 6-8; KBHU Comments, at 1. NEWs should not be given their requested

special exemption in these regulations; their concerns are addressed directly in the terms to which CBI agreed.

There are just over 500 NEWs. Because they overwhelmingly pay only the minimum fee, NEWs in the aggregate pay only about $250,000 in annual royalties, or about 0.04% of 2013 total statutory royalty collections. In contrast to the other categories of broadcasters, the NEWs are largely amateur operations, and have a mission of educating their staff rather than necessarily reaching a large audience. The 20 initial comments in this proceeding from NEWs and representatives thereof – more than two thirds of the initial comments in this proceeding – say that NEWs have had difficulty reporting, and indicate that NEWs care very much about not having to provide reports of their actual usage. In fact, about 97% of NEWs have elected the reporting waiver of Section 380.23(g)(1). Before the reporting waiver, many NEWs either did not report at all, or did so poorly, requiring a disproportionate investment of SoundExchange resources to utilize the data they provided.[4] Moreover, while some NEWs pride themselves on the breadth of their playlists,[5] reporting their usage on a two-weeks-per-quarter sample basis does not allow distribution of royalties on a basis that takes into account the vast majority of such usage. While the provisions in Section 380.23 are less than ideal, and should not in any way be viewed as a model for handling pools of royalties paid by professional operations, they

[4] Other compliance issues with NEWs continue even with the waiver. For example, despite professing to rely on the statutory licenses, commenters KBHU, KNHC, WSLX and WSOU do not appear to have filed NOUs. *See* http://copyright.gov/licensing/114.pdf. And two of them (KBHU and WSLX) do not seem to have paid statutory royalties or otherwise interacted with SoundExchange in recent years. Despite professing or suggesting that they report usage on a sample basis, SoundExchange's records indicate that commenters Lasell College Radio and WGSU have purported to rely on the reporting waiver and have not actually provided ROUs in recent years.

[5] *E.g.*, WJCU Comments, at 4 ("WJCU Radio and many other NEWS offer highly diverse programming, meaning that tens of thousands of unique sound recordings may be broadcast in a single year in contrast to several hundred at a typical commercial music operation").

may well represent the best solution available at this time to the problem of distributing NEW royalties on a fair and cost-effective basis.

However, it is not fair for the NEWs to pick and choose their favorites from among the provisions of Section 380.23 that were negotiated by CBI and that have been in place for several years. SoundExchange hopes that it will be possible to reach an agreement to settle the *Webcasting IV* proceeding as to NEWs on a basis that would generally extend the relevant provisions of Section 380.23 and thereby moot the issues raised in the Joint Petition through 2020. If that happens, there would be no reason for the Judges to adopt the proposals in the NPRM based on the Joint Petition, and the Judges could revisit the question of reporting by NEWs based on a fresh record in five years. Otherwise, the Judges should either adopt the equivalent of all the relevant provisions of Section 380.23, by adopting SoundExchange's proposed late fee for ROUs (see Part III.E.2 of these comments) and proposed recordkeeping provisions (see Part III.G of these comments), or adopt only the changes to the definition of Minimum Fee Broadcaster proposed in the NPRM.

III. SoundExchange Petition

In this part of these comments, we review comprehensively all of the proposals raised in SoundExchange's Petition based on the initial comments concerning them. While we discuss these proposals separately, we cannot emphasize enough that each proposal should be understood in the overall context of the statutory license system, and that the various parts of the notice and recordkeeping regulations need to work together to yield accurate and timely usage information that can be matched to payments and known repertoire if artists and copyright owners are to be paid the royalties they are due. SoundExchange has proposed a package of changes designed to both require delivery of data that will permit automated matching of

reported usage in a higher proportion of cases and provide meaningful incentives to comply with reporting requirements (as well as to adjust various details of the regulations). Broadcasters have suggested diluting the data delivery requirements and weakening the incentives to comply. The Judges should adopt SoundExchange's proposals, subject to the handful of modifications suggested herein in response to the comments of others.

A. ROU and SOA Consolidation, Matching and Identification

1. Consolidation and Matching

SoundExchange proposed a commonsense package of changes to the notice and recordkeeping regulations to enable SoundExchange more efficiently and effectively to match reported usage to royalty payments.[6] In particular, SoundExchange proposed that usage be reported at the enterprise level if feasible, and that in any case there be a one-to-one relationship between the scope of usage reported in an ROU and statement of account ("SOA") unless SoundExchange and the licensee agree otherwise. SoundExchange also proposed clarifying that licensees providing services in multiple rate classes must provide separate ROUs for each different type of service. Petition, at 6-8. Relatedly, SoundExchange proposed that services use

[6] The initial comments in this proceeding illustrate the kinds of problems these proposals are intended to address. For example, Sandab Communications II, L.P. does business as Cape Cod Broadcasting and owns radio stations WQRC, WKPE, WFCC and WOCN. NAB/RMLC Comments, Exhibit H ¶¶ 1-2. It has filed separate notices of use identifying itself as Sandab Communications d.b.a. the various stations. http://copyright.gov/licensing/114.pdf. If it provided a payment or statement of account in the name of Cape Cod Broadcasting, it would not be immediately evident that it relates to Sandab Communications, or which station(s) were intended to be covered. Similarly, KSSU is the name of a NEW service provided by Associated Students, Inc. at California State University, Sacramento. KSSU Comments, at 1. Associated Students filed its notice of use under that name, http://www.copyright.gov/licensing/114.pdf, but commented in this proceeding under the name KSSU. If SoundExchange received payments or ROUs under the names KSSU or California State University, Sacramento, it would not be obvious that they should be assigned to the account of Associated Students.

consistent naming on their SOAs and ROUs, as well as account numbers when assigned by SoundExchange. Petition, at 8-10. These proposals were relatively noncontroversial.

Based on NPR's unique circumstances, NPR took exception to SoundExchange's proposal to favor consolidation of reporting at the enterprise level and require a one-to-one relationship between ROUs and SOAs. NPR Comments, at 10. Because of NPR's unique organizational structure and funding model, SoundExchange has had agreements with the Corporation for Public Broadcasting ("CPB") providing unique reporting arrangements for NPR stations. SoundExchange shares NPR's expectation that it will again be possible to reach agreement with CPB and/or NPR concerning its unique reporting arrangement. *See* NPR Comments, at 1. SoundExchange's proposal in this proceeding specifically contemplates and enables such flexibility, by (1) providing for consolidation to the enterprise level only "if feasible" (proposed Section 370.4(d)(1)); (2) contemplating agreements for other than a one-to-one relationship between ROUs and SOAs (*id.*); and (3) generally authorizing SoundExchange to agree with licensees concerning alternative reporting arrangements (proposed Section 370.5(g)). In view of these provisions, it is neither necessary nor appropriate for the Judges to write NPR's current reporting arrangement into generally-applicable regulations or water down the reporting requirements for all licensees to encompass NPR's unique organizational and funding structure.[7]

NAB/RMLC generally accepted this group of SoundExchange proposals, although they took exception to some of the details. NAB/RMLC do not oppose a requirement that there be a one-to-one relationship between usage reported in an ROU and SOA, so long as there are no adverse consequences for failing to do so. NAB/RMLC Comments, at 69. In other words,

[7] *See* 74 Fed. Reg. at 52,419 ("We have no intention of codifying these negotiated variances in the future unless and until they come into such standardized use as to effectively supersede the existing regulations.").

NAB/RMLC appears to take the position that the Judges are welcome to adopt this requirement, provided that broadcasters are free to ignore it with impunity. Because NAB/RMLC refer to "discrepancies" in "performance counts," *id*, perhaps they just did not understand the proposal. As proposed Section 370.4(d)(1) states, the proposed new requirement is that the ROU and SOA match in the sense of covering the same service offerings, channels or stations. So understood, there is no reason broadcasters need extraordinary relief from this provision. In contrast to immaterial errors in a name (see below), which could occasionally happen inadvertently and would have no consequence for processing of royalty payments, determining consolidation of SOAs and ROUs is a conscious corporate policy decision concerning the design of a business process that must be repeated month after month. Deviations from such a policy and processes should not happen inadvertently. Furthermore, having multiple SOAs associated with one ROU or multiple ROUs associated with one SOA has real operational consequences for SoundExchange. *See* Petition, at 6-7. SoundExchange's proposal provides licensees significant discretion in determining how they wish to consolidate their reporting. To enable that, we ask only that broadcasters consolidate their stations' usage the same way for purposes of both the ROU and SOA. NAB/RMLC do not seem to dispute that it is reasonable to expect licensees to figure out business processes to do that. Once they do that, it is reasonable to expect that licensees will follow their own business processes. NAB/RMLC have not provided any explanation that would justify making this requirement purely hortatory, so the Judges should adopt the proposed requirement.

NAB/RMLC also do not object to the principle that licensees that provide services in multiple rate classes should provide separate ROUs for each different type of service, "provided that submission of separate reports actually is necessary for SoundExchange to allocate and

distribute royalties." NAB/RMLC Comments, at 70. As a practical matter, SoundExchange does need separate ROUs, and licensees provide them today. Although NAB/RMLC argue that separate ROUs should not be required when a licensee has services subject to multiple rate classes and those services have identical playlists, that argument is not persuasive. There are only a handful of licensees that provide multiple services subject to different rate structures.[8] Those licensees would not typically have exactly the same channel lineup and playlists on the different services. Even if such licensees were to have identical playlists, they may have different reporting requirements, and they are virtually certain to have different usage (total performances or aggregate tuning hours) for each different service in a given month. Even in the most fanciful hypothetical in which the same ROU might satisfy applicable requirements for two services, it would not be – and no provider has suggested that it would be – burdensome to submit two copies of the same ROU. The Judges should thus adopt SoundExchange's proposal without NAB/RMLC's unnecessary proviso.

NAB/RMLC also do not oppose the requirement that licensees use consistent names across their SOAs and ROUs, so long as inconsequential errors such as the omission of "Inc." from a company name do not have adverse consequences for licensees. NAB/RMLC Comments, at 69. The purpose of SoundExchange's proposal concerning use of consistent names is to avoid SoundExchange's receiving ROUs and SOAs with different names that have no clear connection. It is not SoundExchange's purpose or intent to inflict penalties on a

[8] NAB/RMLC's comments do not justify their proposed proviso based on any identified problem for a broadcaster. Instead their proviso is grounded in what seems to be a description of Sirius XM's business. *See* NAB Comments, at 70 (referring to the licensee providing a business establishment service or an SDARS, two services that Sirius XM provides, and only Sirius XM provides an SDARS). However, Sirius XM did not take exception to the separate ROU requirement in its initial comments.

licensee that uses consistent naming but makes an immaterial error when doing so. The concerns of NAB/RMLC in this regard seem fully addressed by SoundExchange's discussion of inconsequential good-faith omissions or errors in the context of the late fees provision (*see* Part III.E.2).

NAB/RMLC do not oppose SoundExchange's proposal to assign licensees account numbers, so long as those account numbers are provided at the enterprise level. NAB/RMLC Comments, at 68. SoundExchange would expect to assign account numbers at the enterprise level if the licensee consolidates its payments, SOAs and ROUs at the enterprise level, which SoundExchange has proposed as the preferred option. If a licensee elects not to consolidate its reporting to the enterprise level, SoundExchange would expect to assign separate sub-account numbers to distinguish the different reporting groups within the licensee's enterprise.[9] However, assignment of account numbers in such a situation is a small operational detail likely to affect very few licensees. It need not and should not be addressed in regulations; SoundExchange is prepared to work flexibly with licensees in such cases.

MRI does not take exception to SoundExchange's proposals, but proposes in addition that when an agent like MRI submits SOAs or ROUs, that the SOAs and ROUs identify the agent. MRI Comments, at 3-4. If MRI submits any SOAs or ROUs on behalf of licensees, it is welcome and encouraged to add its name to the documents it submits. At this time, however, it does not seem necessary to require that by regulation.

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[9] It is not apparent that NAB/RMLC disagree with this proposed treatment of licensees that do not consolidate their payment and reporting to the enterprise level. Their real concern seems to be that a licensee should not have to manage 500 individual-station accounts if it does not want to. NAB/RMLC Comments, at 68-69. SoundExchange also would much prefer to deal with licensees at the enterprise level than the individual station level.

2. ROU Headers and Category Codes

SoundExchange proposed modifying the file header specification at 37 C.F.R. § 370.4(e)(7) and requiring use of headers in ROUs. Petition, at 10-12. Inclusion of headers in ROUs would unambiguously identify the ROUs and their providers in a manner that cannot be separated from the ROU and reduce the effort required of SoundExchange and/or the licensee when a licensee submits an ROU with the columns out of order. Implementing use of headers would be trivial from an information technology perspective. Licensees preparing their ROUs with spreadsheet software could include their header information in the template they use. For others, the header information could readily be pasted into the ROU text file before transmission if not automatically generated by the system producing the ROU.

Only NAB/RMLC take significant exception to the use of headers. NAB/RMLC Comments, at 72-76. NAB/RMLC devote most of their discussion of headers to reciting their view of the history of previous notice and recordkeeping proceedings relative to the use of headers in ROUs. However, this history is irrelevant to the question presently before the Judges, which is how reasonably to provide for notice of use of recordings under the statutory license now and for the future. SoundExchange's experience over the last decade convinces it that use of headers would materially improve processing of ROUs.

It is only toward the end of NAB/RMLC's discussion of headers that NAB/RMLC engage substantively with the current operational implications of SoundExchange's proposal. In essence, they make four arguments against use of headers, but each fails.

- NAB/RMLC argue that some of the proposed header information is currently required to be provided outside the ROU itself, in a separate email or cover letter (37 C.F.R. § 370.4(e)(3)(ii) and (iii)). This is true, but one of the operational problems

that SoundExchange is trying to solve is that, despite this requirement, licensees often do not provide this information outside the ROU. It seems more likely that licensees will provide this information if the templates and systems used to generate ROUs contain the header information (or a placeholder therefor) than if the staff responsible for reporting must remember to include this information in a separate email or cover letter. Furthermore, providing this information internal to the ROU makes it inseparable from the ROU. Just as the Judges' rules of procedure require that filings with the Judges have captions on the filings themselves, to ensure that they can be readily associated with the proper docket (*see* 37 C.F.R. § 350.3), the notice and recordkeeping regulations should require ROUs themselves to be identified. To avoid any duplication of effort, SoundExchange proposes eliminating the requirement to provide this information external to the ROU.

- NAB/RMLC argue that some radio stations do not use headers now, and it would be burdensome for them to do so in the future because some of the proposed header data changes from reporting period to reporting period. In fact, at least one major broadcaster licensee uses full headers now, and the examples cited to illustrate burden strain credulity. As described above, basic identification of the licensee and ROU, including a row count, is information licensees are already required to provide. Providing that information internal to the ROU rather than in an email or cover letter would not require more effort, and seems likely to require less effort. The checksum would need to be computed based on the data reported each month, but addition is a

simple arithmetic function easily performed by a spreadsheet or other computer software.[10]

- NAB/RMLC argue that audience measurement type, column headers and file parameters such as number of rows and checksum should be self-evident. But they are wrong as a factual matter. Audience measurement, whether performances or aggregate tuning hours, is just a number. And the ordering of data in an ROU is not as self-evident as NAB/RMLC imagine. Licensees pick and choose among data fields to include in their ROUs (either because the regulations provide options or because they have decided to do so anyway), and SoundExchange regularly receives reports with the columns out of order.[11] Having licensees tell SoundExchange what data they have included and how they have arranged it would be preferable to risking that SoundExchange will interpret their reported data improperly. Indeed, even if they do not use full headers, a number of licensees include in their ROUs a single-row

[10] The suggestion that licensees might not be able to transmit a file with 17 blank rows, NAB/RMLC Comments, at 76, is just silly. First, the whole point of the header is for it not to be blank. Second, a carriage return is a perfectly valid character in a text file.

[11] A recent ROU provided for Cape Cod Broadcasting, the subject of Exhibit H to the NAB/RMLC Comments, illustrates the kinds of issues that are presented in the messy real world of day-to-day operations. That ROU includes a row of column headers (though not other lines of the header contemplated by the regulations). The columns identified by Sandab include all the data elements contemplated by Section 370.4(d)(2), including alternatives, in the order provided therein, except that channel or program name appears between marketing label and actual total performances, rather than between aggregate tuning hours and play frequency. In the rows that follow, sound recording title information is included in the featured artist column; featured artist names are included in the sound recording title column; and neither ISRCs nor album titles and marketing labels are provided. While this ROU demonstrates that requiring headers is not a panacea when licensees do not match their data to the headers they have voluntarily provided, the larger lesson is that this proceeding is not an academic exercise in which it can be assumed that ROUs are provided in the idealized manner presented by NAB/RMLC.

header consisting of column identifiers.[12] The purpose of the number of rows and checksum is to allow SoundExchange to know when it has received all the data the licensee intended to report. Absent this information, SoundExchange would not know if it had received only an incomplete report.

- NAB/RMLC argue that requiring headers would allow SoundExchange to seek late fees for inadvertent minor errors. As explained in Part III.E.2, it is not SoundExchange's purpose or desire to seek late fees for inconsequential good-faith omissions or errors.

NPR's comments concerning headers primarily trumpet that its uniquely-customized reporting arrangement addresses some of the same issues as SoundExchange's proposal in this proceeding. NPR Comments, at 11. NPR's comments, however, have no bearing on the generally-applicable requirements for licensees that report different data in different formats and do not have its unique organizational structure and reporting arrangements. NPR also cautions that implementing SoundExchange's proposals would require time for NPR stations. However, they have time, because NPR's reporting format is governed by a special agreement through 2015 (and may well be after 2015).

CBI finds the inclusion of the checksum in the header confusing and inapplicable to its members. CBI Comments, at 8. CBI is right that the inclusion of the checksum is inapplicable to its members, because only a handful of NEWs actually report usage currently, and we expect that to continue, as described in Part II. In the case of the handful of NEWs that do report, and that report play frequency rather than performances or aggregate tuning hours, play frequency is

[12] *See* NAB/RMLC Comments, at Exhibit D ¶ 6 (Beasley includes "identification of the reported data fields"). SoundExchange has observed such headers in the ROUs of other commenting broadcasters as well.

the column that would be totaled to derive the checksum. That column easily could be totaled with the spreadsheet software referred to in the various NEW comments.

None of the comments filed by others appears to address the subject of category codes. As described in SoundExchange's Petition (at 14-15), if the Judges make the changes described above concerning consolidation of ROUs, matching ROUs to SOAs, and use of account numbers, SoundExchange believes that the concept of category codes can be dropped from the notice and recordkeeping regulations. If the Judges do not make those changes, category codes would continue to play a useful role in royalty distribution, and the Judges should provide a mechanism to ensure that the category code list is always up to date. Petition, at 14-15.

3. Direct Delivery of Notices of Use

SoundExchange proposed requiring licensees to send copies of their notices of use ("NOUs") to SoundExchange when they file them in the Copyright Office. Petition, at 12-14. This proposal responds to a very basic problem. NOUs contain information useful for the orderly flow of reporting and royalties. That is why the Judges and the Office before them have always required licenses to file NOUs. However, there is little point in collecting the information sought in NOUs if that information is unavailable to the people who need to use it – and principally that is SoundExchange.

The Office has generally been helpful in providing NOUs to SoundExchange. It sends batches of NOUs to SoundExchange once per month by email once it has received a check for the proper filing fee, the check has cleared, and the Office has resolved any issues with the filing. However, these deliveries are sometimes delayed when (1) waiting for a check to clear causes delivery of an NOU to slip into the next month, (2) the Office has had issues (such as a payment problem) that cause delivery of an NOU to slip for a month or more, or (3) staff turnover or other

issues in the Licensing Division have caused it to miss deliveries. As a result, SoundExchange has sometimes been able to access NOUs only after repeated requests or months of delay. From time to time, SoundExchange has discussed with Copyright Office staff whether SoundExchange could pull new NOUs more frequently itself, but that has not been practicable, primarily due to the way NOUs are filed in the Licensing Division.

If the Judges wish to have a system in which royalties are promptly and properly processed, that system should not depend upon a flow of NOU information that is slow and has at times been incomplete and irregular. SoundExchange is open to fixing that problem by means other than what it proposed. However, if the Judges choose not to address that problem, they should understand that they are choosing to implement an unreliable system that risks delaying the orderly flow of reporting and royalties.

Against that backdrop, NAB/RMLC oppose direct delivery of NOUs, but do not have any useful suggestions to address the underlying problem. NAB/RMLC Comments, at 80-82. First, NAB/RMLC suggest that SoundExchange's request should be denied unless SoundExchange undertakes to make NOUs available to the public. MRI makes a similar suggestion. MRI Comments, at 4. However, this is a solution in search of a problem. We are not aware of demand for NOUs by anyone other than SoundExchange, and whatever public demand for NOUs there might be is served by the Licensing Division. It makes no sense to impose an unnecessary and duplicative public records function on SoundExchange as a condition to addressing the genuine problem of getting NOUs to SoundExchange in the first place.

Then, NAB/RMLC question SoundExchange's need for the information contained in the NOUs on the theory that similar information is supposed to be contained in ROUs. However, NOUs have always done more than formalize a license's choice to rely on the statutory licenses.

NOUs alert SoundExchange to expect reporting and payments from a new licensee; allow it to set up a new licensee account; and provide a way for SoundExchange to contact the licensee to explain the requirements of the statutory license and how to submit payments, SOAs and ROUs, and to follow up if reporting and payment are not forthcoming, or are not clearly identified when received. While NAB/RMLC do not propose eliminating NOUs, they are essentially arguing against the principal purpose of NOUs. If the Judges wish to implement a reliable system for the orderly processing of reporting and royalties, they should not relegate NOUs to the files of the Licensing Division while leaving SoundExchange to guess that an ROU that cannot readily be matched to a known licensee is an ROU from a new licensee.

NAB/RMLC suggest that if SoundExchange wants NOUs it should go to the Copyright Office to get them. However, as explained above, the problem is not SoundExchange's ability to communicate with the Office or its willingness to visit the Office if necessary, but establishing a reliable and timely flow of data from the Office.[13]

Finally, NAB/RMLC reiterate their refrain that any requirement is an excuse for SoundExchange to seek late fees for inadvertent minor errors. However, this proposal concerns delivery of NOUs, not ROUs, and so would not be reached by SoundExchange's proposed late fee provision. This purported concern is simply out of place.

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[13] WKNC similarly points out that a list of licensees that have filed NOUs is available on the Copyright Office website at http://www.copyright.gov/licensing/114.pdf, and suggests that the Office could provide updates to SoundExchange by means of an RSS feed. WKNC Comments, at 2. However, that list has not always been updated regularly; is in alphabetical order so new entries are not evident; and does not include most of the information contained in the NOUs, particularly the licensee's contact information. Receiving NOUs from the Office in real time by some kind of automated process would be welcome, but it is not in SoundExchange's power to make that happen.

The template comments filed by the various NEW commenters say that they "feel" direct delivery of NOUs is unnecessary and likely to be overlooked. *See, e.g.*, KBCU- Comments, at 2; WSDP Comments, at 2. It may well feel unnecessary for them to provide the information contained in NOUs – they, after all, are not in a position where they have to figure out how to properly account for royalties they receive from payors they have never heard of. It must be remembered that filing an NOU is, for most services, a one-time event. While a few commenting NEWs do not appear ever to have filed an NOU, most of the NEWs expressing concerns about this requirement will probably never file an NOU again. When webcasters do file an NOU, an appropriate instruction on the NOU form and/or the licensee section of SoundExchange's website indicating that a copy should be sent to SoundExchange should be sufficient to allay any concerns about overlooking the requirement.[14]

B. Flexibility in Reporting Format

1. Certification/Signature Requirements

SoundExchange proposed an amendment to Section 370.4(d)(4) to allow an ROU certification to accompany (rather than necessarily being included in) the ROU. SoundExchange also asks the Judges to eliminate the requirements in 37 C.F.R. § 380.13(f)(3) and § 380.23(f)(4) that SOAs bear a handwritten signature.[15] Petition, at 15-17; SoundExchange Comments, at 5. NAB/RMLC support SoundExchange's proposal. NAB/RMLC Comments, at 68.

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[14] The template educational webcaster comments also indicate that online submission of NOUs with a credit card payment would solve a "problem" for them. It is not clear what this problem is for an educational webcaster that has already filed its NOU. However, the Office's choices about how to receive NOUs and the applicable filing fees do not seem relevant to the issue of how to reliably get NOUs from the Office to SoundExchange.

[15] The handwritten signature requirements in 37 C.F.R. § 380.4(f)(3) and 384.4(f)(3) have been eliminated since the filing of the Petition. 79 Fed. Reg. 23,102, 23,129 (Apr. 25, 2014) (amending 37 C.F.R. § 380.4(f)(3)); 78 Fed. Reg. 66,276, 66,278 (Nov. 5, 2013) (amending 37 C.F.R. § 384.4(f)(3)).

CBI supports this proposal, but only if a typed signature is a sufficient electronic signature. CBI Comments, at 9. Similarly, SCAD Radio expresses concern about this proposal based on a lack of understanding of how to use an electronic signature. SCAD Radio Comments, at 2. However, SoundExchange's proposal would not require any licensee to use an electronic signature. While SoundExchange hopes that licensees will find it convenient to sign and submit their SOAs electronically, licensees that do not wish to do so could continue to provide SOAs that have a handwritten signature as they have been required to do all along. Moreover, a typed signature may well constitute a legally sufficient electronic signature.[16] In any event, SoundExchange would provide appropriate instructions for electronically signing and delivering SOAs when it makes that functionality available. The proposed change simply removes an unnecessary impediment to use of electronic signatures where desired. It need not be feared by NEWs.

2. Character Encoding

SoundExchange proposed modernizing the character encoding requirements in the notice and recordkeeping regulations to provide more options for reporting and to facilitate more accurate distributions of royalties.[17] In particular, SoundExchange proposed (1) allowing licensees to choose an appropriate encoding format, with a preference for the UTF-8 encoding

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[16] *See* 15 U.S.C. § 7006 (defining an "electronic signature" as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record").

[17] Character encoding is the manner in which letters, numbers, punctuation marks and the like are represented as 1s and 0s for purposes of processing by a computer. There are many different systems for character encoding. ASCII is probably the most limited, because it is capable of representing only 128 characters: the letters A-Z and a-z, the numbers 0-9, and some basic punctuation marks and control codes. The UTF-8 format allows encoding of more than an additional million characters, including non-Roman alphabets and diacritical marks, and so can support every system of writing in a way that ASCII just does not. Petition, at 17-18.

format if feasible, and (2) requiring licensees to identify the character encoding format they choose to use in the ROU header. Petition, at 17-18.

SoundExchange's analysis indicates that licensees – including broadcasters – regularly provide ROUs encoded in non-ASCII formats, including UTF-8. In connection with the preparation of these Reply Comments, SoundExchange examined ROUs from a selection of 30 webcasters consisting mostly of broadcasters, and found that only 20 of the ROUs were readable in ASCII format.[18] That is not surprising, because character encoding is not something that ordinary computer users focus on, and the long-term trend has been for systems increasingly to default to non-ASCII character encoding formats. SoundExchange can process an ROU using almost any character encoding format, but strongly prefers that licensees use UTF-8 because it can encode any character, including characters from non-English languages that commonly appear in track and album titles and artist names. SoundExchange has recently implemented functionality in its system for ingesting ROUs that automatically tries to identify the character encoding format for each ROU so that it can be read without error. That functionality makes the licensee's identification of the character encoding format it used (item 2 above) less important than it was at the time SoundExchange filed the Petition, although the identification is still desirable to avoid errors and to account for situations in which a licensee chooses a more obscure format.

NAB/RMLC does not object to permitting use of the UTF-8 encoding format, but opposes SoundExchange's proposed preference for that format. NAB/RMLC Comments, at 83-84. NAB/RMLC's opposition to SoundExchange's preference for UTF-8 is puzzling, both

[18] Some of those may have been written in non-ASCII formats, but were nonetheless readable as ASCII files because they used a format backward compatible with ASCII and did not use non-Roman characters.

because choosing among character encoding formats is not typically difficult and because the essence of SoundExchange's proposal is that licensees should be able to choose the character encoding format they use. The purpose of the preference for UTF-8 is simply to steer licensees that can readily choose among character encoding formats toward a format that supports every system of writing, rather than one that is only capable of representing the Roman alphabet. SoundExchange doubts that broadcasters are as committed to ASCII as NAB/RMLC's comments indicate, because, for example, it appears to SoundExchange that Clear Channel, CBS and Univision use UTF-8;[19] Cox uses ISO 8859-1;[20] and Entercom uses Windows-1252. However, if there are broadcasters using ASCII (or some other format) that would need to make a material effort or incur a material expense to change, SoundExchange's proposal is designed to allow them to continue in their present course of conduct. No broadcaster should feel that an option is being "suddenly pulled out from under them" by SoundExchange's proposal.

Various individual webcaster commenters seem similarly confused by SoundExchange's proposal. WSOU agrees with SoundExchange concerning the limitations of ASCII, but expresses concerns about its not knowing the technical specifications of UTF-8 before finding comfort in the flexibility provided by SoundExchange's proposal. WSOU comments, at 4. Its final point is the right one. If WSOU submitted ROUs, it would likely be easy for it to choose to do so in UTF-8 format without understanding the technical details of how UTF-8 is implemented. But if not, it could choose an alternative format. The Blast FM characterizes the change to UTF-8 as a "hassle," The Blast FM Comments, at 1, but likewise would not need to

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[19] Univision's choice of UTF-8 is appropriate given the use of diacritical marks in the Spanish language, which is used to identify much of the repertoire Univision uses.

[20] While Cox "identified a need to continue to use ASCII" to assure compatibility with the systems it uses to generate ROUs, NAB/RMLC Comments, at Exhibit C ¶ 8, it appears to SoundExchange that those systems are not actually generating ROUs in ASCII format.

change if that is really the case. KUIW opposes SoundExchange's proposal, but because it "may not have the students to do any kind of input." KUIW Comments, at 2. However, if KUIW were required to provide ROUs, the character encoding format for its ROU output file would have nothing to do with the amount of data entry involved. By contrast, Lasell College Radio and WJCU seem to understand SoundExchange's proposal, and so support it. Lasell College Radio Comments, at 2; WJCU Comments, at 2.

CBI argues that NEWs should be able to use their choice of character encoding format, but should not be required to tell SoundExchange which format they used. CBI Comments, at 9. This point is largely academic, because almost no NEWs provide ROUs now, and we expect that to continue, as described in Part II. Moreover, to the extent NEWs prepare their ROUs using Excel software and SoundExchange's template, that template will be configured to make it easy for licensees to use Excel to generate a UTF-8 output file (assuming the Judges adopt SoundExchange's character encoding proposal).

3. XML File Format

SoundExchange proposes to make XML (Extensible Markup Language) a permissible (not mandatory) alternative file format for delivery of ROUs. Petition, at 19. Most of the comments do not address this proposal. The discussion of this proposal in the NAB/RMLC Comments is confusing because it is combined with its discussion of the character encoding format. NAB/RMLC comments, at 83-84. The encoding of characters and the formatting of files are distinct concepts.[21] However, because NAB/RMLC say use of XML should be optional,

[21] A file is a collection of characters that are encoded in some format. The selection of a character encoding format and the selection of the format for the file in which the encoded characters will be delivered are separate and independent choices.

and that is exactly what SoundExchange proposes (*see* proposed Section 370.4(e)(2)), it appears that NAB/RMLC support SoundExchange's proposal in this regard.

C. Facilitating Unambiguous Identification of Recordings

1. ISRC, Album Title and Label

Under current regulations, PSS are required to include in their ROUs, among other information, the album title, the marketing label, and the International Standard Recording Code ("ISRC"), "where available and feasible." 37 C.F.R. § 370.3(d)(5), (6), (8). Other types of services may report either the ISRC or the album title and marketing label. Overwhelmingly they choose album title and marketing label, or do not report any of the three. Of the three, ISRC is the one data element with the most power to identify recordings accurately and unambiguously.[22] SoundExchange proposed that the PSS requirement be extended to the other types of services. Petition, at 21-23.

SoundExchange's proposal to require ISRCs "where available and feasible" reflects the simple fact, which the Judges have recognized, that "[b]efore [SoundExchange] can make a

[22] For example, the artist Sam Smith has released at least six different recordings of his popular song "Stay with Me":

Artist	Track	ISRC
Mary J. Blige | Sam Smith	Stay With Me [Darkchild Version]	GBUM71402190
Sam Smith	Stay With Me	GBUM71308833
Sam Smith	Stay With Me [Darkchild Version]	GBUM71401356
Sam Smith	Stay With Me [Live]	GBUM71402928
Sam Smith	Stay With Me [Shy FX Remix]	GBUM71401439
Sam Smith	Stay With Me [Wilfred Giroux Remix]	GBUM71401440

If a licensee reported to SoundExchange only that it used the recording "Stay with Me" by Sam Smith, the licensee might have used any of Sam Smith's six recordings of the song. Identifying the recording as from the album *In the Lonely Hour* would likely point to his main studio recording of the song, although his duet with Mary J. Blige was included as a bonus track on at least one version of that album. His other recordings of the song appear to have been distributed as digital singles and an EP, but not on an album. Under these circumstances, a licensee's reporting of the ISRC of the specific recording it used would unambiguously identify that recording in a way that reporting of artist name, track title and album title would not.

royalty payment to an individual copyright owner, [it] must know the use the eligible digital audio service has made of the sound recording." 73 Fed. Reg. at 79,727-28. When SoundExchange receives from a licensee in an ROU a line of usage data that cannot be matched to a known recording and/or payees with reasonable confidence, either because the data provided is incomplete or because the data, although complete, could describe any of several known recordings with different payees, SoundExchange has no means of knowing which recording the service actually used, and hence who should be paid for the use.

As described in Part I, an average of 29% of the lines of data in the ROUs ingested by SoundExchange last year could not be matched automatically to known repertoire, resulting in delays in distributing about 23% of statutory royalty payments. This indicates an extremely high level of missing or erroneous data for many services, given that for some services, fewer than 1% of lines of reported usage data could not be matched automatically. Many licensees have an average match rate under 50%. This is a particularly high number when one understands that SoundExchange's systems have long been designed to "learn" from the manual matching that SoundExchange does. That is, if a particular line of data reported by a licensee cannot be matched automatically, and SoundExchange then determines through a manual process that it likely was intended to identify recording *X*, SoundExchange's systems will thereafter automatically match that licensee's reporting of the same identifying information to recording *X*. To have 29% of lines not match automatically despite this feature of SoundExchange's systems requires a large and steady stream of new ambiguities and errors.

This low match rate reflects a mix of causes that are difficult to separate and quantify. To some extent, the set of data elements currently required by the ROU regulations is not sufficient to identify recordings unambiguously even when the required information is reported

completely, accurately and unambiguously. To an even greater extent, licensees fail to report the currently-required data elements completely, accurately and unambiguously. There are tens of millions of commercial recordings, and SoundExchange maintains over 90,000 artist accounts and about 30,000 copyright owner accounts. With numbers like that, there are a lot of names that sound a lot alike, particularly when abbreviated. For example, the label name "Boss" is reported for many tracks. However, Boss, Boss Productions, Boss Records and Boss Sounds are different copyright owner royalty recipients represented in SoundExchange's repertoire database. SoundExchange has also received reports of a Boss Entertainment, and other record labels have Boss in their names (*e.g.*, Big Boss Records). It appears that licensees sometimes use the single word "Boss" to identify at least several of these different entities.

In each case, the answer to these problems is the same. Generally reporting more data elements, even if some specific items are sometimes missing, inaccurate, indecipherable or ambiguous, will both tend to increase SoundExchange's automatic match rate and facilitate manual matching. Ten years ago, when it settled on the data elements presently required in ROUs, the Copyright Office "emphasized that they represent the minimum requirements," and that it was "*highly likely* that additional requirements will be set forth after the Office has determined the effectiveness of these interim rules." 69 Fed. Reg. at 11,518 (emphasis added).[23]

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[23] Given that the current requirements have always been viewed as the minimum necessary to enable proper payment of artists and copyright owners, the Judges should reject NAB/RMLC's suggestion to require reporting of only title and artist information, thereby reducing SoundExchange's match rate further. NAB/RMLC Comments at 23-35. Even NAB/RMLC concede that title and artist would enable unique identification of the actual recordings used only about 90% of the time. NAB/RMLC Comments, at 33. Moreover, the source on which they rely explains that 90% applies only to contemporary music, and that the number is 70-80% for older music. NAB/RMLC Comments, at Exhibit F ¶ 16. The statutory license system must pay artists and copyright owners a higher percentage of the time. Given the problems described above that

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Now that the volume of statutory royalty payments and reported usage has increased significantly, and is increasing rapidly, the Judges should elevate ISRC data beyond its status as an alternative reporting option in the "minimum requirements," to seek ROU data that would allow more rapid and accurate distribution. More frequent reporting of ISRCs is the one single thing that is most likely to increase matching, and hence proper payment of artists and copyright owners entitled to royalties. The time has come for other services to report ISRC when available and feasible, in the same manner the PSS have since 1998 and is common in direct license relationships.

Other commenters were deeply divided concerning this proposal. A2IM strongly supported it. Sirius XM, MRI, and apparently the many webcasters that didn't file initial comments in this proceeding accepted it. Broadcasters and their representatives opposed it.

a. Comments Accepting SoundExchange's Proposal

A2IM strongly supported SoundExchange's proposal. It explained that independent record companies release and own "the largest group of sound recordings," and often release recordings by artists that are less famous and less identified with specific labels than in the case of major label recordings. A2IM Comments, at 2. It advocated reporting of ISRC where available and feasible as the best solution for improving accuracy of royalty distributions to independent labels and their artists. *Id.* at 3.

Sirius XM accepted SoundExchange's proposal on the understanding that these data elements only would have to be provided when available. Sirius XM Comments, at 2. MRI indicated that it is "well aware" of the data matching issues that motivated SoundExchange's

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on average only yield a 71% initial match rate under the current regulations, delivery of fewer data elements would certainly drive that rate down significantly.

proposal, and cited various reasons for these problems. It suggested minor clarifications addressing the availability of these data elements. MRI Comments, at 4-5.

As SoundExchange emphasized in its initial comments, Sound Exchange has proposed the same standard that has been applicable to PSS for over 15 years, which requires services to provide an ISRC only when the ISRC is available and it is feasible for the licensee to provide it. SoundExchange Comments, at 6-7. Thus, SoundExchange agrees with the principle expressed by Sirius XM and MRI that licensees should not be required to provide any data element that does not exist for a particular recording. SoundExchange agrees with Sirius XM (but not MRI) that it is not necessary to add any additional language to the proposed regulations to achieve that result. For as long as there have been notice and recordkeeping regulations, there have been instances of the types cited by Sirius XM and MRI in which particular data elements do not exist for particular recordings. However, SoundExchange is not aware of anyone previously suggesting that the Judges' rules might require a service to provide information that does not exist, nor is it aware of any disputes in that regard. While SoundExchange is not opposed in principle to clarifying that proposition, it would have to be done with some care to avoid creating unwanted implications that the Judges previously or in other respects did require delivery of information that does not exist for particular recordings. This simply seems unnecessary.[24]

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[24] Sirius XM did not advocate, but said it "would support" a requirement that SoundExchange make ISRCs available in a format convenient for each licensee. Sirius XM Comments, at 2. Since nobody has proposed such a thing, it is not necessary to say more. However, SoundExchange *is* exploring ways to make ISRCs more available to licensees, if the necessary investment of artist and copyright owner resources is justified by a greater promise that licensees might use them in reporting. Because Sirius XM's suggestion contemplates significant technical interaction between individual licensees and SoundExchange, that suggestion is more properly left for exploration on a voluntary basis between SoundExchange and services that have the capability and interest to pursue it.

b. Comments Opposing SoundExchange's Proposal

Broadcasters and their representatives vigorously opposed SoundExchange's proposal, and NAB/RMLC suggest that the Judges take a large step in the opposite direction by requiring reporting that is less comprehensive.[25] NAB/RMLC Comments, at 20-23, 46-48, 50-54. NAB/RMLC offer four reasons in support of their objection, all of which are unavailing.

First, they contend that ISRCs are not available. NAB/RMLC Comments at 36-39. The thrust of NAB/RMLC's argument is that "many sound recordings have no ISRC assigned."[26] NAB/RMLC Comments at 36. They assert that many "sound recordings made before 1989 often have no ISRC" and "many smaller independent labels and self-published artists do not obtain them." NAB/RMLC Comments at 36-37.

NAB/RMLC vastly overstate the degree to which sound recordings in commercial use have not been assigned ISRCs. While some record companies were slower than others to adopt the ISRC standard, and it may have been true a decade ago that many record companies did not assign ISRCs to their recordings, a very high proportion of commercial recordings have an ISRC assigned to them today, whether or not they were first released after adoption of the ISRC standard. As a label executive explained during a recent music licensing roundtable conducted by the Copyright Office, "on the label side we have been working with ISRC for about 20 years,

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[25] The new exemptions from reporting that NAB/RMLC propose are addressed in Parts IV.B-.D. To the extent that NAB/RMLC argue that it is too burdensome for them to figure out what album a recording came from, we note that statutory licensees are required by 17 U.S.C. § 114(d)(2)(C)(ix) to identify the album title to the listening audience as a condition of the statutory licenses.

[26] As part of this section of their comments, NAB/RMLC also suggest that where ISRCs are assigned, services do not necessarily have ready access to them. We address that as part of NAB/RMLC's second argument.

and I think we are pretty good about ISRCs assigned to all the products."[27] Apple – by far the dominant provider of digital music downloads in the U.S. – now requires that all sound recordings available in the iTunes store and its related services have an ISRC assigned to them.[28] That is a powerful incentive for a record company or distributor to assign ISRCs to its recordings, and iTunes offers a catalog of over 26 million recordings.[29] SoundExchange expects that with its next database update this month it will have ISRCs for about 14 million recordings.

Nonetheless, NAB/RMLC try to sow doubt about the availability of ISRCs by addressing at length the supposed state of ISRC use by independent artists. E.g., NAB/RMLC Comments, at 36 & Exhibit L. However, this has little or nothing to do with the actual operational concerns of broadcasters. In a more candid part of NAB/RMLC's comments they explain that broadcasters are "likely to play more 'mainstream' music, with playlists that are necessarily more limited than those of large multi-channel webcasters like Pandora." NAB/RMLC Comments, at 52. NAB/RMLC's professed concern for the unavailability of ISRCs for music by independent artists is just misdirection.[30] In fact, ISRCs are readily available for the vast majority of commercial recordings, and as described below, SoundExchange intends to facilitate their availability further.

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[27] Transcript of New York Roundtable in Copyright Office Docket No. Docket No. 2014-03, at 334 (June 23, 2014) (statement of Andrea Finkelstein, Sony Music Entertainment).

[28] *iTunes Music Provider: Frequently Asked Questions*, https://www.apple.com/itunes/working-itunes/sell-content/music-faq.html.

[29] http://www.apple.com/pr/library/2013/12/16BEYONC-Shatters-iTunes-Store-Records-With-Over-828-773-Albums-Sold-in-Just-Three-Days.html?sr=hotnews.rss

[30] NAB/RMLC also suggest that assignment of ISRCs is prohibitively expensive. NAB/RMLC Comments, at 36, Exhibit K ¶ 6. However, this is simply wrong as applied to anyone in the business of creating and marketing recordings. For a one-time (not annual) $80 registration fee, a label (including an artist) can receive a registration code enabling it to assign up to 100,000 ISRCs per year. https://www.usisrc.org/faqs/registration_fees.html. And a long list of approved ISRC Managers can provide individual ISRCs for artists or labels who do not wish to manage their own ISRC assignment. https://www.usisrc.org/managers/index.html.

Moreover, NAB/RMLC's argument that ISRCs are not available is also beside the point. As explained above, SoundExchange has proposed that services only be required to provide an ISRC when an ISRC is *available* and it would be *feasible* to provide it – as has been the case with the PSS for over 15 years. If a particular sound recording has no ISRC, the ISRC obviously would not be "available," and there would be no expectation that the service would provide one.

Second, NAB/RMLC argue that it would not be economically reasonable for broadcasters to try to associate ISRCs with the recordings they use, and *SoundExchange* should "associate ISRCs with other sound recording identifying information" instead.[31] To the extent this argument is about who has "the burden" of "looking up" ISRCs, it demonstrates a fundamental misunderstanding of the role of ROUs and of the problem that SoundExchange seeks to solve through the provision of ISRCs in ROUs. The purpose of ROUs is *not* to help SoundExchange learn the ISRCs of sound recordings that licenses report having used. Instead, the purpose is for SoundExchange to obtain from licensees accurate and unambiguous identification of the specific recordings that the licensee has used.

The identity of the specific recording that a licensee has used is not information "that SoundExchange already has collected." NAB/RMLC Comments, at 41. That is information that the licensee creates anew each month, and that is known to SoundExchange only when the licensee provides it to SoundExchange. The purpose of the notice and recordkeeping regulations is to prescribe how the licensee will communicate that information. *See* 17 U.S.C. § 114(f)(4)(A). ISRCs and other sound recording identification elements in ROUs are the way in

[31] NAB Comments at 39-41, Exhibit C ¶ 5 (suggesting that SoundExchange should match broadcaster-provided title and artist information to ISRCs), Exhibit F ¶ 17 (same).

which the licensee describes to SoundExchange the recordings it has used, and including ISRCs in ROUs would identify the recordings used with greater precision.

Embedded within NAB/RMLC's economic reasonableness argument is a question of how licensees feasibly acquire and report ISRCs. As a practical, operational matter, there are a variety of sources from which ISRCs are available. NAB/RMLC make much of various examples of promotional CDs with minimal identifying information and no perceptible ISRCs. *See* NAB/RMLC Comments, at 38. However, NAB/RMLC's own comments suggest that most broadcasters get most of their music from services such as PlayMPE, an online resource that typically provides a variety of associated metadata, including ISRC.[32] More generally, and as explained in the Petition, larger services that receive electronic copies of recordings from record companies and digital distribution companies should typically receive ISRCs as part of the accompanying metadata. To the extent services obtain recordings from commercial products, the ISRC generally should be encoded thereon, and when present, easily can be extracted with widely-available software tools. Petition, at 22-23. When a licensee does not have immediate access to ISRCs by one of those means, good ISRC databases are available on the internet.[33]

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[32] NAB/RMLC Comments, at Exhibit B ¶ 6-7 (Salem gets "the vast majority" of its new music from PlayMPE); NAB/RMLC Comments, at Exhibit E ¶ 5-6 (West Virginia Radio receives most of its music from music service providers, particularly Play MPE); NAB/RMLC Comments, at Exhibit G ¶ 6-7, 11 (referring to WDAC acquisition of recordings from PlayMPE, and implying that ISRC is often available for recordings obtained through PlayMPE); NAB/RMLC Comments, at Exhibit H ¶ 2 (Cape Cod Broadcasting obtains non-classical recordings mostly from PlayMPE and another service).

[33] For example, the U.K. society PPL provides a repertoire database with ISRCs at http://repsearch.ppluk.com/ARSWeb/appmanager/ARS/main and the French Société Civile des Producteurs Phonographiques provides a repertoire database with ISRCs at http://www.scpp.fr/SCPP/Accueil/REPERTOIRE/Catalogue/Choix_catalogue/BasePhonogrammes/tabid/81/language/en-US/Default.aspx. While operated by foreign societies, sound recording repertoire is highly internationalized, so these databases tend to have the ISRCs of recordings popular in the U.S. The thirteen year old SoundExchange testimony on

Footnote continued on next page

The real issue here does not seem to be any shortage of ways for licensees easily to obtain ISRCs, but rather that many broadcasters have chosen not to store in their internal databases ISRCs that are available to them.[34]

SoundExchange anticipates that it will be able to provide ISRCs to interested services, either by offering them an ISRC search capability for recordings in its repertoire database or supplying them ISRCs that are missing from their ROUs (when the recordings can be identified in SoundExchange's repertoire database with reasonable confidence from other available information including the album title and marketing label name).[35] Of course licensees will still need to identify the particular recordings they use in their services. However, this will provide yet another means for any licensee readily to obtain ISRCs for recordings in its library.

As a result of the foregoing, SoundExchange believes that it generally should be feasible for licensees to acquire ISRCs and include them in their reports of use. However, if not, its

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which NAB/RMLC relied for the proposition that ISRC information is not publicly available is simply out of date. *See* NAB/RMLC Comments, at 39.

[34] *See, e.g.,* NAB/RMLC Comments, at Exhibit B ¶ 7 (available data needs to be copied to another database); NAB/RMLC Comments, at Exhibit E ¶ 10 (West Virginia Radio's database has not been configured to store ISRC); NAB/RMLC Comments, at Exhibit H ¶ 6 (Cape Cod Broadcasting does not capture related metadata). In arguing that ISRCs are unavailable, NAB/RMLC rely heavily on a statement provided by Rusty Hodge of SomaFM.com. NAB/RMLC Comments, at 36-39. However, what Mr. Hodge says is that SomaFM has not "stored" ISRCs for most of the recordings in its database. NAB/RMLC Comments, Exhibit K ¶ 5. Mr. Hodge adds that ISRCs can be lost in file conversion. *Id.* ¶ 7. That is to say, services do not retain ISRCs that are provided to them.

[35] Like Sirius XM, NAB/RMLC allude to the possibility of SoundExchange "decid[ing] someday to make its database available for services to use" or even "the Judges mandat[ing] such disclosure." NAB/RMLC Comments, at 41. While SoundExchange intends to make its repertoire database information (including ISRCs) available to services, a *requirement* that SoundExchange make its database available would be inappropriate. As RMLC's counsel Mr. Greenstein explained when he was representing SoundExchange last time such a suggestion was made, "[t]he CRB lacks the authority to expropriate SoundExchange's database for the benefit of licensees." Reply Comments of SoundExchange, Inc. in Copyright Office Docket No. RM 2005-2, at 25 (Sept. 16, 2005).

proposal is designed to provide flexibility in this regard. SoundExchange has only proposed that licensees be required to provide an ISRC when the ISRC is *available* and it is *feasible* for the licensee to provide it. This limitation has been part of the reporting regulations for the PSS for 15 years. Our understanding is that when the Judges required the PSS to provide ISRCs only when feasible, the Judges meant to indicate that licensees would not need to do that which is commercially impracticable. That language seems entirely sufficient to address the issues of "small services with few staff and limited resources" as to which NAB/RMLC profess concern. NAB/RMLC Comments, at 40.[36]

Third, NAB/RMLC contend that it would be unreasonable to expect licensees to provide ISRCs because SoundExchange and the RIAA "strongly opposed" mandating the provision of ISRCs in a separate Copyright Office proceeding that relates to an entirely different issue. NAB Comments at 41-42. The Judges should not be persuaded by their attempt to take prior comments made by SoundExchange and the RIAA out of their context.

The statements referred to were made in response to a Notice of Inquiry in which the Copyright Office sought advice on how to reengineer its platform for recording documents related to copyrighted works. *See Strategic Plan for Recordation of Documents,* 79 Fed. Reg. 2696 (Jan. 15, 2014).[37] The Office sought comments on, among other things, "whether it should adopt incentives or requirements with respect to the provision of standard identifiers" and

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[36] The cumulative comments provided by NEWs say that they are "very relieved" by the qualifier "if feasible." *E.g.*, KNHC Comments, at 2. CBI asserts that ISRC reporting by NEWs "is rarely feasible." CBI Comments, at 9. While few NEWs actually report usage at all, they are correct that SoundExchange's proposal would not require them to report by ISRC when that is not feasible. NPR also objects to this proposal. NPR Comments, at 12-13. However, given its special reporting arrangement, this proposal would not apply to NPR until 2016, and reporting arrangements for the period after 2015 likely will be a matter of discussion between the parties.

[37] *Available at* http://copyright.gov/fedreg/2014/79fr2696.pdf.

whether such provision "would aid in uniquely identifying affected works and in linking Copyright Office Catalog information about works to other sources of information about such works." *Id.* at 2699. SoundExchange took the position that "the Copyright Office *should* facilitate the collection of industry-standard unique identifiers, such as ISRCs." Comments of SoundExchange, Inc., in Copyright Office Docket No. 2014-1, at 4 (Mar. 15, 2014) (emphasis added).[38] SoundExchange added:

> ISRCs have become the standard within the recording industry to identify tracks. Record labels use ISRCs to identify their recordings and incorporate them into the metadata of their recordings that they provide to their digital partners. As examples, Apple's iTunes store requires an ISRC for each sound recording in order to make that recording available for sale to the public, and SoundExchange collects ISRCs from sound recording copyright owners in order to identify accurately their recordings for the purposes of distributing streaming royalties properly. Likewise, digital music services frequently report ISRC information to sound recording copyright owners when they report their usage under direct licenses in order to identify the sound recordings they have streamed.

Id. SoundExchange further explained that, although the Copyright Office should seek to collect ISRCs at recordation, it would be unworkable to make collection of ISRCs *mandatory* for the purpose of recordation because a single copyrighted work subject to recordation may have multiple sound recordings, each with a unique ISRC. *Id.* at 4-5 & n.3. The RIAA offered similar observations. *See* Comments of the Recording Industry Association of America, Inc. in Copyright Office Docket No. 2014-1, at 10 (Mar. 14, 2014) (encouraging the use of identifiers, such as ISRCs, "on a voluntary basis," but explaining that it would be unworkable to require

[38] *Available at* http://www.copyright.gov/docs/recordation/comments/79fr2696/SoundExchange.pdf.

them for recordation because "[e]ach individual version of the recording has a unique ISRC number").[39]

SoundExchange's and RIAA's comments that provision of ISRCs should not be a requirement for the recordation of copyrighted works were directed to unique issues relating to the statutory registration and recordation functions of the Copyright Office, and plainly do not reflect any lack of support for ISRCs by SoundExchange and RIAA. Nothing in these comments suggests that services should not use ISRCs to identify the tracks they report as used. Indeed, the feature of ISRCs that made their mandatory reporting unworkable for copyright recordation purposes – *i.e.* that ISRCs uniquely identify different versions of sound recordings, not copyrighted works – illustrates the reason that ISRCs would be useful here.

Finally, NAB/RMLC contend that providing ISRCs is not necessary, and would actually increase reporting errors. NAB/RMLC Comments, at 42-44. NAB/RMLC are correct that some recordings can be identified unambiguously with less information than others. However, as described above, the reporting that SoundExchange currently receives does not allow automatic matching of about 29% of reported lines of data (corresponding to about 23% of royalties). To the extent that SoundExchange received ISRCs, it would be able to match these lines, increasing the accuracy and speed with which these royalties can be paid to the proper artist and copyright owner.

NAB/RMLC's suggestion that inclusion of ISRCs in ROUs would increase reporting errors is disconnected from operational reality. SoundExchange receives a large amount of poor quality data, including from broadcasters. While ISRCs likely would be misreported occasionally, just like other identifiers, providing an additional data point – particularly one with

[39] *Available at* http://copyright.gov/docs/recordation/comments/79fr2696/RIAA.pdf.

the identifying power of ISRC – would certainly tend to increase matching rather than decrease it.

2. Classical Music

Reporting of usage of classical music has been a persistent problem, because a high proportion of usage is of recordings of a relatively small number of musical compositions, and services often have not provided data sufficient to identify which recording of a composition they used. To improve SoundExchange's ability to match reported usage of classical music to specific recordings and payees, SoundExchange proposed that services be required to identify the featured artist and the recording title with greater particularity than is clear from the current regulations. Petition, at 21, 23-24.

Sirius XM recognizes the difficulties presented by identification of classical recordings and so accepts SoundExchange's proposal with clarifications. It also suggests that the effective date of this requirement be delayed by 12-18 months.[40] Sirius XM Comments, at 2-3. It is not apparent to SoundExchange that Sirius XM's clarifications are necessary:

- Sirius XM suggests that the six fields of data sought by SoundExchange (three relating to identification of each of the featured artist and the recording title) should be required "only where available to the licensee." Sirius XM Comments, at 2. In Section 370.4(d)(2)(ix) of the proposed regulations attached to the Petition and NPRM, SoundExchange suggested qualifying all of these except the composer name and overall title of the work with the words "if any" or "if applicable," and it is not apparent how a service could use a classical recording under the statutory licenses

[40] Similarly, NPR indicates that "changing the field formats of reports of use is technology feasible, [but] it would take a substantial amount of time for NPR/DS to incorporate the changes into the current reporting system." NPR Comments, at 13.

without knowing the composer and work title.[41] To the extent that might be possible in some obscure set of circumstances, any concerns about penalties for failing to provide this information seem fully addressed by SoundExchange's discussion of inconsequential good-faith omissions or errors in the context of the late fees provision (*see* Part III.E.2).

- Sirius XM also said that 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." Sirius XM Comments, at 3. In formulating its proposal, SoundExchange attempted to be as clear as possible that "these are new, separate fields for classical reporting," *id.*, by specifying in Section 370.4(d)(2)(ii) and (iii) of the proposed regulations that there is an exception to the requirement to provide featured artist and sound recording title "in the case of a classical recording," and including the new data elements as a separate item in Section 370.4(d)(2)(ix), reportable only "[i]n the case of a classical recording." While it seems unnecessary, SoundExchange has no objection to making that point even clearer.

SoundExchange also has no objection to providing a reasonable period for implementation of this requirement, and suggests that January 1, 2016 might be a reasonable and easily-administrable effective date for the requirement to provide expanded identification of classical recordings.

The broadcaster commenters take a very different approach from Sirius XM. NAB/RMLC call SoundExchange's proposal "[u]nnecessary and [u]nreasonable." NAB/RMLC

[41] Among other things, it is not apparent how a statutory licensee could comply with the requirement of 17 U.S.C. § 114(d)(2)(C)(ix) to identify the sound recording and album title to the listening audience without knowing this information.

Comments, at 44-46.[42] For its opposition, NAB/RMLC rely primarily on information provided by Cape Cod Broadcasting. NAB/RMLC Comments, at 45 and Exhibit H. However, Cape Cod Broadcasting illustrates the kinds of problems SoundExchange is attempting to address by its proposal. As Mr. Bone explains, Cape Code Broadcasting uses a radio automation system that has been customized by a software developer to meet its specific requirements, and Cape Cod Broadcasting has chosen to configure that customized system to store only work title and composer information. NAB/RMLC Comments, at Exhibit H ¶ 7. This phenomenon is illustrated in Exhibit H-1 to the NAB/RMLC Comments, which shows an example of a work identified in that system only as "Five Hungarian Dances" by Brahms.

As a result of Cape Cod's decision to configure its customized radio automation system to store only limited data, and its sloppy and inconsistent practices for capturing even that, a recent ROU provided for Cape Cod Broadcasting includes:

- In the featured artist column, generally names of musical works, or sometimes component parts or collections thereof (*e.g.*, "Allegro from Cello Sonata in g," "2 Gigues from Pieces de Clavecin," "Classic Cluster#5 (Sat,Bee,Br)");
- In the sound recording title column, generally names of composers, usually just the last name, and sometimes abbreviations of names, groups of composers or other

[42] Some of the comments provided by NEWs also "object" to SoundExchange's proposal. *E.g.*, KBCU Comments, at 3; *see also* CBI Comments, at 10. Some of the NEW commenters object to this proposal even though their comments suggest that they do not actually have "DJs at this time interested in playing classical music." *E.g.*, KSSU Comments, at 4; SCAD Atlanta Comments, at 3; SCAD Radio Comments, at 3. Because the NEWs generally do not seem to use classical music, and they do not report their actual usage when they do, their objections are entitled to no weight. Similarly, NPR calls some aspects of this proposal "unworkable" for its stations. NPR Comments, at 13. However, given NPR's special reporting arrangement, this proposal, if adopted, would not apply to NPR until at least 2016, and any implementation issues at that time likely would be worked out in discussions between the parties.

information (*e.g.*, "BACH," "SANZ, TARREGA, ALBENIZ," "TCHAIK,RACH,TCHAIK," "PUCCINI (Fine day,Belovdad,NessDr");[43] and

- No sound recording identifying information, such as featured artist, ISRC, album title or marketing label.

As the foregoing makes clear, all that Cape Cod Broadcasting has attempted to do is identify musical works, rather than specific recordings of those works, and in many cases it has not even done a very good job of identifying the musical works. This is contrary to the Copyright Office's clear instructions when it adopted the relevant regulations. 69 Fed. Reg. at 11,523-24. It should be apparent that such an ROU is useless for purposes of identifying the recordings actually used by Cape Cod Broadcasting and distributing royalties to artists and copyright owners.

An example illustrates the point. Antonio Vivaldi's *The Four Seasons* is one of the most popular pieces in the classical music repertoire. In just the single ROU described above, it appears that Cape Cod Broadcasting tried to report the use of six different recordings of movements from *The Four Seasons*, for which it identified the featured artist in a manner such as "Vl. conc. in F, Autumn R. 293 P. 257" or "Vl. conc. in g, Summer" (in each case the sound recording title is given as "VIVALDI," and no other identifying information is provided). This can in no sense be said to provide meaningful notice of use of specific sound recordings. See 17 U.S.C. § 114(f)(4)(A). This is also a significant problem. SoundExchange currently holds close to $700,000 in royalties that it cannot distribute because licensees have identified only the

[43] On some lines of the ROU, the fields are reversed or otherwise combined, so the featured artist column includes composers or groups of composers and sometimes the names of works as well, and the sound recording title column includes names of musical works or components or collections thereof.

composer and title of a musical work and not the specific sound recording used. SoundExchange has reached out to Cape Cod Broadcasting concerning ROU compliance on various occasions, including at least twice in roughly the last year concerning data reporting issues leading to extremely low match rates. However, those outreach efforts obviously have not led to a significant improvement in Cape Cod Broadcasting's reporting.

Even in the case of classical music reporting by a service that tries to comply with the applicable regulations, unambiguous identification of classical recordings presents special challenges. This is because the most popular classical musical works – the ones that are used most often by statutory licensees – have been recorded many times, often by performers known for their expertise with certain composers and works, and those recordings are often released and re-released by a small set of labels emphasizing classical music. And classical albums often are titled with the name of the musical work. For example, SoundExchange has database entries for about 500 different recordings of *The Four Seasons* that have been identified as used under the statutory licenses. The Decca label alone has released recordings of *The Four Seasons* by at least six different featured artist combinations.[44] One of the ensembles with a recording of *The Four Seasons* distributed by Decca is I Musici de Roma, an Italian chamber orchestra particularly known for its performances of works by Vivaldi. (There is also a separate ensemble called I Musici de Montreal.) Its recording of *The Four Seasons* distributed by Decca was originally recorded for and released on the Philips label (a corporate affiliate). I Musici de Roma

[44] (1) Janine Jansen; (2) I Musici/Federico Agostini; (3) Neville Marriner/Alan Loveday/Academy of St. Martin in the Fields; (4) Werner Krotzinger/Karl Munchinger/Stuttgart Chamber Orchestra; (5) The Academy of Ancient Music/Christopher Hogwood; and (6) Leopold Stokowski/New Philharmonia Orchestra.

has released a total of at least six different recordings of *The Four Seasons* on the Philips label,[45] and at least another two different recordings of *The Four Seasons* on other labels.[46] Philips has released at least nine other recordings of *The Four Seasons* as well, one of those featuring Felix Ayo, a violin soloist who also performed on two of Philips' I Musici releases of *The Four Seasons*[47] and has released other recordings of the work as well.

Against this backdrop, identifying a use of *The Four Seasons* by title and artist as NAB/RMLC proposes, NAB/RMLC Comments, at 33, 46, does not unambiguously identify a specific recording. If a use was identified by title and artist only as *The Four Seasons*/I Musici, the recording actually used could be any of at least eight different recordings by I Musici de Roma. If a use was identified only as *The Four Seasons*/Ayo, the recording likewise could be any of a number of different recordings. Adding the album title and label as contemplated by the current regulations does not substantially narrow the range of ambiguity when the album title is reported as *The Four Seasons* and the label is Philips.

As Sirius XM recognized, SoundExchange's proposed additional data fields for classical recordings are designed to provide the additional information necessary to allow proper payment. Three of these fields – composer, title of overall work, and title of movement or other constituent part of the work – are necessary to identify the relevant constituent musical work with precision.

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[45] (1) I Musici/Felix Ayo; (2) I Musici/Felix Ayo (again, in a different performance); (3) I Musici/Roberto Michelucci; (4) I Musici/Pina Carmirelli; (5) I Musici/Federico Agostini; (6) I Musici/Mariana Sirbu.

[46] (1) I Musici/Antonio Anselmi, on the Dynamic label; (2) I Musici/Francesco Renato, on the Fratelli Fabbri Editori label.

[47] (1) Felix Ayo/Vittorio Negri/Berlin Chamber Orchestra; (2) Arthur Grumiaux/Arpad Gerecz/Les Solistes Romands; (3) Henryk Szeryng/English Chamber Orchestra; (4) Viktoria Mullova/Claudio Abbado/Chamber Orchestra of Europe; (5) Thomas Wilbrandt/Christopher Warren-Green/Philharmonia Orchestra; (6) Jan Tomasow/Antonio Janigro/I Solisti Di Zagreb; (7) Gheorghe Zamfir; (8) Berdien Stenberg; (9) Raymond Fol Big Band.

While NAB/RMLC object to (and even ridicule) these requirements, this is, as described above, information that Cape Cod Broadcasting currently reports when it identifies *Spring* as having the sound recording title "Vivaldi" (the composer) and the featured artist "Vl. conc. in E, Spring R. 269 P. 241" (the overall work and part). Thus, for these three items, SoundExchange is not asking for an "incredible amount of information," NAB/RMLC Comments, at Exhibit H ¶ 8, but just proposing a format for reporting of information that Cape Cod Broadcasting tracks and reports currently.

As to the other three fields – ensemble, conductor and soloist(s) – the foregoing examples show that it is necessary to identify the combination of featured artists involved in this way to identify unambiguously the particular recording used. Reporting this information will require Cape Cod Broadcasting to do additional work, but reporting the data currently required by the regulations would require Cape Cod Broadcasting to do all or most of that work. The problem here is that for at least a decade Cape Cod Broadcasting has chosen not to store or provide any featured artist identifying information at all. It is time that it start to do so, and as it starts to do so, it should collect and report featured artist information in a way that will unambiguously identify the classical tracks it uses.

D. Reporting Non-Payable Tracks

Some licensees may not be required to make payments to SoundExchange for all the sound recordings they use in their services. For example, in the *SDARS II* proceeding, the Judges determined that use of certain categories of recordings would not be compensable under the royalty structure adopted in that proceeding, and provided for a corresponding adjustment of the payment amount owed by the service. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23,054, 23,072-73 (Apr. 17, 2013); 37 C.F.R. § 382.12(d), (e). The SDARS rate regulations contain specific

provisions requiring identification of tracks for which a service claims a royalty exclusion. 37 C.F.R. § 382.12(h). In this proceeding, SoundExchange proposed language for Section 370.4(d)(2) operationalizing that requirement and extending it to other types of services. Petition, at 24-26. Sirius XM agrees that for services that pay royalties on a percentage of revenue basis, "this is necessary information," although it observes that this requirement should not extend to material such as voice breaks that may be logged in playlists. For services paying royalties on a per-performance basis, however, it asserts that "this is none of SoundExchange's business." Sirius XM Comments, at 3. NAB/RMLC likewise oppose this proposal. NAB/RMLC Comments, at 48-50. Various NEWs "strongly object" to this proposal, although it would not have any effect on them. *E.g.*, KBCU Comments, at 3; *see also* CBI Comments, at 10-11. MRI proposes procedures for addressing disputes if SoundExchange's proposal is adopted. MRI Comments, at 5.

Relatively few licensees have the financial incentive and purported wherewithal to administer licensing at the individual recording level so as to rely on the statutory licenses for some of their usage and direct licenses for other usage, or to exclude from their royalty payments use of particular tracks for which a license may not be required. For the NEWs and the vast majority of other licensees that do not rely on direct licenses or take royalty deductions for pre-1972 recordings or other tracks, SoundExchange's proposal would have no impact whatsoever. They would not be required to make exclusions that they have never made before and have no business reason of their own to make (*e.g.*, because they pay only the minimum fee). Instead, they would continue to report the same scope of usage they currently report (if any), and would flag none of the reported tracks as excluded.

For the relatively small set of usage-intensive licensees with the financial incentive and purported wherewithal to take royalty deductions at the individual track level, the reporting sought by SoundExchange is critical. The Judges adopted the current SDARS reporting requirement because in *SDARS II*, "[d]espite the Judges' requests," even a large, sophisticated service like Sirius XM was "incapable of providing the Judges with accurate data as to the identity and volume of" the recordings exempt from statutory licensing. As a result, the Judges found that "[r]easonable accuracy and transparency are required" to provide confidence that the appropriate payment is made. 78 Fed. Reg. at 23,073. If Sirius XM could not produce an accurate assessment of royalty deductions for use on its SDARS service in response to multiple specific requests from the Judges in the middle of a litigation with millions of dollars at stake, there is no reason to believe that the same systems and staff would do a better job of accounting for use on its webcasting service, or that other webcasters with fewer resources and less motivation would do a better job. Thus, the problem that the Judges identified in *SDARS II* applies equally to all services, whether they pay royalties on a percentage of revenue or per-performance basis. Absent reporting of which tracks services believe to be non-payable, SoundExchange has no practical means of determining whether artists and copyright owners are being properly paid for usage that is payable.

None of the commenters dispute the basic proposition that transparency is necessary to enable SoundExchange to ensure that it is receiving the proper compensation in the face of an inability of the part of services to distinguish accurately between payable and non-payable tracks. Rather, commenters have raised two arguments that challenge whether the Judges have the statutory authority to require reporting of non-payable tracks, neither of which is persuasive.

First, NAB/RMLC argue that their services should not be required to disclose tracks that they believe to be non-payable because the Copyright Act provides for "reasonable notice of the use of their sound recordings under" the statutory licenses, 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A), and does not specifically "require[] reporting of sound recordings not subject to the statutory licenses." NAB/RMLC Comments, at 48-49. This observation is not responsive. Sections 112 and 114 do not identify any of the specific data items that licensees are required to report in ROUs. It is up to the Judges to determine what reporting is necessary to provide "reasonable notice" of services' use of sound recordings. As long as there is little reason to believe that services are capable of accurately distinguishing between those performances that are subject to the statutory license and those that are not, the only way to provide reasonable notice of use of sound recordings under the statutory license is to require services that rely on the statutory licenses for some of their usage, but not all, transparently to disclose what recordings they think they are using outside the statutory license.

Second, Sirius XM and NAB/RMLC contend that they should not be required to report tracks that they believe are non-payable because SoundExchange "has no statutory authority to collect and distribute royalties for sound recordings not subject to the statutory licenses." NAB/RMLC Comments at 49; Sirius XM Comments at 3 (arguing that SoundExchange's "statutory mandate is to collect royalties for performances made under the statutory license"). This too is beside the point. SoundExchange does not seek in these proposed regulations to collect or distribute royalties for non-payable tracks. The issue is that reporting of tracks asserted to be non-payable is essential to accurate collection of royalties for those sound recordings that are payable.

As noted above, Sirius XM has pointed out that, although reporting of directly licensed and pre-1972 tracks is necessary in some circumstances, SoundExchange's proposed regulations could be read to require services to report the transmission of "every voice break, interstitial, introduction, and the like." Sirius XM Comments at 3. Similarly, NAB/RMLC point out that that the current language of Section 370.4(d)(2) arguably requires that result. NAB/RMLC Comments, at 54-55. SoundExchange agrees that licensees should not report these sorts of incidental transmissions, and it is a problem when they do. To clarify that incidental transmissions should not be reported, SoundExchange proposes in Exhibit A revised language for Section 370.4(d)(2) that implements its proposal while also clarifying that incidental transmissions should not be reported.

MRI suggests that if the Judges adopt SoundExchange's proposal, SoundExchange should be required to return an electronic file identifying any disputed tracks. MRI Comments, at 5. If the Judges adopt SoundExchange's proposal, SoundExchange would certainly want and expect to implement business processes for communicating to licensees questions about deductions the licensees have taken. However, it is premature to know exactly what those processes would be, and hence to prescribe them by regulation. SoundExchange would not necessarily know about direct licenses that a licensee may be relying on. Accordingly, SoundExchange would need to use information reported by licensees pursuant to its proposal to investigate possible reporting issues. SoundExchange believes that the nature of its response to perceived under-reporting is a question that it should be left to address in the first instance as an operational matter. If there are subsequent issues, the Judges could consider the matter on a more informed basis at a later time.

E. Late or Never-Delivered ROUs

1. Proxy Distribution

SoundExchange proposes that the Judges grant it standing authorization to make proxy distributions when its board determines that it has done what is practicable to try to secure missing ROUs from a service and further efforts to seek missing ROUs are not warranted. Petition, at 27-29. In general, proxy distribution is not a desirable substitute for having actual usage data on which to base distributions to artists and copyright owners. However, in limited circumstances it has proven to be a satisfactory means of distributing small pools of royalties that cannot reasonably be distributed based on actual usage data.[48] SoundExchange's proxy proposal seems widely supported, although the Judges and various commenters raise questions concerning details of its implementation.

As an initial matter, because some commenters seem confused, it should be understood what is – and what is not – contemplated by SoundExchange's proposal. SoundExchange's proxy proposal addresses cases in which it has not received a useable ROU, and after taking reasonable actions to try to secure the missing ROU, SoundExchange determines that further efforts to seek the missing ROU are not warranted. As described in the Petition, experience shows that SoundExchange's efforts to coax recalcitrant licensees to provide ROUs over a period of years reduce the pool of royalties being held pending receipt of ROUs to a small sliver of the overall royalty pool. SoundExchange's proposal is not intended to address the ordinary case in which it receives an ROU that can be ingested into its royalty system but some lines of reported data do not match known repertoire. In such cases, SoundExchange pays the proper payees for

[48] SoundExchange's Petition stated that it had about $13.1 million in royalties for the 2010-2012 period that are undistributable due to missing or unusable ROUs (about 1.2% of total royalties for that period). Petition, at 28. That number has since fallen to about $9 million.

the matched usage, and attempts manually to identify, and if necessary, research the unmatched usage. If it is ultimately impossible for SoundExchange to identify some of the recordings used (and hence their artists and copyright owners) with reasonable confidence, SoundExchange handles the royalties associated with that usage in accordance with applicable regulations concerning the disposition of royalties payable to unidentified copyright owners and performers. *E.g.*, 37 C.F.R. § 380.8.[49]

NAB/RMLC and NPR support SoundExchange's proxy distribution proposal, although a little too enthusiastically. NAB/RMLC Comments, at 63-65; NPR Comments, at 9.[50] As SoundExchange cautioned in its Petition, there is a risk that licensees that face no compulsion to deliver ROUs, and that understand that their payments will eventually be distributed by proxy, will be even less motivated to deliver ROUs than they are today. Petition, at 29. The various broadcaster comments in this proceeding make clear that broadcasters would prefer not to do any reporting at all. The possibility of proxy distribution when licensees fail to report should not be allowed to become an excuse for non-reporting by licensees. Thus, if the Judges implement SoundExchange's proxy proposal, they should also implement a late fee to motivate reporting.

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[49] While the economic effects of that treatment are analogous to a proxy distribution, in that a reduction of SoundExchange's expenses for a year results in an increase in payments to everyone receiving royalties for that year, the processes are distinct. For clarity, when the A2IM comments refer to the desirability of using ISRCs to avoid use of a proxy process, it is referring to the unidentified payees process, and not to SoundExchange's proxy proposal. *See* A2IM Comments, at 3.

[50] For clarification, when the NPR Comments mention current proxy distribution of CPB payments, they are describing an analogous process of distributing royalties based on less than comprehensive data. That process is a function of the unique reporting arrangements in place for NPR, and is distinct from SoundExchange's proposal here. However, we agree with the thrust of NPR's comments that SoundExchange's proposal is conceptually similar to other situations in which royalties are distributed based on less than comprehensive data, and hence does not need to be subject to a higher level of oversight than other analogous situations.

Sirius XM and MRI recognize that use of a proxy may be necessary in some circumstances, but propose various procedural requirements. Sirius XM Comments, at 3-4; MRI Comments, at 6. Their suggestions are unnecessary and inappropriate.

First, they suggest notice to the service and an opportunity for the service to cure its reporting deficiencies. However, such notice and cure is assumed by SoundExchange's proposal, because the proposal becomes operative only after SoundExchange determines that it has done what is reasonable to seek the missing ROUs. In fact, SoundExchange's license management system will soon allow it to automate the sending of reminder notices to licensees that fail to provide required ROUs. As a result, licensees should expect even more persistent reminders from SoundExchange than when follow-up was a more manual process. Accordingly, providing licensees one last chance to produce an ROU that is years late would simply serve to delay distribution of royalties that should finally be placed into the hands of artists and copyright owners.

Next, Sirius XM and MRI express concerns about the distributive effects of different proxy distribution methodologies and propose a notice and comment process to address such methodologies. SoundExchange agrees that proxies are imperfect. That is why SoundExchange views proxy distribution as a last resort. But the procedures Sirius XM and MRI propose are unnecessary, and not desired by their supposed beneficiaries. Sirius XM and MRI have no stake whatsoever in the methodology used for a proxy distribution. The procedures they suggest could be justified as an expenditure of artists' and copyright owners' money only if those procedures would be welcomed and appreciated by artists and copyright owners. Notably, the artists and copyright owners who would be entitled to comment on the details of particular distribution methodologies under the Sirius XM/MRI proposals have not commented in this proceeding

concerning SoundExchange's suggestion that such details be left to SoundExchange's board. Instead, A2IM – the representative of the constituency for which Sirius XM and MRI express the most concern – is satisfied that it has a voice on the SoundExchange board. A2IM Comments, at 2. Artists and copyright owners understand that SoundExchange's board represents its constituents, and they are content to leave the technical details of how a proxy distribution would be implemented to SoundExchange. The Judges should not require SoundExchange to delay payments to artists and copyright owners – and spend their money – implementing a notice and comment process desired only by commenters with no interest in the matter.[51]

Finally, MRI confusingly argues that SoundExchange should not be able to agree with its members to discriminate against non-members. This concern makes no sense, but other regulations already prohibit SoundExchange from discriminating against non-members. *E.g.*, 37 C.F.R. § 380.4(g).

2. Late Fees

Because late submission of ROUs is a significant problem that delays distribution of millions of dollars of statutory royalties each year, and SoundExchange's proxy distribution proposal, while necessary, might provide licensees an excuse never to provide ROUs, SoundExchange proposed establishing a late fee for ROUs. Petition, at 29-30. The late fee provision it suggested including in Section 370.6(a) was patterned on the ones currently

[51] It also should be noted that, contrary to Sirius XM's and MRI's expressed concerns about SoundExchange favoring more popular repertoire at the expense of less repertoire, the Annual/License Type methodology used for the 2004-2009 distribution, which SoundExchange has said it would expect to be its default methodology, tends to be over-distributive. That is, the Annual/License Type methodology results in distribution of some royalties to everyone whose recordings were used by any other service of the same type, even though many of the less popular of those recordings were probably not used by the specific services whose royalties are being distributed by proxy.

contained in Sections 380.13(e) and 380.23(e) of the Judges regulations' by virtue of settlements with broadcaster groups. SoundExchange believes that this proposal is vitally important, because, as this proceeding has illustrated, some services have not made reporting a priority, and a late fee is the most practicable method of focusing their attention on the need to do better.

Sirius XM does not oppose SoundExchange's proposal, but suggests that (1) there should be no "stacking" of late fees when a service delivers a payment, SOA and ROU late, but on the same day; (2) no late fee should be payable for "inconsequential good-faith omissions or errors"; and (3) SoundExchange should be encouraged to work with services to identify and correct errors. Sirius XM Comments, at 4-5. SoundExchange does not disagree with Sirius XM's suggestions, although it is not clear to us that those suggestions require any changes in the proposed regulatory language:

- Sirius XM cites the Judges' *SDARS I* rate determination as holding that the current late fee provision for SOAs does not contemplate "stacking" of late fees when the payment and SOA are delivered late, but on the same day. Sirius XM Comments, at 4; *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080, 4100 (Jan. 24, 2008). SoundExchange did not intend to achieve a different result when it proposed the late fee for ROUs. The Judges did not see fit to address the subject of stacking specifically in the regulatory language providing late fees for SOAs. As to stacking, the regulatory language SoundExchange proposed to implement the late fee for ROUs does not seem meaningfully different from the language the Judges used to implement the late fee for SOAs. Accordingly it is not evident that stacking needs to be addressed in regulatory language here, although the treatment of stacking is a

matter that could be clarified in regulatory language if the Judges thought it necessary to do so in this context.

- Sirius XM cites the Judges' past determinations that no late fee should be payable for "inconsequential good-faith omissions or errors" in a SOA and suggests that the same principle should apply to ROUs. Sirius XM Comments, at 4; 73 Fed. Reg. at 4100; *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24,084, 24,108 (May 1, 2007). While SoundExchange patterned its ROU late fee proposal most directly on the Sections 380.13(e) and 380.23(e), rather than the somewhat different language of Sections 380.4(e) and 382.13(d) addressed by the Judges' prior determinations, SoundExchange did not expect or intend to collect late fees for inconsequential good-faith omissions or errors in ROUs. As this proceeding has illustrated, SoundExchange routinely receives a high volume of bad data in ROUs – particularly from broadcasters. However, under the ROU late fee provisions of Sections 380.13(e) and 380.23(e) that are applicable to broadcasters, SoundExchange has not sought to collect late fees for "inconsequential good-faith omissions or errors," and would not expect to do so if its proposal were adopted. While the Judges did not see fit to clarify in the regulatory language of Sections 380.4(e) and 382.13(d) that late fees are not payable where a licensee made only "inconsequential good-faith omissions or errors," the Judges could clarify that in proposed Section 370.6(a) if they deem it necessary and appropriate to do so.
- SoundExchange is strongly motivated to – and does – work with services to identify and correct errors where useful, without a regulatory provision requiring it to do so. As described elsewhere in these Reply Comments, bad data reported by licensees has

significant costs for SoundExchange and materially delays distribution of a significant amount of royalties. SoundExchange is well-motivated to reduce those costs and delays when it reasonably can, because the artists and copyright owners that control SoundExchange want their royalties quickly and with the minimum necessary expense deductions. However, this is not a subject that lends itself to regulation, for a couple reasons. First, not all licensees or reporting problems are situated similarly, so a one-size-fits-all approach does not make sense. A level of interaction between SoundExchange and a licensee that might be warranted for a high-paying licensee that has reporting issues that can be corrected by interaction and wishes to take steps to correct those issues may not be warranted for a licensee paying only a small amount of royalties or having different issues or less willingness to correct them. Second, facilitating future automatic processing of ROUs with errors does not necessarily require interaction between SoundExchange and the licensee. As described in Part III.C.1 of these Reply Comments, SoundExchange's systems have long been designed to learn from its previous manual efforts to match a licensee's reported usage to known repertoire. Regulations should not require efforts to address matters that SoundExchange has already addressed through the programming of its systems.

Broadcasters have quite a different perspective on SoundExchange's proposed late fee. NAB/RMLC accuse SoundExchange of seeking to "punish services who have trouble preparing their ROUs and submitting them on time," and oppose SoundExchange's proposal on the grounds that it is not necessary to compensate SoundExchange for the lost time value of money and that the Judges have previously declined to adopt this proposal. NAB/RMLC Comments, at

55-58. While almost no NEWs provide ROUs, NEWs say they are "uncomfortable" with the late fee provision because it might be invoked in the case of "one line of data with missing information or a typo." *E.g.*, KBCU Comments, at 3.[52] CBI echoes its members' comments. CBI Comments, at 11.

The broadcasters' vigorous opposition to SoundExchange's late fee proposal is remarkable, because that proposal was patterned on the late fee provisions of Sections 380.13(e) and 380.23(e) of the Judges regulations, which were negotiated and agreed to by NAB and CBI as part of settlements of the *Webcasting III* proceeding.[53] Despite their professed alarm over making these provisions permanent, the broadcasters do *not* say – nor could they – that SoundExchange has been "harsh" or "unreasonable" or sought to "punish" services in its administration of the current provisions. SoundExchange has been entirely reasonable and judicious in its administration of the current provisions, and would do likewise if the Judges adopt its proposal. To the extent there is any legitimate concern that SoundExchange might seek to apply the late fee provision unreasonably, those concerns are fully addressed by the discussion of immaterial errors above.

As described in Part I, slow and poor quality reporting of usage by licensees remains a problem even after a decade of experience with the notice and recordkeeping regulations, and SoundExchange's efforts to engage with licensees to obtain ROUs and improve their reporting.

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[52] WSOU proposes that late fees be capped at $100. WSOU Comments, at 4. While that might seem like a lot of money to WSOU, it would easily be ignored by a more usage-intensive service.

[53] NAB/RMLC suggest that SoundExchange coerced the broadcasting industry into accepting this provision. NAB/RMLC Comments, at 58 n.16. That suggestion is unfounded. The broadcasting industry is much bigger and more powerful than SoundExchange, and had the option of participating in a proceeding before the Judges if it was not satisfied with its settlement options.

In 2013, lateness in delivering ROUs affected approximately $203 million in royalties (about 31% of statutory royalties), and ROUs that SoundExchange received late were, on average, delivered about 90 days late. Under the quarterly distribution schedule SoundExchange used in 2013, such lateness delayed distribution to artists and copyright owners of about $19 million in royalties (and delayed the distribution of those royalties by at least a quarter). In 2014, SoundExchange has been providing monthly royalty distributions to artists and copyright owners that receive electronic payments and have royalties due of at least $250.[54] Under this schedule, similar lateness will cause delay in distribution of a much larger amount of royalties. Once a useable ROU is received, poor quality data initially delay the distribution of approximately 23% of the royalties associated with ingested ROUs paid to SoundExchange – or about $150 million in royalties for 2013.

While SoundExchange is eventually able to obtain and process data sufficient to distribute with reasonable accuracy all but a few percent of statutory royalty payments, distribution of tens of millions of dollars of royalties is held up for months or years in the process. SoundExchange believes that the possibility of late fees under the provisions that have been applicable to broadcasters for the last several years has been somewhat effective in encouraging broadcasters to provide ROUs on a timely basis. But despite their vigorous opposition to extending those provisions, they are not the only licensees that are late in reporting. The Judges should make the late fee for broadcasters a permanent feature of the reporting regime and extend it to other types of licensees.

[54] NAB/RMLC's statement that SoundExchange makes distributions only quarterly is outdated. *See* NAB/RMLC Comments, at 62.

3. Accelerated Delivery of ROUs

To help speed the flow of royalties to artists and copyright owners, SoundExchange proposed shortening the time for providing ROUs, making it 30 days following the end of the relevant reporting period. Petition, at 30-31. Almost all commenters opposed this proposal. *E.g.*, NAB/RMLC Comments, at 61-63; Sirius XM Comments, at 5; MRI Comments, at 6; NPR Comments, at 12.[55]

SoundExchange continues to believe that its proposal has merit. Under the monthly royalty distribution schedule SoundExchange implemented this year, the current 45-day reporting cycle for licensees means that even when licensees report quality data on time, distributions to artists and copyright owners are delayed by a month relative to what would be possible with a 30-day reporting cycle for licensees.

However, if the Judges decide not to adopt this proposal, SoundExchange would propose in the alternative linking the time for provision of ROUs to the time for providing payments and SOAs for the relevant type of service. Proposed regulatory language implementing this alternative proposal is attached as Exhibit B. This change would allow the Judges to consider in rate proceedings, based on the specific circumstances of the particular type of service involved, whether it would be practicable to shorten both the payment and reporting cycle, creating a future mechanism to accelerate the flow of royalties to artists and copyright owners in specific cases where the Judges consider that reasonable.

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[55] CBI and various NEWs objected to this proposed change. *E.g.*, CBI Comments, at 11; KBCU Comments, at 4. Because almost no NEWs report usage at all, their views concerning how long they might need to report are entitled to no weight.

F. Correction of ROUs and SOAs

SoundExchange occasionally receives from licensees at their own initiative corrected ROUs and SOAs once it has already processed the licensee's ROUs and SOAs for the relevant period and distributed the relevant royalties. Fortunately, such occurrences are relatively uncommon. However, once SoundExchange has allocated the payment on a SOA to usage on an ROU, such corrections are very disruptive to the flow of royalties through SoundExchange. Moreover, while SoundExchange can always allocate an additional payment, downward adjustments may not be recoverable (or take a long time to recover) from some royalty recipients. To provide a clear process for correcting ROUs and SOAs, SoundExchange proposed a new Section 370.7 that would (1) bar licensees from claiming credit for a downward adjustment in royalty allocations after the date that is 90 days after submission of the original ROU or SOA; and (2) permit SoundExchange to allocate any adjustment to the usage reported on the service's next ROU, rather than the ROU for the period being adjusted. Petition, at 31-32.

We did not see that any commenter took exception to SoundExchange's proposal to allow it to allocate adjustments to future usage, which would be computationally and logistically simpler for SoundExchange than adjusting past royalty statements. The Judges should adopt that proposal in any event.

Sirius XM agreed that some deadline for adjustments is appropriate, although it suggested that six or nine months would be more appropriate than three. It also observed that "it should be clear that that this regulation does not impact the separate audit provision," and suggested that the deadline apply to claims by SoundExchange for upward adjustment. Sirius XM Comments, at 6. As to the first of Sirius XM's points, the later the deadline for claiming downward adjustments, the more potential there is for disruption to the orderly flow of royalties

and an inability for SoundExchange to recover royalties that have been distributed. While six months may not seem like all that long, it is long enough that SoundExchange will generally have distributed the vast majority of the relevant payment, and that current playlists will be very different. Receiving restated SOAs and ROUs claiming a downward adjustment within 90 days would be far less disruptive.

SoundExchange agrees with Sirius XM's observation that proposed Section 370.7 should not affect the audit process. Section 370.7 was intended to address the specific issue of licensees' self-reporting of corrections to ROUs and SOAs, and was not intended to address the entirely separate audit process. SoundExchange would have no objection to clarifying that point if the Judges were inclined to do so.

However, because Section 370.7 was not intended to affect the audit process, it is not apparent to SoundExchange that Sirius XM's other suggestion – a reciprocal deadline for claims by SoundExchange for upward adjustment – makes sense. While reciprocity in the adjustment deadline may have some superficial appeal, it must be remembered that the statutory licenses do not provide for reciprocity of information until there is an audit. Before that, all SoundExchange knows about a licensee's usage and royalty obligation is what the licensee has told SoundExchange. Thus, the audit process is the typical vehicle for SoundExchange to make claims for underpayment. Moreover, failing to pay statutory royalties when relying on the statutory licenses constitutes copyright infringement. *See* 17 U.S.C. § 114(f)(4)(B). The Judges could not negate that result by anything they might do in the notice and recordkeeping regulations.

NAB/RMLC oppose SoundExchange's proposed deadline for licensee self-correction of ROUs and SOAs. NAB/RMLC Comments, at 59-60. In part their opposition is based on

SoundExchange's audit right. *Id.* at 60. As described above, SoundExchange did not intend to preclude licensees from raising, as part of the resolution of an audit, errors tending to reduce their royalty obligations. Thus, as a practical matter, the audit clarification suggested by Sirius XM probably address most of NAB/RMLC's real concern.

NAB/RMLC are also just wrong that SoundExchange can – forever – recover past overpayments by withholding future royalty distributions. *Id.* While NAB/RMLC are correct that SoundExchange has reserved the right to recoup overpayments from artists and copyright owners, that does not mean that it is always possible to do so, or to do so quickly. The music business is hits driven, and tastes change quickly. Recordings also change ownership from time to time, and an overpayment to a former owner of a recording cannot be recovered from the current owner. Thus, the longer the time that elapses before an adjustment, the more complicated it is to recover an overpayment, and the less likely it is that SoundExchange will be able to fully recover money that has already been distributed.

It adds insult to injury to suggest that SoundExchange should pay licensees interest on overpayments when SoundExchange has distributed the money to artists and copyright owners, may not be able to recover the overpayments from them, and will have to expend significant effort to process an adjustment. SoundExchange is not a bank. Licensees should pay their royalties accurately, and not view depositing money with SoundExchange as a possible investment option.

NAB/RMLC can't seriously suggest that ROUs and SOAs should perpetually be subject to adjustment. There should be some reasonable deadline for SoundExchange's processing of claimed overpayments. SoundExchange believes that a three month deadline would be appropriate.

G. Recordkeeping

Section 114(f)(4)(A) requires that the Judge adopt regulations pursuant to which records of use of sound recordings "shall be kept and made available by entities performing sound recordings." This recordkeeping obligation is distinct from the "requirements by which copyright owners may receive reasonable notice of the use of their sound recordings." ROUs serve the purpose of providing notice of use.[56] Currently, what is required in the way of recordkeeping for usage is simply that licensees retain copies of their ROUs for three years. 37 C.F.R. §§ 370.3(h), 370.4(d)(6). Because this arrangement does not provide artists and copyright owners any assurance that they will be able to look behind a licensee's ROUs to assess their accuracy in an audit, SoundExchange proposed in Section 370.4(d)(5) that services be required to retain and provide access to unsummarized source records of usage in electronic form, such as server logs or other native data, rather than simply the ROUs that are supposed to be derived therefrom. Petition, at 32-34.

SoundExchange believes that both Section 114(f)(4)(A) and sound policy require the Judges to adopt a more robust recordkeeping requirement. When SoundExchange's auditors have been able to access underlying source records, SoundExchange frequently has found underpayment and underreporting. These practices can have significant economic consequences. In one case, non-reporting of transmissions of 30 seconds or less has been estimated to have led to a 10-20% underpayment. In another case, SoundExchange's auditor found a 16%

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[56] 63 Fed. Reg. at 34,295 ("[b]ecause section 114(f)(2) mandates requirements by which 'copyright owners' may receive reasonable notice of the use of their recordings, provision must be made for individual copyright owners to have access to the Reports of Use"), 34,296 (in Section 201.36(a) describing report of use regulations as "prescrib[ing] rules under which Services shall serve copyright owners with notice of use of their sound recordings"); NAB/RMLC Comments, at 13.

underpayment based on non-reporting of transmissions of 60 seconds or less and of recordings that listeners joined in progress. In such an environment, requiring licensees to retain only their self-serving ROUs, and not the documentation from which those ROUs were derived, does not assure copyright owners of access to genuine "records of . . . use" as contemplated by Section 114(f)(4)(A). This is why voluntary licenses commonly require licensees to retain supporting records, not just copies of the reporting that they provide to their licensors. In the same manner, the Judges should not design a reporting system that provides no meaningful check on licensees that might not be sufficiently motivated to ensure the accuracy of their payments.

Because nobody likes to be the subject of a meaningful audit, commercial licensees and their service provider opposed SoundExchange's proposal. NAB/RMLC Comments, at 65-67; Sirius XM Comments, at 6; Triton Comments, at 6-9.

NAB/RMLC principally argue that this proposal should be rejected because the Judges rejected a proposal for server log retention that was "just litigated" in the *Webcasting III* rate proceeding. NAB/RMLC Comments, at 65. First, SoundExchange's proposal here is different from the one it made in *Webcasting III*. In *Webcasting III*, SoundExchange's proposal was for the retention of "original server logs sufficient to substantiate all rate calculation and reporting." Second Revised Proposed Rates and Terms of SoundExchange, Inc. in Docket No. 2009-1 CRB Webcasting III, at 15 (July 23, 2010). Here, SoundExchange's proposed regulatory language provides "server logs" as an example of permissible record retention, but is intentionally more flexible, allowing licensees to retain "unsummarized source records of usage underlying the Report of Use" that might be appropriate to the circumstances. The point is that licensees use some kind of underlying records to generate their ROUs. Whatever those records are, licensees

should be required to retain evidence of the decisions the licensees made in determining what usage to report to SoundExchange.

Second, the decisional standards applicable to rate cases are different from the requirements of this rulemaking proceeding. In *Webcasting III*, the question was whether SoundExchange's proposed server log retention term "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). Based on the record of that proceeding, the Judges found that SoundExchange "failed to meet its evidentiary burden." *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23,102, 23,125 (Apr. 25, 2014). Here, the question is whether SoundExchange's current proposal is appropriate or even necessary to assure copyright owners of access to records of use as contemplated by Section 114(f)(4)(A). The Judges' *Webcasting III* decision does not speak to that question.

Finally, it is misleading to refer to Webcasting III as "just litigated." While the Judges' most recent Webcasting III decision was published in the *Federal Register* only a few months ago, direct cases in that proceeding were filed in 2009, and the evidentiary record was closed in 2010. Five years after SoundExchange first made its *Webcasting III* server log retention proposal, the Judges should indeed consider SoundExchange's current proposal based on current facts.

Turning to the merits, NAB/RMLC argue that retaining source records of usage would be unduly burdensome. Referring to the need to "[r]etain[] logs of every user connection for three years across multiple stations," the suggestion is that such records would be of such vast size that licensees could not possibly be expected to retain that much data. They challenge

SoundExchange to quantify the burden that it would place on them, while making no effort to do so themselves. NAB/RMLC Comments, at 65.

Of course, broadcasters are uniquely positioned to know how large their unsummarized source records of usage are, and what it might cost them to store those records within their current information technology environments. That they made no effort to quantify these circumstances is a sign that the burden of such storage is really not all that substantial in today's world of "big data" and cloud storage. While the size of such records would obviously depend on the nature of the records and the specific data elements the licensee chooses to include in them, the extent of usage of a particular licensee's service, and the licensee's technological approach to storing the records, the information available to SoundExchange suggests that such records are not at all large by current standards. "Organizations are inundated with data – terabytes and petabytes of it."[57] By contrast, an average webcaster's usage data is relatively compact.

The ROUs SoundExchange receives vary in size between 1 kilobyte and 270 megabytes. Based on the sizes of detailed monthly log files it has examined for SoundExchange and other clients, SoundExchange's audit firm has estimated that detailed webcaster server log files for statutory licensees would likely vary in size within the large range of half a gigabyte to possibly over 65 gigabytes per month, with the latter representing the logs of an extremely usage-intensive commercial webcaster whose logs contain significant sound recording metadata. Thus, the high end of that range represents approximately the largest source records that one

[57] SAS, Big Data Meets Big Data Analytics, http://www.sas.com/content/dam/SAS/en_us/doc/whitepaper1/big-data-meets-big-data-analytics-105777.pdf, at 1; *see also* What is Big Data, http://www.ibm.com/big-data/us/en/ ("Big data is being generated by everything around us at all times. Every digital process and social media exchange produces it. Systems, sensors and mobile devices transmit it.").

realistically might expect to exist. For all licensees, the actual log file size depends on the log file structure and the licensee's archiving practices. For example, log files are much smaller when the licensee links to sound recording metadata stored externally to the log rather than repeating that metadata within the log. While these factors make it difficult to generalize about the size of log files or other source records, SoundExchange understands that even large broadcaster licensees may well have log files that are smaller than five gigabytes per month.

At five gigabytes per month, three years of source records would constitute 180 gigabytes of data, which would fit comfortably on the hard drive of any relatively recent computer. To the extent that a licensee might wish to make special storage arrangements, a three terabyte hard drive is available for $110 or less,[58] and three years of such records would use up only 6% of the space on the drive. Google also offers long-term cloud storage for 2¢ per gigabyte per month.[59] Thus, three years of such records could be stored in the cloud for $3.60 per month. Even at the high end of SoundExchange's audit firm's estimate (which likely would apply only to an extremely usage-intensive commercial webcaster paying many millions of dollars in statutory royalties), and without any efforts to store the data more efficiently, 36 months of records at 65 gigabytes per month would equal less than 2.5 terabytes of data, which would still leave room on that $110 three terabyte hard drive, or cost less than $50 per month to store in the cloud. In the current environment, file size and storage cost just are not reasons that licensees should be allowed to discard their detailed usage data before the end of the audit period.

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[58] *E.g.*, http://www.amazon.com/Seagate-Expansion-Desktop-External-STBV3000100/dp/B00834SJU8/ (as of Sept. 3, 2014 quoting a price of $109.99 for a Seagate 3TB external hard drive).

[59] https://developers.google.com/storage/pricing#storage-pricing.

NAB/RMLC argue that source records, and particularly server logs, might be confusing. NAB/RMLC Comments, at 66. Triton similarly argues that raw data can be misinterpreted, and specifically argues that some short connections may not constitute payable performances. Triton Comments, at 7. However, these suggestions illustrate precisely why SoundExchange should have access to source records underlying ROUs. Preparing ROUs is not a purely mechanical task. Licensees and their contractors like Triton make decisions about what uses they will report and pay for, and which they will *not* report and pay for. In essence, NAB/RMLC and Triton argue that licensees' decisions should conclusively be considered proper, and SoundExchange should have no practical ability to look behind and question those decisions. This is just to say that they would prefer not to be audited. It is not a reason for the Judges to deny SoundExchange access to genuine records of use as contemplated by Section 114(f)(4)(A).

Finally, NAB/RMLC argue that third parties may control server logs, and that the terms in Section 380.15(d) already address access to such records. NAB/RMLC Comments, at 66-67. SoundExchange's proposal specifically addresses access to third-party records, in a way that is compatible with, but not superseded by, Section 380.15(d). Specifically, SoundExchange proposes that "[i]f the Service uses a third-party contractor to make transmissions and it is not practicable for the Service to obtain and retain unsummarized source records of usage underlying the Report of Use, the Service shall keep and retain the original data concerning usage that is provided by the contractor to the Service." Petition, at 56. It appears that broadcasters "are willing to make available to SoundExchange in connection with an audit these relevant records." NAB/RMLC Comments, at 67. Beasley indicates that it already keeps these records for three years. NAB/RMLC Comments, at Exhibit D ¶ 15. For this reason, Triton's expressed concerns about data duplication and storage are simply irrelevant. *See* Triton Comments, at 6.

Sirius XM takes a different approach, arguing that SoundExchange's proposal would transform its audits into "technical audits," and asserting that the Judges rejected the concept of technical audits in the *Webcasting II* rate proceeding. Sirius XM Comments, at 6. However, the portion of the Judges' decision they cite concerned auditor qualifications. 72 Fed. Reg. at 24,109. This decision has no bearing on SoundExchange's current proposal. Notably, Sirius XM has nothing to say about data volumes or data storage costs.

When a service's royalty payments depend on its usage of sound recordings, it obviously would prefer not to have SoundExchange second-guess its decisions about how it has computed its payments. However, that is precisely why the Judges have consistently authorized SoundExchange to verify licensees' royalty payments on behalf of artists and copyright owners. *E.g.*, 37 C.F.R. § 380.6. The Judges' should not make auditing an illusory process, and should instead adopt SoundExchange's source record retention proposal.

H. Proposals SoundExchange Characterizes as Housekeeping

1. Quattro Pro Template

SoundExchange proposed deleting the requirement in 37 C.F.R. § 370.4(e)(2) that it provide a template ROU in Quattro Pro format. Petition, at 34. The idea to have a Quattro Pro template was originally the Copyright Office's. *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 70 Fed. Reg. 21,704, 21,706 (Apr. 27, 2005). It is not evident to SoundExchange that any licensee was ever interested in the availability of such a template or ever used Quattro Pro to prepare its ROUs. Whether or not such interest might once have existed, the comments in this proceeding do not indicate any demand for a Quattro Pro template today. Moreover, there is no need for a Quattro Pro template today. Quattro Pro does not appear to be available as a standalone product today. Its successor product WordPerfect

Office is capable of reading files in Microsoft Excel format.[60] As a result, if any licensee wished to compile an ROU using WordPerfect Office, it could load SoundExchange's Excel template into WordPerfect Office and do so.

Unaware of any interest in Quattro Pro or WordPerfect Office, NAB/RMLC and various NEWs suggest that SoundExchange should be required to provide templates in Google Sheets or other formats. *E.g.*, NAB/RMLC Comments, at 71; KBCU Comments, at 2. As an initial matter, these suggestions should be discounted because nothing in the record suggests that calls for other templates have any basis in actual reporting operations, as opposed to mere speculation about how ROUs might be prepared. Licensees today could use any spreadsheet software they want to prepare ROUs,[61] yet SoundExchange has seen no indication that licensees are actually preparing ROUs using any spreadsheet software other than Excel. In contrast to other portions of the NAB/RMLC Comments that cite the circumstances of particular broadcasters, the NAB/RMLC Comments contain no indication whatsoever that there is any actual operational demand for a template in any format other than Excel. The NEWs' boilerplate requests for a Google Sheets template also do not clearly reflect any real operational need, since most of the requests come from licensees that do not (and as discussed in Part II, we assume will not) report at all. SoundExchange should not be required to spend the money of artists and copyright owners indulging fanciful ideas that have no basis in real reporting operations.

These requests also reflect a misunderstanding of the role of the template in the generation of reports of use. Consistent with the Copyright Office's original description, 70 Fed.

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[60] WordPerfect Office X7 Quick Reference Card: Working with Microsoft Office Files, *available at* http://www.corel.com/static/landing_pages/16900020/WPO_2.pdf.

[61] Section 370.4(e)(2) is a requirement for SoundExchange to provide a template, not a requirement for licenses to use particular spreadsheet software – or spreadsheet software at all – to prepare their reports of use.

Reg. at 21,706, the template is a spreadsheet data file that provides a structure for licensees to input the usage data required by the regulations. Today's spreadsheet software commonly reads data files in formats other than their own proprietary format, and it is particularly common for other brands of spreadsheet software to read Excel files. Thus, for example, and just like WordPerfect Office, Google Sheets reads files in Excel format.[62] In fact, a user need only drag and drop SoundExchange's Excel template into Google's spreadsheet interface to work with that template using Google Sheets. There just is no reason for SoundExchange to make available templates in formats other than Excel.[63]

2. Inspection of ROUs

Section 370.5(d) requires SoundExchange to make ROUs available for inspection by copyright owners at SoundExchange's office, and requires SoundExchange to try to locate copyright owners to enable such inspection. In SoundExchange's petition, it proposed that the Judges amend this provision to (1) conform it to current law by recognizing that SoundExchange should permit inspection of ROUs by featured artists as well,[64] and (2) conform it to longstanding practice by recognizing that copyright owner inspection of ROUs has never been an operationally-significant aspect of the statutory licenses. *See* Petition at 34-36; NPRM at 25,044.

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[62] Overview of Google Sheets, https://support.google.com/docs/answer/140784?hl=en&ref_topic=20322 ("Here's what you can do with Google Sheets: Import and convert Excel, .csv, .txt and .ods formatted data to a Google spreadsheet").

[63] CBI and various NEWs express the view that SoundExchange should update its template based on the outcome of this proceeding. *E.g.*, CBI Comments, at 8; KBHU Comments, at 2. SoundExchange will of course do that.

[64] Since this provision was originally crafted by the Office, the Small Webcaster Settlement Act, Pub. L. No. 107-321, 116 Stat. 2780 § 5(c) (2002), amended Section 114(g)(2) to provide for direct payment to artists by SoundExchange.

a. Inspection by Artists

As to the first of SoundExchange's proposed amendments, NAB/RMLC contend that "it is not for the Judges to provide" artists with access to ROUs because ROUs are "highly confidential," and Section 114(f)(4)(A) empowers the Judges to provide notice of use only to "copyright owners." NAB/RMLC Comments, at 82.

This argument, however, is based on a misunderstanding of Section 114(f)(4)(A). That provision requires the Judges to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings." Congress has explained that a purpose of such notice requirements is "to insure payment to the proper parties." H.R. Rep. No. 108-408, at 42 (2004). Toward that end, the Judges have prescribed the regulations that are the subject of this proceeding, which among other things require licensees to provide ROUs to SoundExchange. Those ROUs fulfill the notice function contemplated by Section 114(f)(4)(A) and allow SoundExchange to pay the copyright owners *and artists* that Section 114(g)(2) and the Judges' regulations require SoundExchange to pay.

It is an entirely separate question whether SoundExchange must treat ROUs or the information contained therein as confidential, or on the other hand whether SoundExchange should be permitted or required to provide access to the ROUs it has received by persons who have a business interest under the statute in knowing their contents. NAB/RMLC's argument is based on an implicit, faulty premise that Section 114 somehow makes ROUs confidential except as to copyright owners. However, nothing in the language of Section 114(f)(4)(A) mandates that any of the information disclosed as part of the notice mechanism adopted by the Judges must be kept confidential. Nor does it even suggest that, in implementing a mechanism for providing reasonable notice to copyright owners, featured artists may not have access to the information

that is disclosed to SoundExchange in ROUs. Thus, at the very least, Section 114(f)(4)(A) leaves it to the Judges' discretion to determine who should be able to access the ROUs that the Judges require licensees to provide to carry out the statutory notice function.

The recent determination of the Register of Copyrights in the context of *Phonorecords II* makes clear that Section 114(f)(4)(A) should not be read to incorporate an implicit assumption of confidentiality. There, in response to a referral from the Judges, the Register concluded that the almost identically-worded notice provision of Section 115 did not authorize the Judges to require that copyright owners keep confidential information reported by licensees pursuant to that provision. *See Scope of the Copyright Royalty Judges Authority to Adopt Confidentiality Requirements upon Copyright Owners within a Voluntarily Negotiated License Agreement*, 78 Fed. Reg. 47,421, 47,423 (Aug. 5, 2013) (rejecting the argument that "the CRJs' notice and recordkeeping authority authorizes the imposition of obligations on the copyright owners who are subject to the section 115 license"); *see also Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords*, 78 Fed. Reg. 67,938, 67,941 (Nov. 13, 2013) ("*Phonorecords II*") (declining to adopt proposed confidentiality provisions based on the Register's determination). If the notice language of Section 115 does not authorize the Judges to adopt a confidentiality provision for the accountings provided thereunder, essentially the same language in Section 114 cannot implicitly require confidentiality for the recipients of ROUs thereunder.[65]

[65] Despite the Register's decision in *Phonorecords II*, SoundExchange has not sought in this proceeding to challenge the Judges' prior confidentiality provision in Section 370.5(e). SoundExchange has sought only a much more limited amendment that would expressly require it to permit inspection of ROUs by artists.

Finally, ROUs are not nearly as sensitive as NAB/RMLC suggest. Most of the information contained in ROUs is just *not* confidential. The names of services, artists, sound recordings, albums, and labels could hardly be more public. Even the playlists of services can't be said to be confidential in any traditional sense of that word. When a broadcaster or other licensee transmits a *public* performance of a recording, it by definition makes its use of that recording nonconfidential. *See, e.g.,* 17 U.S.C. § 114(d)(2)(C)(ix) (requiring licensees to display to a public audience of listeners much of the identifying information contained in ROUs). SoundExchange recognizes that licensees would prefer not to have their competitors obtain easy access to comprehensive and detailed information about their playlists and the frequency of their use of particular recordings. However, SoundExchange has not proposed opening its doors to *licensees* to inspect each others' ROUs. It has only proposed permitting *featured artists* to access ROUs at SoundExchange's office *pursuant to agreements restricting the artists' use of the ROUs*.

Ever since the amendment of Section 114(g)(2) to provide for direct payment of featured artists by SoundExchange, artists have had a very direct interest in the contents of ROUs that rooted in Section 114 itself. The Judges should not allow NAB/RMLC's false assumption of an implied confidentiality restriction to override artists' direct statutory interest in the contents of ROUs.

MRI, by contrast, agrees with SoundExchange that artists should be able to inspect ROUs, but takes an opposite tack from NAB/RMLC by suggesting that SoundExchange be required to send copies or provide online access to ROUs to artists and copyright owners. MRI Comments, at 7. As an initial matter, artists and copyright owners have not asked to see unprocessed ROUs in the ordinary course. This is a transparent effort by MRI to require

SoundExchange to spend the money of artists and copyright owners to build and operate an infrastructure to deliver ROUs to create some kind of a business opportunity for MRI. Moreover, while SoundExchange is not overly impressed with NAB/RMLC's claims that ROUs are "highly confidential," SoundExchange is sympathetic to the view that comprehensive and detailed information about playlists and play frequency does not need to be in general circulation. Within the music industry, it is not customary for artists and record companies to have access to detailed information about usage of the works of other artists and record companies, so MRI's suggestion that complete, unprocessed ROUs be sent in the ordinary course to potentially everyone in the music industry would be a radical departure from current practice that might raise competitive concerns for artists and copyright owners as well as services.

b. Locating Copyright Owners to Enable Inspection of ROUs

NAB/RMLC alone take exception to SoundExchange's proposed deletion of the requirement that it try to locate copyright owners to encourage them to come by its reading room to inspect ROUs. NAB/RMLC Comments, at 91-93. NAB/RMLC's lack of any interest in this matter, while no artist or copyright owner has expressed any concern whatsoever about this housekeeping change, would be a sufficient reason for the Judges to ignore NAB/RMLC's purported concerns. NAB/RMLC's professed interest in payment of artists and copyright owners is also ironic given their efforts with respect to almost every other issue presented in this proceeding to weaken requirements for reporting of the data that SoundExchange needs to be able to identify and pay artists and copyright owners.

If the Judges are interested in considering NAB/RMLC's position on its merits despite NAB/RMLC's not having any reason to care about SoundExchange's relationship with artists and copyright owners, the Judges should understand that NAB/RMLC's argument bears little

relationship to the provision at issue or even the subject matter of this proceeding. NAB/RMLC acknowledge that the premise of the current provision – making available unprocessed ROUs in the ordinary course – "does not make sense." NAB/RMLC Comments, at 92. Yet NAB/RMLC oppose deletion of a provision that "does not make sense" because of an expressed concern about SoundExchange's efforts to locate *for payment purposes* both copyright owners *and artists* – when the current provision does not speak to payment or mention artists, and NAB/RMLC has opposed SoundExchange's efforts to add a reference to artists to the first part of the relevant paragraph (as discussed above). In the end, NAB/RMLC advocate a completely different provision than the one SoundExchange proposed deleting, and one that goes well beyond "requirements by which copyright owners may receive reasonable notice of the use of their sound recordings." 17 U.S.C. § 114(f)(4)(A).

As SoundExchange explained in its initial comments, it has made significant and ongoing efforts throughout its history to locate for payment purposes both copyright owners and artists. SoundExchange Comments, at 15. Those efforts will continue unabated without NAB/RMLC's proposed new provision just as they have in the absence of that provision in the past. SoundExchange's proposal to delete a provision that "does not make sense" was always a "housekeeping" proposal. The Judges should treat it as such.

3. Redundant Confidentiality Provisions

SoundExchange proposed deleting the redundant confidentiality provisions in Sections 370.3(g) and 370.4(d)(5). Petition, at 36-37. We did not see that any other commenter addressed that proposal. The Judges should make that housekeeping change.

4. Clarification of New Subscription Services and Definition of Aggregate Tuning Hours

SoundExchange proposed clarifying in current Section 370.4(d)(2)(vii) (Section 370.4(d)(2)(viii) as numbered in the proposed regulations included in the Petition and NPRM) that the reference therein to new subscription services was intended to allow cable music services paying royalties under 37 C.F.R. Part 383 on a percentage of revenue basis, but not new subscription services providing subscription webcasting and paying royalties pursuant to 37 C.F.R. Part 380 Subpart A on a per-performance basis, to report usage on an aggregate tuning hour ("ATH") rather than actual total performance ("ATP") basis, because the former face "technological impediments to measuring actual listenership." 73 Fed. Reg. at 79,729. SoundExchange proposed related conforming changes in the definition of aggregate tuning hours in Section 370.4(b)(1). Petition, at 37-38.

SoundExchange did not see that any commenter questioned SoundExchange's interpretation of what was originally intended in Section 370.4(d)(2)(vii). Sirius XM proposed an unrelated change to that provision (*see* Part IV.G). NAB/RMLC opposed SoundExchange's proposal, but not specifically because of its proposed change in the treatment of new subscription services. Instead, NAB/RMLC's opposition was based on misplaced concerns about ATH reporting enabled by Part 380, and because they advocate leaving to rate proceedings the question whether particular categories of services should be permitted to report on an ATH basis rather than an ATP basis (anticipating that they will argue in *Webcasting IV* that broadcasters should be able to do so). NAB/RMLC Comments, at 76-80.

NAB/RMLC's opposition to this proposal is much ado about nothing. The Copyright Act could hardly be clearer that the Judges are empowered to adopt notice and recordkeeping provisions in rate proceedings: "Among other terms adopted in a determination, the Copyright

Royalty Judges may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations." 17 U.S.C. § 803(c)(3). SoundExchange recognizes that, pursuant to that provision, there are certain categories of services that are permitted by provisions in Part 380 to report on an ATH basis. Because Section 803(c)(3) specifies that notice and recordkeeping requirements adopted in rate proceedings "apply in lieu" of the regulations in Part 370, SoundExchange assumed that the relevant provisions of Part 380 would continue to supersede the limitations in Part 370 as they have done in the past, so services permitted by provisions in Part 380 to report on an ATH basis would continue to be able to do so notwithstanding anything in Part 370. Thus, by operation of Section 803(c)(3), SoundExchange's proposal is entirely consistent with the result for which NAB/RMLC advocates, and Section 803(c)(3) makes NAB/RMLC's proposals entirely unnecessary.

In the course of advocating for what Section 803(c)(3) plainly allows, NAB/RMLC suggest defining the term ATH in Section 370.4(b)(1) without reference to specific types of services. SoundExchange followed the Judges' lead in identifying various categories of service in the definition of ATH, and SoundExchange does not think that removing the references to service types is necessary to achieve the result that NAB/RMLC want. However, SoundExchange agrees with NAB/RMLC that the concept of ATH is not inherently limited to certain kinds of services, so it is not necessary to state redundantly in the definition of ATH what services are eligible to report on an ATH basis. Because it would be consistent with good regulatory draftsmanship to simplify the ATH definition, SoundExchange has included a proposed simplified definition of ATH in Exhibit C.

Moreover, while SoundExchange questions whether the ATP and/or ATH reporting provisions should, uniquely among the provisions in Part 370, direct casual readers to the applicable terms for superseding provisions, SoundExchange is not opposed to including somewhere in Part 370 an indication that reporting on a different basis might be permissible under applicable terms. However, SoundExchange believes that the specific regulatory language NAB/RMLC propose at page 79 of their comments is not as clear as it should be about where the reader should look to find different reporting provisions, and improperly assumes that such other provisions necessarily would track the ATH reporting provisions here. In case the Judges are inclined to adopt language along the lines proposed by NAB/RMLC, SoundExchange has included clearer alternative language in Exhibit C.

SoundExchange disagrees with NAB/RMLC's suggestion that broadcasters should be permitted to report usage on an ATH basis rather than an ATP basis when the royalties broadcasters pay are calculated on a per-performance basis. See NAB/RMLC Comments, at 77-78. However, because NAB/RMLC do not suggest any change in the notice and recordkeeping regulations that would presently allow such reporting in any new situation, no detailed response is required at this time.

5. Miscellaneous

a. SoundExchange Annual Report

SoundExchange proposed specifying in regulations that its annual report required by Section 370.5(c) should be posted by September 30. As explained in the Petition and in SoundExchange's initial comments, SoundExchange proposed the September 30 date to allow it sufficient time to receive (and hence quantify) its royalty collections for a calendar year, close its books on the year, and complete its annual audit, rather than rushing to release an annual report

based on incomplete and unaudited numbers by March 31, as has been the case based on a preference previously expressed by the Judges. Petition, at 38-39; SoundExchange Comments, at 17. Only NAB/RMLC seem to have addressed this proposal.

NAB/RMLC argue that SoundExchange should be required to provide an annual report within 90 days after the close of the year, and also propose amendments that would require SoundExchange to provide "more comprehensive and detailed information" in its annual reports and provides a laundry list of information it would like to see in those reports. NAB/RMLC Comments, at 84-89.

As an initial matter, the Judges' authority relative to the issue of an annual report by SoundExchange is very limited, and to the extent such authority exists, NAB/RMLC are not parties in interest. Section 114(f)(4)(A) empowers the Judges to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings." 17 U.S.C. § 114(f)(4)(A). SoundExchange plays a part in providing copyright owners notice of the use, and an annual report of some kind can perhaps be justified if integral to that function. However, Section 114(f)(4)(A) is not an invitation to the Judges to impose on SoundExchange the kinds of extensive recordkeeping and reporting provisions contemplated by NAB/RMLC. Under Section 114(f)(4)(A), recordkeeping and reporting is for "entities performing sound recordings."[66]

The Copyright Office recognized the limits of notice and recordkeeping authority when it originally adopted the annual report provision. That provision was adopted as part of the original

[66] *See* 78 Fed. Reg. 47,421, 47,423 (Aug. 5, 2013) (nearly identical language in Section 115 authorizes Judges "to issue notice and recordkeeping requirements under which records of such use shall be kept and made available *by licensees*" (emphasis original)).

Section 114 notice and recordkeeping regulations. 63 Fed. Reg. at 34,297. When the Office adopted it, the Office explained this provision as part of its discussion of how copyright owners would receive notice of use from the collective that copyright owners had only just agreed to establish, and that would eventually become SoundExchange. *Id.* at 34,294. The idea was, evidently, to provide copyright owners certain basic information concerning the operation of the yet-to-be-formed collective so that they could understand how it would provide them payments and usage information. That limited function probably represents a valid exercise of notice and recordkeeping authority, but makes clear that the only legally-relevant beneficiaries of the annual report are those who are entitled to notice of use, not licensees.

Turning to the specifics of NAB/RMLC's arguments and proposals, SoundExchange has seen no indication that artists and copyright owners are clamoring for an early look at incomplete and unaudited financial statistics. NAB/RMLC's analogy to the timing of reporting by publicly-traded companies is simply inapt. Companies that sell products and services recognize revenue pursuant to complicated accounting rules, but the upshot of those rules is that on January 1, companies can determine from information in their possession, such as signed contracts, shipment records, timecards and invoices, what revenue they can recognize for the year ended December 31. SoundExchange is not so lucky. It can only estimate its royalty collections for a year until licensees actually pay and provide statements of account allowing SoundExchange to associate a payment with the relevant year. As a result, it is only late in the first quarter of each year that SoundExchange can reasonably determine its royalty collections for the previous year, and SoundExchange's annual audit typically is not complete until June of the following year. Thus, providing an annual report with audited numbers is not feasible until the third quarter. Given the limited role of the annual report, the lack of demand for it, and SoundExchange's

desire to provide the report required by regulations in the form of a more typical corporate annual report, SoundExchange proposes making the deadline the end of the third quarter.

Finally, as to NAB/RMLC's proposal that SoundExchange report a laundry list of information, the discussion above makes clear that all or most of this information is well outside the scope of the Judges' notice and recordkeeping authority, because it does not have anything to do with providing notice of use to copyright owners. To be sure, SoundExchange has provided and will continue to provide appropriate information about its operations to its artist and copyright owner constituents. Moreover, as a tax exempt organization, SoundExchange is separately required to file an annual information return on IRS Form 990 that identifies various financial information similar to that suggested by NAB/RMLC. Even if the Judges had authority to require SoundExchange to report the kinds of information sought by NAB/RMLC as a notice and recordkeeping regulation, the Judges should not require SoundExchange to spend the money of artists and copyright owners preparing additional elaborate disclosure documents that NAB/RMLC seek simply to get a leg up in discovery for rate proceedings.

b. SoundExchange Address, Etc.

The "Miscellaneous" section of the NPRM grouped together a handful of other proposals, including removing an incorrect address for SoundExchange, using consistent references to defined terms and the statutory licenses, and eliminating the definition of a term that is not used. Petition, at 38-40. We did not see that any commenter other than NAB/RMLC addressed these proposals. NAB/RMLC did not oppose these changes, but they suggested that SoundExchange be required to publish its address on the homepage (in contrast to some other page) of its website. NAB/RMLC Comments, at 71-72. It happens that SoundExchange's address *is* on the homepage of its website at http://www.soundexchange.com/. However, it does not seem

necessary for the Judges in their notice and recordkeeping regulations to micromanage the location of contact information on SoundExchange's website.

IV. Additional Issues

In their comments, NAB/RMLC and Sirius XM propose a number of additional changes to the notice and recordkeeping regulations that were not contemplated by the NPRM. The Judges should decline to address these proposals in this proceeding for the reasons the Judges, in their 2009 notice and recordkeeping proceeding, declined to consider "additional proposals [that] went beyond the scope of the Judges' specific inquiry." *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 74 Fed. Reg. 52,418, 52,422 (Oct. 13. 2009). There, the Judges explained that proposals raised for the first time in comments were not "ripe for determination," were "insufficiently developed," and "merit more detailed consideration" than would have been afforded if they were considered in that posture. *Id.* at 52,422. The Judges thus considered new proposals only insofar as they amounted to clarifications or a technical change (such as a change in address or typographical correction). *Id.* at 52,423. In fact, the adoption of proposals that go beyond the scope of the Judges' NPRM could amount to a serious procedural violation. *See, e.g., Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977).

To the extent that the Judges may be interested in addressing some of the new proposals made in the initial comments, SoundExchange addresses them briefly below.

A. Systematic Adjustment Process

Sirius XM and its contractor MRI vaguely suggest that SoundExchange be required to implement some kind of an automated, systematic adjustment process with licensees. Sirius XM Comments, at 1, 5; MRI Comments, at 2-3.

While SoundExchange is not opposed to exploring such a process with individual licensees where that makes sense, such a process does not lend itself to treatment in regulations. This proceeding illustrates that the approximately 2,500 statutory licensees vary widely in their size, usage, technical sophistication and information technology infrastructures. While Sirius XM professes to want sophisticated technical interaction with SoundExchange, most commenters in this proceeding claim to have difficulty using spreadsheet software to generate even the most basic ROUs. *E.g.*, KNHC Comments, at 2 (licensee "is capable of providing" ROUs in Google spreadsheet and Excel formats, but "would be hard pressed to use any others"). Even NAB/RMLC lament the variety and primitive state of their members' systems. NAB/RMLC Comments, at 10-11. This is why it has been controversial to specify requirements for ROUs, even though delivery of such reports is, as an information technology matter, a very basic function. Specifying procedures for an automated two-way flow of information would be much more complicated, because it appears that Sirius XM and MRI contemplate intricate technical interactions across a wide range of parameters, which would require a high degree of interoperability between the relevant systems. Such interoperability would have to be worked out licensee-by-licensee, which would be quite resource-intensive and time-consuming. Companies sometimes work out such procedures when it makes sense, but it would not make sense to impose on SoundExchange a mandate to implement such interactions with all licensees when only Sirius XM seems interested.

B. Third-Party Programming

NAB/RMLC propose that broadcasters not be required to report usage of recordings in third-party programming. NAB/RMLC Comments, at 46-48. The Copyright Office rejected just such a proposal a decade ago, finding "no authority in the statute to create such exemptions" and

that such exemptions are not compatible with the statutorily-required reasonable notice of use. 69 Fed. Reg. at 11,521 & n.12.

In the decade since, the case for rejecting this proposal has only become stronger. While this proposal might seem from NAB/RMLC's comments to be a minor point, it appears to SoundExchange as an exception that could swallow the census reporting rule. Network and other third-party programming is a substantial part of the programming used by some broadcasters, and is becoming more so as the radio industry moves toward a model in which less and less content is locally produced.[67] NAB/RMLC's comments illustrate the point. On WDAC, syndicated programming spans about 160 hours of each week, leaving only about an hour a day of original programming. Sixty percent of this third-party programming is music. NAB/RMLC Comments, at 47. Under NAB/RMLC's proposal, WDAC would be excused from providing usage data for all, or almost all, of its music programming, and NAB/RMLC's proposal does not indicate how artists and copyright owners would be paid for WDAC's usage of their works.

NAB/RMLC's proposal also obscures an important issue in use of third-party programming. Broadcasters generally pay royalties on a per-performance basis. 37 C.F.R. § 380.12(a). Counting performances requires knowing how many sound recordings are played to

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[67] E.g., Edison Research, What Nationalization Will Mean to American Radio, http://www.edisonresearch.com/what-nationalization-will-mean-to-american-radio/ (Mar. 13, 2014) (describing Clear Channel and Cumulus efforts to nationalize programming across station groups); Clear Channel CEO Bob Pittman Defends Corporate Radio at CRS, http://www.allaccess.com/net-news/archive/story/102686/clear-channel-ceo-bob-pittman-defends-corporate-ra (Feb. 22, 2012) (describing Clear Channel defense against critics who bemoan loss of local talent due to use of network programming); Clear Channel's Programming Purge, http://radioinsight.com/blog/headlines/54030/clear-channels-programming-purge/ (Oct. 26, 2011) (describing restructuring and layoffs as network programming is used on more stations).

how many listeners. *See* 37 C.F.R. § 380.11 (definition of Performance). If broadcasters "receive little, if any, information from the programming providers regarding the recordings included in that programming (either the identifying information for the recordings or when they are played)," NAB/RMLC Comments, at 46, it is not apparent how broadcasters could calculate their royalty payments accurately. The only way artists and record companies can be assured of being paid properly is if broadcasters are motivated to seek necessary reporting information from their program providers. The Judges should not at this time carve out a new reporting exception for third-party programming.

C. Small Broadcaster Waiver

NAB/RMLC propose exempting small broadcasters from reporting requirements by making the provisions of Section 380.13(g)(2) permanent and extending them to a broader set of broadcasters. NAB/RMLC Comments, at 50-52. To put this proposal in context, there are about 300 small broadcasters as defined in Section 380.11, which collectively paid about $150,000 in royalties for 2013.

While this proposal is superficially similar to the reporting waiver for NEWs discussed in Part II, small broadcasters are situated very differently from NEWs. In contrast to NEWs, small broadcasters are commercial operations with professional staff that have made a business decision to engage in webcasting. Rather than having a mission to educate their staff, small broadcasters are out to grow their audience. The Judges have recognized that such commercial services are situated differently than NEWs:

> in the commercial case, broadcasters who do not adapt in the long run will fail as commercial entities to achieve the critical mass necessary to justify their presence on the Web. Therefore, they ultimately have a strong financial incentive to become more than very low intensity users, adapt their technology, ultimately achieve

> the same capabilities as their competitors on the Web and, in the process, attain comparable capabilities for full census reporting.

74 Fed. Reg. at 52,420. To a similar effect, the Copyright Office has explained:

> It has been asserted by some services throughout this docket that for some services any reporting of information regarding performances will be too great a burden. While this assertion, if true, might result in certain services ceasing operation under the statutory licenses, it is not a valid reason to eliminate reporting altogether.

69 Fed. Reg. at 11,521.

SoundExchange agrees that if commercial broadcasters choose to make webcasting a business, they should, like other commercial webcasters, be prepared to do the things that are necessary to ensure that artists and copyright owners are properly paid when their works are used. That is why Section 380.13(g)(2) specifically provides that the reporting waiver provided therein was made available "[o]n a transitional basis for a limited time . . . with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations." 37 C.F.R. § 380.13(g)(2). Small broadcasters have now had almost five years to figure out how to provide proper reporting for their usage of copyrighted recordings. The waiver that was specifically agreed upon as a transitional arrangement should not be made permanent or be extended to other services that have previously been required to provide proper reporting.

D. Sample Reporting

NAB/RMLC also propose that broadcasters that find census reporting too difficult should be permitted to report usage for "no more than two weeks per calendar quarter." NAB/RMLC Comments, at 52-54. In effect, they ask the Judges to reverse their 2009 decision that census reporting should be the norm for all licensees except certain minimum fee broadcasters. See 74 Fed. Reg. at 52,419-22.

While NAB/RMLC assert that such sampling is "a widely used, well-respected, and accurate means of gauging music use," NAB/RMLC Comments, at 53, SoundExchange is aware of no empirical basis to believe that such a sample is statistically accurate. Intuition suggests that such a sample would not be statistically accurate. Radio playlists vary from week to week as new recordings are released and older recordings drop out of rotation. Basing royalty distributions on reporting of usage for just two of the thirteen weeks in a quarter would overweight usage of the recordings that happen to be popular in those weeks and underweight usage of recordings that are popular in other weeks. While different broadcasters' reporting usage for different weeks might tend to mitigate those effects, that cannot be assumed.

It is true that ASCAP and BMI have used such sampling as part of their distribution methodology. However, we understand that BMI has more recently based its distributions primarily on census data obtained from a monitoring service,[68] and ASCAP's continued reliance on a two-week sample has engendered some controversy in the Copyright Office's ongoing music licensing study.[69]

In the end, NAB/RMLC provide no substantial reason for the Judges to reverse their 2009 decision that census reporting should be the norm.

E. Certification under Penalty of Perjury

NAB/RMLC propose that the Judges delete the requirement in Section 370.4 that licensees certify ROUs under penalty of perjury. NAB/RMLC Comments, at 68.

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[68] BMI Links With Monitoring Services, http://www.billboard.com/biz/articles/news/1438516/bmi-links-with-monitoring-services (May 4, 2004).

[69] E.g., Comments of Geo Music Group in Copyright Office Docket No. 2014-03, at 12, 18.

SoundExchange urges the Judges not to consider this proposal, as it goes beyond the scope of the NPRM. The NPRM simply proposed allowing ROU certifications external to the ROU. SoundExchange also asked the Judges to eliminate the requirements in 37 C.F.R. § 380.13(f)(3) and § 380.23(f)(4) that SOAs bear a handwritten signature. These proposals have gone unopposed and, as NAB/RMLC themselves recognize, would benefit broadcasters. NAB/RMLC Comments, at 68. These proposals do not open the door to this other, unrelated and more significant change, for which NAB/RMLC have not developed a factual record.

To the extent the Judges do consider NAB/RMLC's new proposal, it should be rejected. The requirement that licensees certify ROUs under penalty of perjury has existed since the Copyright Office promulgated its first notice and recordkeeping rules in 1998. 63 Fed. Reg. at 34,295. In adopting that certification, the Office specifically considered the argument NAB/RMLC makes here – that a mere statement of accuracy would be sufficient. *Id.* at 34,291. The Office concluded, however, that "[r]eports of Use must be accompanied by a statement by a Service representative, signed under penalty of perjury." *Id.* at 34,295. SoundExchange believes that this certification continues to serve an important role in communicating to licensees the gravity of reporting under a statutory license that operates on the honor system, and NAB/RMLC provide no facts to support their assertion that this requirement is all of a sudden too onerous today.

F. Confirmation of Receipt of ROUs

NAB/RMLC propose that SoundExchange be required to confirm receipt of ROUs within one business day by return email. NAB/RMLC Comments, at 90-91. While some form of acknowledgement may be practicable for some ROUs, NAB/RMLC's proposal is not as trivial as they imply. Licensees are permitted to deliver their ROUs by multiple means, including File

Transfer, email and CD-ROM. 37 C.F.R. § 370.4(e)(3). While most ROUs are delivered by email, the concept of "return email" makes no sense for other delivery means, and SoundExchange would not necessarily have a valid email address for a licensee when ROUs are delivered by other means.

Even for ROUs delivered by email, the only reason NAB/RMLC cite for their proposal is that WDAC reports having once had to resubmit an ROU assertedly provided previously, and EMF reports on "several occasions" having done the same. NAB/RMLC Comments at 90-91, Exhibit G ¶ 16, Exhibit J ¶ 9. This small inconvenience for a couple of broadcasters would not justify a new mandate in any case, and SoundExchange has recently made improvements to its ROU tracking systems that should alleviate such issues in the future.

G. ATH Reporting for Sirius XM

Sirius XM proposes eliminating the ATH reporting requirement for SDARS. Sirius XM Comments, at 6-7. SoundExchange does not question Sirius XM's assertion that its installed base of radios is unable to report back information concerning which channels subscribers are listening to. However, Sirius XM's inability to provide such information has significant consequences for the distribution of statutory royalties. When licensees report usage on an ATH basis, the reported ATH tells SoundExchange how to weight royalty allocations to each of the service's channels or stations based on listenership. Because Sirius XM's channels range from ones devoted to top hits to ones devoted to specialized genres like "'80s Hair Bands" and "Canadian Indie Music," its channels must vary enormously in listenership. However, in the absence of any listenership data, SoundExchange must distribute royalties equally among all the recordings used on each channel of the service. Thus, the play of a recording on the Canadian Indie Music channel generates the same royalty distribution as one on the Hits channel. Given

the size of Sirius XM's royalty payments, treating all channels as having equal listenership, rather than weighting royalty distributions by channel listenership as reporting of ATH data would permit, has significant economic effects.

Accordingly, SoundExchange believes that Sirius XM should be required to provide ATH data if and when it becomes feasible for Sirius XM to do so, and in its absence, that Sirius XM should be required to provide other listenership information that could be used to weight royalty allocations (*e.g.*, survey data), if available. Sirius XM's proposal came too late in this proceeding to develop a proper record concerning what data Sirius XM reasonably might be able to provide that would allow a fair distribution of its statutory royalty payments in the absence of ATH data. Thus, SoundExchange believes it would be most appropriate to address that question in discussions between the parties or, if necessary, in a separate proceeding in which the Judges could make a decision based on a fully-developed record.

Conclusion

SoundExchange appreciates the opportunity to provide these Reply Comments and urges the Judges promptly to adopt revised notice and recordkeeping regulations consistent herewith.

September 5, 2014

Respectfully submitted,

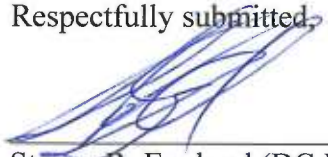

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Exhibit A
Reporting Non-Payable Tracks

As discussed in Part III.D, SoundExchange proposes the following revised language for Section 370.4(d)(2):

> *Content.* For a ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service that transmits sound recordings pursuant to the statutory license set forth in section 114~~(d)(2)~~ of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (d)(3) of this section, with the exception of incidental transmissions as described in paragraph (b)(3)(iii) of this section, whether or not the Service is paying statutory royalties for the particular sound recording:

Exhibit B
Delivery of ROUs

As discussed in Part III.E.3, if the Judges decide not to adopt that the ROU delivery proposal in the Petition, SoundExchange would propose the following revised language for Section 370.4(c):

> *Delivery*. Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the ~~forty-fifth~~day that is the same number of days after the close of each reporting period identified in paragraph (d)(3) of this section as the period for making monthly payments for the relevant type of service.

Exhibit C
Definition and Reporting of Aggregate Tuning Hours

As discussed in Part III.H.4, SoundExchange proposes the following revised language for Section 370.4(b)(1):

> *Aggregate Tuning Hours* are the total hours of programming that a ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~Service has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, ~~that provide audio programming consisting, in whole or in part, of eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment service transmissions,~~ less the actual running time of any sound recordings for which the ~~service~~Service has obtained direct licenses apart from 17 U.S.C. 114~~(d)(2)~~ or which do not require a license under United States copyright law. For example, if a ~~nonsubscription transmission service~~Service transmitted one hour of programming to 10 simultaneous listeners, the ~~nonsubscription transmission service~~Service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the ~~nonsubscription transmission service~~Service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a ~~nonsubscription transmission service~~Service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the ~~nonsubscription transmission service~~Service's Aggregate Tuning Hours would equal 10.

As also discussed in Part III.H.4, SoundExchange suggests that the following revised language for Section 370.4(d)(2)(vii) and (viii) (as numbered in the proposed regulations included in the Petition and NPRM) could be used to refer to alternative terms adopted in rate proceedings:

> (vii) For ~~a nonsubscription transmission service~~any Service except those ~~qualifying as minimum fee broadcasters~~identified in paragraph (d)(2)(viii) or permitted to report on an alternative basis pursuant to terms in subchapter E: The actual total ~~performances~~Performances of the sound recording during the reporting period~~.~~;
>
> (viii) For a ~~preexisting satellite digital audio radio service, a new subscription service, a business establishment service or a nonsubscription service qualifying as a minimum fee broadcaster~~Preexisting Satellite Digital Audio Radio Service, a service as defined in § 383.2(h), a Business Establishment Service or a Nonsubscription Service qualifying as a Minimum Fee Broadcaster:[70] The actual total ~~performances~~Performances of the sound recording during the reporting period or, alternatively, the . . . .

[70] SoundExchange separately noted that Minimum Fee Broadcasters would more accurately be called something like "Eligible Minimum Fee Webcaster." SoundExchange Comments, at 3 n.2.