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In the Matter of:)
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NOTICE AND RECORDKEEPING FOR)
USE OF SOUND RECORDINGS UNDER)
STATUTORY LICENSE)
_____)

Docket No. RM 2005-2

COMMENTS OF SOUNDEXCHANGE, INC.

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August 26, 2005

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COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange"), a nonprofit organization incorporated in the State of Delaware and jointly controlled by representatives of sound recording copyright owners and performers through an eighteen-member board of directors, on behalf of itself and the tens of thousands of copyright owners and performers on whose behalf it collects and distributes statutory royalties, respectfully submits these Comments in response to the Copyright Royalty Board's ("Board") Supplemental Request for Comments for Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2005-2, published in the Federal Register on July 27, 2005. 70 Fed. Reg. 43,364 ("Supplemental Request").

INTRODUCTION

SoundExchange appreciates the Board's efforts to establish format and delivery specifications for reports of use that satisfy the statutory requirement that copyright owners receive "reasonable notice of the use of their sound recordings" under statutory license. 17 U.S.C. §§ 114(f)(4)(A), 112(e)(4). SoundExchange has worked diligently to develop a royalty collection and distribution system that operates efficiently and effectively, enabling copyright owners and performers to receive timely royalty payments with limited administrative cost while at the same time providing licensees with the tools they need to fulfill their statutory obligations.

To operate efficiently and effectively, SoundExchange relies on automated technology. SoundExchange's custom-built computer system is capable of collecting the large amounts of data reported by the hundreds or thousands of services that are making or will be making digital audio transmissions of sound recordings under statutory license, and then processing that data to calculate the amount of royalties to which each of the tens of thousands of copyright owners and performers is entitled. To process this enormous amount of information with as minimal administrative cost as possible, SoundExchange must receive data in a single standardized format, which is consistent with standard business practices for automated data exchange. The

harm that would be caused by any type of “flexible” formatting requirements cannot be overstated – without significantly reducing the costs for webcasters, such “flexible” formatting would dramatically increase SoundExchange’s costs, taking money out of the pockets of the statute’s beneficiaries – artists and record companies.

In the comments below, we have attempted to respond to the Board’s request for more detailed information regarding the notice and recordkeeping requirements proposed by the Copyright Office in its April 27, 2005 Notice of Proposed Rulemaking (“NPRM”) and for reports from consultants. To that end, we submit the Declaration of Shane Sleighter (attached hereto as Ex. A), a vendor with substantial experience in software development. Mr. Sleighter explains in detail why SoundExchange’s computer system needs incoming data to conform to fixed format and delivery specifications. Indeed, fixed format and delivery specifications are the norm for organizations that process large quantities of electronically transmitted data, including the U.S. Government. Mr. Sleighter also provides detailed responses to each of the Board’s specific factual questions, with the exception of a few to which his areas of expertise do not relate. We have answered the questions outside of Mr. Sleighter’s expertise.

We also submit the Declaration of Barry M. Massarsky (attached hereto as Ex. B), the founder and principal of Barry M. Massarsky Consulting, Inc., to address another issue of enormous significance – whether a system of sample reporting is an adequate substitute for the census reporting SoundExchange has proposed and the Copyright Office indicated would be appropriate under the statutory standard. Copyright Office Interim Regulations in Docket No. 2002-1E, 69 Fed. Reg. 11,515, 11,526 (Mar. 11, 2004) (“Once final regulations are implemented, year-round census reporting is likely to be the standard measure rather than the periodic reporting that will now be permitted on an interim basis.”). The short answer is that sample reporting is insufficient, is inconsistent with the statute itself, and will seriously harm many artists who will not receive compensation for the use of their works. As Mr. Massarsky’s Declaration sets forth in detail, he conducted a study of the impact of sample reporting on the

accuracy with which sound recording performances are reported, and concluded that sampling would result in massive underreporting of the copyright owners and performers whose sound recordings are actually performed. To avoid this harm, which undermines the purpose of the statute, and to accurately identify the copyright owners and performers who are entitled to statutory royalties, census reporting is essential.

RESPONSES TO LEGAL AND POLICY QUESTIONS

SoundExchange responds to the Board's legal and policy questions first because our responses to these "questions of a more general nature," Supplemental Request, 70 Fed. Reg. at 43,368, reflect principles that guide and inform our responses to the Board's specific factual questions that are of a more technical nature.

1. **Did Congress, in 17 U.S.C. 114(f)(4)(A) and 112(e)(4), require the Copyright Royalty Judges to prescribe particular formatting and delivery requirements at the level of detail described in the April 27, 2005, notice of proposed rulemaking? Is there some relevant set of Internet conventions or practices that could guide the Board in setting data submission standards here?**

The statute's text, purpose, and legislative history – as well as the practical reality of the exchange of massive amounts of data in electronic form – compel the conclusion that the CRJs must prescribe formatting and delivery requirements. Sections 112 and 114 of the Copyright Act require those using copyrighted sound recordings under the statutory licenses to compensate copyright owners and requires the Copyright Office to provide "reasonable notices of use." 114(f)(4)(A) and 112(e)(4). The legislative history of the Copyright Royalty and Distribution Reform Act of 2004 explains that the purpose of recordkeeping is "to insure the proper use of the [section 112 and 114] license[s] and to insure proper payment to the proper parties." H.R. Rep. No. 108-408, at 42 (2004), *reprinted in* 2004 U.S.C.C.A.N. 2332, 2357.

Satisfying these statutory requirements and fulfilling the statute's purposes requires the Board to establish detailed procedures and formats. Proper payment requires SoundExchange to receive reports of millions of performances of copyrighted sound recordings whose performers

and owners are entitled to payment. As the Copyright Office recognized in the April 27, 2005 NPRM, the most efficient method of transmitting reports of use is electronically, 70 Fed. Reg. at 21,706. That fact cannot be seriously disputed given the mass of information SoundExchange is charged with processing in order to collect and distribute royalty payments for digital performance of sound recordings.¹ Moreover, the requirements for reports of use submitted electronically necessarily involve details technical in nature. Although SoundExchange has employed its best efforts to reach agreement with the licensees who have objected to our proposed format and delivery specifications, we have been unable to do so.² It is therefore incumbent upon the Board to establish the requirements that will insure that SoundExchange receives from licensees the information it needs “to insure proper payment to the proper parties” as well as the information copyright owners need “to insure proper use of the [statutory licenses].”

¹ In this day and age, any other notice would be unreasonable as well as contrary to the very nature of the digital medium giving rise to the statutory liability, and thus arbitrary and capricious. Indeed, many businesses such as banks, and in some instances the U.S. government, require transmissions of large amounts of data to be made electronically. *See, e.g.,* SunTrust Bank’s File Specifications for Consumer Debits and Credits and for Corporate Debits and Credits, (attached hereto as Exs. C and D), and Wachovia’s Cash Management - ACH Formats (updated Nov. 2002) (attached hereto as Ex. E); *see also* 8 C.F.R. § 217.7 (Department of Homeland Security requirement that airlines submit passenger information electronically via electronic mail (e-mail), or floppy diskette); 30 C.F.R. § 210.21 (Department Of the Interior electronic reporting requirements for reports to Minerals Management Service).

² We have discussed with College Broadcasters, Inc. (“CBI”) that organization’s proposal of a joint request to extend the deadline for filing supplemental comments with the Board and continue discussing the possibility of settlement, and we understand that National Religious Broadcasters Music License Committee and Salem Communications Corporation may also desire an extension. While SoundExchange agrees that negotiated settlements are always preferred, we have not agreed to seeking an extension here because (i) our experiences to date in attempting to reach agreement on the reporting requirements lead us to believe that a negotiated settlement in an appropriate time frame is unlikely, and (ii) further delay in the adoption of reporting requirements adversely harms the copyright owners and performers we represent. CBI and NRBMLC, as well as other small webcasters, have not shown a willingness to provide reports that accurately reflect the breadth of their programming nor have they agreed even on the need for electronic reporting. Because regulations establishing formatting requirements for reports of use have not been issued, SoundExchange has been unable to distribute the millions of dollars in royalties it has collected since April 2004. While some services have voluntarily submitted reports of use in a format compatible with SoundExchange’s system, *e.g.,* Gore-Overgaard Broadcasting, Inc., Live365, and AOLRadio, *see* Sleighter Decl. ¶ B, others have transmitted royalty payments but not the reports of use SoundExchange needs to be able to allocate the royalty payments among copyright owners and performers. SoundExchange therefore urges the Board to proceed as expeditiously as possible in establishing reporting requirements that will enable SoundExchange to distribute the undistributed royalties it is currently holding as well as the royalties it will collect prospectively.

While SoundExchange appreciates the Board's discomfort with having to establish regulations outside its "reservoir of traditional agency expertise," there is ample evidence from the practices of the U.S. Government, as well as other large organizations, of the need for regulations at the level of detail described in the NPRM. Examples of the U.S. government organizations' detailed format and delivery specifications include specifications for child support enforcement data exchange (attached hereto as Ex. F), and the standards posted on the FedeBiz Web Site for status information on shipments of goods, (attached hereto as Ex. G, downloaded from <http://fedebiz.disa.mil/FILE/IC/FED/4030/856S/43f856sa.pdf>), for customer account analysis (primarily for banks), (attached hereto as Ex. H, downloaded from <http://fedebiz.disa.mil/FEDICGET.html?FED3040>), and for weapons systems data changes, (attached hereto as Ex. I, downloaded from <http://fedebiz.disa.mil/FILE/IC/FED/4030/888w/43f888wa.pdf>). Other organizations' similarly detailed format and delivery specifications include Arizona Department of Health Services' Hospital Discharge Data Reports, (attached hereto as Ex. J), SunTrust Bank's File Specifications for Consumer Debits and Credits and for Corporate Debits and Credits, (attached hereto as Exs. C and D), and Wachovia's Cash Management - ACH Formats (updated Nov. 2002) (attached hereto as Ex. E). The National Institute of Standards and Technology ("NIST") has explained the necessity of detailed standards for Electronic Data Interchange ("EDI") as follows:

Standards Required for EDI. From the point of view of the standards needed, EDI may be defined as an interchange between computers of a sequence of standardized messages taken from a predetermined set of message types. Each message is composed, according to a standardized syntax, of a sequence of standardized data elements. It is the standardization of message formats using a standard syntax, and the standardization of data elements within the messages, that makes possible the assembling, disassembling, and processing of the message by computer.

Implementation of EDI requires the use of a family of interrelated standards. Standards are required for, at minimum: (a) the syntax used to compose the messages and separate the various parts of a message, (b) types and definitions of application data elements, most of variable length, (c) the message types, defined by the identification and sequence of data elements forming each message, and

(d) the definitions and sequence of control data elements in message headers and trailers.

Additional standards may define: (e) a set of short sequences of data elements called data segments, (f) the manner in which more than one message may be included in a single transmission, and (g) the manner of adding protective measures for integrity, confidentiality, and authentication into transmitted messages.

Federal Information Processing Standards 161-2 at 2 of 11 (“FIPS PUB 161-2”) (NIST Apr. 29, 1996) (copy downloaded from <http://www.itl.nist.gov/fipspubs/fip161-2.htm> (attached hereto as Ex. K). (emphasis added); *accord id.* at 1 (describing EDI as “the computer-to-computer interchange of strictly formatted messages”) (emphasis added).³

As the NIST standards explain and the above examples of the government and private business format specifications illustrate, EDI requires a standardized syntax using a sequence of standardized data elements. Such strict formatting is necessary for data to be exchanged electronically. SoundExchange’s proposed format specifications, by requiring the use of specific data elements in specific fields, are consistent with the federal government’s approach to EDI, as well as that of other organizations.

³ NIST identifies the following primary objectives of EDI:

- a. to ease the interchange of data sent electronically by use of common standards that allow for automated message processing;
- b. to promote the achievement of the benefits of EDI: reduced paperwork, fewer transcription errors . . .
- c. to promote migration to a universally used family of EDI standards, in order to further Government efficiency and to minimize the cost of EDI implementation by preventing duplication of effort.

Federal Information Processing Standards 161-2 at 4 (Ex. K). The principles on which SoundExchange bases its proposed specifications are analogous:

First, the adopted format of the reports of use must enable an agent designated to collect and distribute statutory royalties to develop automated, economical data processing systems to facilitate the accurate and efficient distribution of royalties. Second, the adopted formats must be based upon commonly accepted standards for the electronic exchange of data between entities to facilitate such exchanges and minimize any costs that may be required for the development of new delivery or processing systems. Third, the files should not be attributed with any operating system settings that do not allow the file to be read using widely used data loading tools. Fourth, the adopted formats must be robust enough to accommodate different file sizes and delivery mechanisms.

Comments of SoundExchange in Docket No. RM 2002-1B at 4 (Sept. 30, 2002).

2. Could a system of webcast sampling, analogous to the sampling performed by performing rights societies in the context of broadcasting, meet the record-of-use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4)?

As indicated by the attached Declaration of Barry M. Massarsky, (Ex. B), a system of sample reporting similar to that prescribed by performing rights societies would deprive tremendous numbers of recording artists and record labels of statutory royalties. A system of sampling would not satisfy the requirement of 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(4) that copyright owners receive “reasonable notice of the use of their sound recordings.” By its nature, a system of sampling would report only some and not all of the performances made under the license, resulting in payment of some, but not all, performers and owners. That necessarily conflicts with the statute’s mandate that copyright owners and artists be paid for the use of their works under the statutory license. Indeed, the regulations that the Board must implement present a far different situation than voluntary agreements for reporting entered into by the performing rights societies; whereas such organizations may be free to enter into agreements authorizing less than census reporting, Congress did not authorize the Board to impose a system in which some artists and copyright owners are denied compensation, even though their works are being used by others.

In addition, as discussed below and in the Declaration of Barry Massarky, the inequities of a sampling system in the context of webcasting are likely to far exceed any inequities that may occur from the use of sampling with respect to terrestrial radio broadcasts. Webcasters typically utilize extraordinarily broad playlists, much broader than those of terrestrial radio broadcasters. This is especially true with college radio stations. *See, e.g.,* Comments of Harvard Radio Broadcasting in Docket No. RM 2002-1 at 5 (Apr. 5, 2002). Because of the breadth of typical webcaster playlists, a system of sampling would result in significantly inaccurate reporting of the sound recordings that are actually performed by services making digital audio transmissions under the statutory license.

In order to demonstrate the enormous unfairness that would be created by a system of sampling, SoundExchange is providing the Declaration of Barry Massarsky. Mr. Massarsky compared (a) the sound recordings reported in a full census report of use covering January 1 to March 31, 2005, that one service transmitted to SoundExchange,⁴ with (b) the sound recordings identified in samples of that report of use. Based on the sample periods the performing rights organization ASCAP would likely rely upon under its experimental Internet licenses, as well as the argument of some webcasters for sample periods of one to three days,⁵ Mr. Massarsky pulled the following samples from the three-month “census” period: one week, the first three days of the period, three non-consecutive days, and one day.⁶ Mr. Massarsky then directed a SoundExchange employee to perform an automated comparison of (a) the data for each sound recording identified in the full census report of use – *viz.*, the sound recording title, record label (the copyright owner), and artist name – with (b) the data for each sound recording captured in each of the sample periods.⁷ The results are displayed in the Excel spreadsheets and graphs attached to Mr. Massarsky’s Declaration as Exhibits 1, 2, and 3.

As the spreadsheets and graphs illustrate, the percentage of copyright owners and performers whose sound recordings are omitted increases significantly as the period measured shifts from the full census period to the one-day sample period. For example, the one-day sample omitted nearly 70% of copyright owners whose works were actually performed during the census period. The three-days samples omitted nearly half (45.25% in the three-non-

⁴ It is SoundExchange’s position that there is no legal impediment to identifying the service that provided the report of use. However, out of an abundance of caution, we do not identify the service whose data Mr. Massarsky analyzed in this Declaration. If the Board were to issue an order directing SoundExchange to reveal the service’s identity, we will readily do so.

⁵ See, e.g., Intercollegiate Broadcasting System, Inc. (“IBS”) Comments in Docket No. 2002-1 at 4 & n.3 (undated, but stamped as received Apr. 5, 2002); Harvard Radio Comments in Docket No. RM 2002-1H at 3 (May 27, 2005).

⁶ As explained in Mr. Massarsky’s Declaration, the starting dates of each of the sample periods were randomly selected using a computer randomization program.

⁷ A SoundExchange employee, rather than an employee of Barry M. Massarsky Consulting, Inc., performed the comparison because SoundExchange maintains possession and control of the report of use.

consecutive day sample and 45.88% in the sample of the first three days of the census period) of copyright owners whose works were performed. The one-week sample omitted nearly 30% of the copyright owners whose works were performed, meaning that the sample captured only 70% of the copyright owners whose works were actually performed.

The results for performers were comparable. In the one-day sample, over 70% of the recording artists whose works were performed were missed. In the three-day samples, almost half (47.92% in the three-non-consecutive day sample and 48.16% in the sample of the first three days of the census period) of such recording artists were missed, and the one-week sample missed over 31% of the recording artists whose works were performed during the three-month period. In addition to the more than 70% of performers whose works were performed but would not receive any compensation, the spreadsheets further show that using a sample of one day out of a three-month period would result in another more than 20% of recording artists whose works were actually performed being underpaid.⁸ In addition to those performers who would not be paid at all with a sample period of three days, using such a sample would also cause more than a third (36.25% in the three-non-consecutive day sample period and 33.75% in sample of the first three days of the census period) of recording artists to be underpaid, and a one-week sample period would result in almost 40% of recording artists being underpaid. The large numbers of performers and copyright owners who would be paid nothing or would be underpaid under a system of sampling demonstrate that such a system is wholly insufficient to satisfy the statutory requirement for records of use.

SoundExchange also references the results of its 2003 analysis of the impact of sampling prepared in support of its December 22, 2003, Reply Comments before the Copyright Office on notice and recordkeeping. (The results of that analysis, Exhibit A to SoundExchange's

⁸ The percentage of artists who would be underpaid does not include artists who would be paid nothing at all because they were not captured in the sample.

December 22, 2003, Reply Comments in Docket No. 2002-1D, are attached hereto as attached hereto as Ex. L.) In that analysis, SoundExchange compared (a) full census reports of use provided by the then-existing three preexisting subscription services (“PES”) for the period January 1 through March 31, 2002 (the “Study Period”) to (b) reports for various three-day and seven-day sample periods pulled from the Study Period. The results of the three-day sample were tremendously harmful to copyright owners and performers; anywhere from thirty to fifty-three percent of the sound recordings reported by the PES on their reports of use for the Study Period were omitted from the sample. Even in the seven-day sample, significant omissions still occurred. According to SoundExchange’s analysis, the seven-day sample omitted between twelve and thirty-two percent of the sound recordings reported by the PES on their reports of use.

The Copyright Office recognized in issuing the Interim Regulations for recordkeeping in this proceeding that “before [a designated agent] can make a royalty payment to a copyright owner, [it] must know how many times the eligible digital audio service made use of the [copyright owner’s] sound recording and how many listeners received it.” 69 Fed. Reg. at 11,516; *see also id.* at 11,526 (recognizing that census reporting “is likely to be the standard measure” provided in final recordkeeping regulations). The results of Mr. Massarsky’s analysis and SoundExchange’s 2003 analysis demonstrate that a system of sample reporting is not workable because it would not enable SoundExchange to know “how many times the eligible digital audio service made use of the sound recording[s and for which royalties are owed] and how many listeners received it.” Without this information, SoundExchange would lack the means necessary to “insure proper payment to the proper parties,” H.R. Rep. No. 108-408, at 42, *reprinted in* 2004 U.S.C.C.A.N. at 2357; *see also* 17 U.S.C. § 114(g)(2) (requiring SoundExchange to distribute royalties for sound recording performances among the copyright owners of the sound recording, the featured recording artist or artists, and the non-featured musicians and non-featured vocalists.) Indeed, Mr. Massarsky concluded that “a census of sound

recording digital performance data, rather than sampling analogous to that of ASCAP, is necessary to accurately identify the copyright owners and artists whose sound recordings have been performed and are entitled to royalties under the statutory license.” Massarsky Decl. ¶ 35.

If sample periods such as those analyzed by Mr. Massarsky are adopted by the Copyright Royalty Board, then those copyright owners and performers whose works are not captured in a sample period would be paid nothing in a royalty distribution even though their works were in fact performed under the statutory licenses. Because sample reporting would likely deprive thousands of copyright owners and performers of the royalties which they are entitled to receive from the digital audio transmission of their sound recordings, the Board lacks a record basis to adopt sample reporting. To adopt anything other than census reporting would frustrate Congress’ intent to ensure that all artists and labels are compensated for the use of their creative works by services making reproductions or transmissions under a statutory license.

3. **Under the provisions of any final rule adopted to implement the notice and record of use requirements of 17 U.S.C. 114(f)(4)(A) and 112(e)(4), either copyright owners (in the form of their agent, SoundExchange) or licensees will be burdened with having to change their existing data systems. From a legal and a policy perspective, on whom is it most appropriate to place these burdens? Is the court's discussion in *Amusement and Music Operators Association v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1154-55 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982) (“depriv[ing] copyright owners of increased remuneration for the exploitation of their works by showing that some * * * operations will become unprofitable is * * * unsound and unjust”) pertinent to this inquiry?**

The congressionally stated purpose of this rulemaking proceeding – to establish formatting and specification requirements that will enable SoundExchange to collect records of use with which it can pay copyright owners and performers the royalties they are entitled for performance of their works – should determine the allocation of burdens between SoundExchange and the licensees concerning recordkeeping requirements. See H.R. Rep. No. 108-408, at 42, *reprinted in* 2004 U.S.C.C.A.N. at 2357; *accord* 70 Fed. Reg. at 21,708 (“the [Copyright Act] requires [the Board] to adopt record of use regulations that will facilitate the distribution of royalties”) (emphasis added). As the Copyright Office recognized, “while a

balancing of both owner and user interests is desirable, [the Board] is ultimately charged with the task of creating a system that will work." 70 Fed. Reg. at 21,708 (emphasis added).

For the system of collection and distribution of royalties to work, SoundExchange must receive electronic data that is formatted such that software can "read" it and use it to allocate royalties among copyright owners and performers. *See* Decl. of Shane Sleighter.

SoundExchange has already expended a tremendous amount of time and money – working with many webcasters and with a goal of making data exchange as efficient as possible – to develop a user friendly system that benefits licensees, copyright owners, and artists by keeping administrative costs down for all concerned. SoundExchange's software system is like that of other organizations that process large amounts of electronically transmitted data. Because SoundExchange is the single entity designated to receive reports of use from the hundreds of thousands of services that are or will be making digital audio transmissions of sound recordings, requiring licensees to conform their data submissions to a single, fixed format is logical as well as consistent with standard business practices. *See, e.g.*, Expanded Federal Parent Locator Service, Child Support Enforcement Network's Interstate Case Reconciliation Data Exchange Specifications (attached hereto as Ex. F); draft standard for Customer Account Analysis posted on the FedeBiz Web Site, (attached hereto as Ex. H, downloaded from <http://fedebiz.disa.mil/FEDICGET.html?FED3040>); Arizona Department of Health Services' Hospital Discharge Data Reports, (attached hereto as Ex. J); SunTrust Bank's File Specifications for Consumer Debits and Credits and for Corporate Debits and Credits, (attached hereto as Exs. C and D); and Wachovia's Cash Management - ACH Formats (attached hereto as Ex. E). Once licensees have gained experience using the established format and delivery specifications, they will be able to conform their data submissions to those specifications fairly easily, thereby minimizing the overall costs associated with reports of use.

The Copyright Office based its proposed rules for recordkeeping on what it found to be "the essentials" for organization and formatting of reports of use and for delivering them to

SoundExchange. 70 Fed. Reg. at 21,706. The Declaration of Shane Sleighter, Software Development Manager for Acumen Solutions, Inc., as discussed in more detail below, explains that SoundExchange's software system is unable to accommodate additional flexibility without incurring substantial costs. Licensees should bear the burden of adapting to the "essential" format and delivery specifications necessary for an efficient royalty collection and distribution system.

Indeed, SoundExchange has already alleviated services of significant obligations and burdens. The statutory licenses under sections 112 and 114 of the Copyright Act provide services with a monumental benefit – the right to reproduce or transmit any sound recording lawfully released in the United States without the obligation to negotiate directly with copyright owners for those rights. But nowhere in Sections 112 or 114 are services granted the right to pay royalties or deliver reports of use to a single entity rather than each copyright owner directly. Instead, it was the copyright owners and performers who incurred the expense of creating SoundExchange. If the copyright owners and performers had not undertaken this effort, then the services themselves would have had to pay for the creation of one or more entities to handle royalty collection and distribution, or incurred the cost of paying each copyright owner and performer directly. *See Determination of Royalty Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,266 (July 8, 2002) ("Webcaster I") ("Read literally, section 114 appears to require that Services pay the statutory royalties to each Copyright Owner. As a practical matter, it would be impractical for a Service to identify, locate and pay each individual Copyright Owner whose works it has performed.").

Specifically with regard to recordkeeping, SoundExchange initially worked with three preexisting subscription services in order to create a reporting tool that would work with those services' scheduling software. And SoundExchange went further to accommodate eligible nonsubscription transmission services and new subscription services by:

- Making available the option of reporting use of sound recording performances on the commercially available spreadsheet program Microsoft Excel. SoundExchange has developed and posted on its Web Site the template for creating reports of use with Excel, as the April 27 Notice proposed, consistent with the proposed rules. *See* http://www.soundexchange.com/licensee/documents/Excel_Template.xls. SoundExchange provides on its Web Site step-by-step instructions on how to use the Excel template, fill it out, what the data elements are, format of data elements, order of the data elements, values for certain data elements, and how to execute the Macro that saves the file to American Standard Code for Information Interchange (“ASCII”) text using the preferred delimiter and text separator. *See id.* SoundExchange worked with Microsoft to write a Macro that converts Excel spreadsheets into an ASCII file that is formatted for SoundExchange’s system. SoundExchange is currently working with Corel toward obtaining a similar Macro for conversion of Quattro Pro spreadsheets into an ASCII file formatted for SoundExchange’s system. Sleighter Decl. ¶ A-1.
- Agreeing that services may choose from four delivery options for transmitting reports of use to SoundExchange; via File Transfer Protocol (FTP), e-mail attachment, compact disk-read only memory (CD-ROM), or floppy diskette.
- Agreeing to allow services to submit files with or without headers.

With this system in place, the burden should be on licensees to conform to it, not on SoundExchange to modify it to suit the individual preferences of each and every webcaster. The Board should consider the above-described costs that SoundExchange has already incurred when it considers whether any *additional* costs should be imposed upon copyright owners and performers. The Copyright Office based its proposed rules for recordkeeping on what it found to be “the essentials” for organization and formatting of reports of use and for delivering them to SoundExchange. 70 Fed. Reg. at 21,706. The Declaration of Shane Sleighter, Software Development Manager for Acumen Solutions, Inc., as discussed in more detail below, explains that SoundExchange’s software system is unable to accommodate additional flexibility without incurring substantial costs. SoundExchange believes that the licensees must bear the responsibility and cost of providing standardized reports of use in an electronic format that ensures the prompt, efficient and accurate collection, allocation, and distribution of royalties to the copyright owners and performers entitled to those royalties. Copyright owners and

performers, through their common agent, SoundExchange, should not be burdened with any additional costs.⁹

To the extent that some services seeking to enjoy the benefits of the statutory license argue that the specifications proposed in the NPRM are too onerous or that certain services should be exempted from conforming to a single fixed standard because to do so might jeopardize their financial health, the Seventh Circuit's decision in *Amusement and Music Operators Association v. Copyright Royalty Tribunal*, 676 F.2d 1144 (7th Cir. 1982), is instructive. In that case, the appellate court flatly rejected "the proposition that the [Amusement and Music Operators Association] may deprive copyright owners of increased remuneration for the exploitation of their works by showing that some jukebox operations will become unprofitable" at the royalty rate proposed by the Copyright Royalty Tribunal, deeming the proposition to be "unsound and unjust." *Id.* at 1154-55. The court recognized the realities of a market economy: "Marginal constituents populate every industry in a market economy, and some of these constituents may go out of business when costs increase." *Id.* at 1154. The Librarian of Congress similarly explained in his July 8, 2002 Webcaster I¹⁰ that:

The law requires only that the [Copyright Royalty Arbitration] Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

⁹ If standards are not fixed and impose too significant a burden on SoundExchange, then the copyright owners and performers represented by SoundExchange reserve the right to seek the adoption of terms in future rate proceedings that require licensees to pay statutory royalties directly to each copyright owner and performer whose recording has been performed. Although the section 112 and 114 statutory licenses have relieved services of the burden to *negotiate* directly with individual copyright owners for a license to reproduce or transmit sound recordings, the statute does not grant services a *right* to enjoy the convenience and cost savings of paying a single entity that will bear all of the costs of royalty collection and distribution.

¹⁰ The Librarian's decisions are entitled to the weight of precedent in this proceeding. *See* 17 U.S.C. § 803(a)(1) (providing that the Copyright Royalty Judges shall act based on, *inter alia*, prior determinations and interpretations of the Librarian of Congress).

67 Fed. Reg. 45,240, 45,254 (July 8, 2002).¹¹

While *Amusement and Music Operators Association* and the Librarian's ruling in Webcaster I concerned determinations of a royalty rate and this proceeding concerns determination of reporting requirements, the underlying principle is directly applicable here. The Seventh Circuit and the Librarian of Congress recognized that licensees benefiting from a statutory license have certain obligations, such as the obligation to pay royalties. Services benefiting from the section 112 and 114 licenses likewise have obligations, and those obligations include submitting reports of use that are sufficient "to insure the proper use of the [section 112 and 114] license[s] and to insure proper payment to the proper parties," H.R. Rep. No. 108-408, at 42, *reprinted in* 2004 U.S.C.C.A.N. at 2357. *Amusement and Music Operators* and Webcaster I establish that the impact of a royalty rate on some services' financial health or viability is not a basis for exempting them from the obligations of a statutory license. Likewise, the impact of reporting requirements that are necessary for SoundExchange to make proper royalty distributions on some services' financial health or viability is no ground for exempting them from the requirements.

¹¹Likewise, the Copyright Office explained in its announcement of interim notice and recordkeeping regulations that there is no basis for exempting noncommercial entities from the statutory reporting obligations on the grounds that the requirements may cause some services to cease webcasting:

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 operations under the statutory licenses, it is not a valid reason to eliminate reporting altogether. The law states that the Librarian of Congress must adopt regulations under the section 114 license to provide copyright owners of sound recordings with 'reasonable notice' of the use of their sound recordings. No provision is made for not adopting regulations in certain circumstances, or for exempting certain services from any reporting information. . . . [C]ertain services — in particular noncommercial broadcasters — seek a complete exemption from reporting any data. . . . We find no authority in the statute to create such exemptions, nor do we find such exemptions as constituting "reasonable notice" of the performance of sound recordings.

Copyright Office Interim Regulations in Docket No. 2002-1E, 69 Fed. Reg. 11515, 11521 (Mar. 11, 2004) (internal citations and footnotes omitted). We note again SoundExchange has provided services with tools to lessen the burdens associated with preparing and submitting reports of use, as described above. *See supra* at 13-14.

The claims of some services that they lack the capability (technological and/or financial) to submit data in accordance with the NPRM or that submitting such data would be unduly burdensome likewise provide no statutory basis for adopting alternative regulations that would not provide SoundExchange with the information it needs to perform its collection and distribution services in an efficient and timely manner.¹² There is simply no ground in the statute for an exemption from reporting for any class (e.g., noncommercial entities) or type (e.g., eligible nonsubscription transmission services) of service. See 17 U.S.C. § 114(f)(4)(A) (“The Librarian of Congress shall also 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 use shall be kept and made available by entities performing sound recordings) (emphasis added); accord 17 U.S.C. § 112(e)(4); see also H.R. Rep. No. 108-408, at 42, reprinted in 2004 U.S.C.C.A.N. at 2357 (purpose of recordkeeping requirements is “to insure the proper use of the [section 112 and 114] license[s] and to insure proper payment to the proper parties”). Indeed, the Copyright Office has previously determined that services engaged in webcasting or broadcast simulcasting possess a level of sophistication that justifies requiring those services to provide reports of use:

One could argue that reporting the use of sound recordings is not “reasonable” if a service cannot under any circumstances provide information about the sound recordings. Even if the Office were persuaded that some services cannot report any data – which we are not – the argument would be unpersuasive.

¹²We observe that Harvard Radio Broadcasting Company (“WHRB”) states on the home page of its Web Site that it “has recently switched streaming service to Live365.com.” www.whrb.org. Live365 advertises on its Web Site that it offers “full licensing/royalty coverage for SoundExchange, ASCAP, BMI, and SESAC.” <http://www.live365.com/pro/index.html>. It also displays a testimonial from WHRB. <http://www.live365.com/pro/educational.html>. If Live365 is in fact handling WHRB’s reporting and royalty-payment obligations, then WHRB has no cause to challenge the notice and recordkeeping requirements proposed by SoundExchange.

We also note that Salem Communications (“Salem”), a Christian and family-themed multi-station radio operator, is a publicly traded company that had \$187.5 million in net broadcasting revenues in 2004 and total revenues of \$196.9 million that year. Salem Communications 2004 Annual Report at 3 (attached hereto as Ex. M). Its “Station Operating Income Margin” as reported in its 2004 Annual Report was 38.2%. *Id.* These figures indicate that Salem has the financial and should have the technological capability to provide reports of use in the format proposed in the NPRM.

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.

Copyright Office Interim Regulations, 69 Fed. Reg. at 11521 at n.12.

Placing information about sound recordings performed into reports of use should not be much of a burden for webcasters. Each service availing itself of the statutory license and controlling the programming it transmits has a statutory obligation to display the artist name, sound recording title and album title simultaneously with the transmission of the sound recording, and therefore must be in possession of that information if it wishes to enjoy the protections of the statutory license. *See* 17 U.S.C. § 114(d)(2)(C)(ix); H.R. Rep. No. 105-796, at 84 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 660. And many college radio stations already require the tracking of all transmitted sound recordings, for example:

- The Policy Manual for KSBR, Jazz/FM 88.5 from Saddleback College in South Orange County, California, states that “KSBR webcasts under the provisions of the Digital Millennium Copyright Act, which requires that electronic records be maintained on every song played on the station. The Scott Studio system automatically produces that record during regular format hours. During specialty shows song information must be manually entered into the computer. Information should be entered in close proximity to the actual time that the song played.” KSBR Policy Manual at 8 (attached hereto as Ex. N). (downloaded from <http://www.collegebroadcasters.org/manuals/KSBR%20manual.doc>) (Aug. 4, 2005).
- The Operations Manual for WETD 90.7FM, Alfred State College, Alfred, New York, states that “[e]very music selection . . . must [be] entered on a Log sheet.” WETD Operations Manual at 3 (attached hereto as Ex. O) (downloaded from <http://web.alfredstate.edu/wetd/operations.htm>) (Aug. 4, 2005).
- The Training Manual for WSUM-91.7FM, University of Wisconsin, Madison, Wisconsin, states that students “must fill out an on-line log with all of the songs you play. This is not required by the FCC, but it is helpful to WSUM for charting and whatnot. The playlist is accessible on the computer to the right of the board in Studio A via the world wide web (www.wsum.org/playlist_input.php). . . . All shows (including talk shows) must log songs played. If you play a new release, be sure to check the appropriate box as well as the genre the new release fits best into.” WSUM On-Air/Training Manual (Compiled Spring 2004) at

14 (attached hereto as Ex. P), (downloaded from <http://www.collegebroadcasters.org/docs/WSUMDraftTrainingManual.doc>) (Aug. 4, 2005).

- The Manual for WRCT, 88.3 FM, Carnegie Mellon University, Pittsburgh, Pennsylvania, states that “[t]he purpose of tracking playlists is to keep a record of what artists, albums and songs are being broadcast. These logs enable the Music Director to report accurate information to various record companies and maintain the flow of free music into the station. Playlists are entered into the WRCT database on the air studio computer. See the ‘Air Studio – Air Studio Computer’ section for details on entering playlists.” WRCT: A Manual, Revision C (July 2004) at 38 (attached hereto as Ex. Q) (downloaded from <http://www.wrct.org/WRCT-TheManual.pdf>); *see also id.* at 40 (“Log in to the database and start a new playlist for your show.”).¹³

If college radio stations are already tracking each sound recording broadcast for their own internal purposes, then certainly those stations can provide the same detailed information to SoundExchange.

RESPONSES TO SPECIFIC FACTUAL QUESTIONS

In order for statutory royalties to be allocated accurately among the tens of thousands of copyright owners and performers entitled to such royalties, services must provide reports of use in a standardized and structured format. This is not simply a request of SoundExchange; it is a practical reality. Without fixed reporting standards, no entity collecting royalties from thousands or even hundreds of services would be able to allocate and distribute royalties in a cost-efficient manner. If royalties cannot be distributed in a cost-efficient manner, then Congress’ goal of ensuring compensation to copyright owners and artists for the use of sound recordings will have failed.

The Declaration of Shane Sleighter, Software Development Manager, Acumen Solutions, Inc., provides detailed responses to each of the Board’s specific factual questions, with the exception of those outside his areas of expertise and we therefore did not ask him to address. We

¹³The foregoing documents were obtained from CBI’s Station Document Resource located at <http://www.collegebroadcasters.org/doc.shtml>.

summarize those responses below, offer additional information relevant to the questions, and respond to the questions Mr. Sleighter does not address.

A. Spreadsheets

The Board has asked questions about SoundExchange's proposal to allow services to provide reports of use using two commercially available spreadsheets. Supplemental Request, 70 Fed. Reg. at 43365. As the Board notes and we reference above, SoundExchange has already accommodated services by agreeing to accept reports of use created with Microsoft Excel. SoundExchange has made available on its Web Site a template for Excel that allows services to easily enter their report of use information, http://www.soundexchange.com/licensee/documents/Excel_Template.xls, and is working to develop a similar template for Quattro Pro.

Contrary to the assertions of CBI and WHRB, reporting use of sound recordings on a Microsoft Excel or Corel Quattro Pro spreadsheet is not objectively expensive or time-consuming for noncommercial webcasters – or anyone else – with basic familiarity with computers. Many of today's computers come pre-loaded with a Microsoft Excel or Corel Quattro Pro spreadsheet program and the programs are thus already available, essentially, for free. Sleighter Decl. ¶ A-1. Even if purchased separately, the programs are not objectively expensive; Excel may be purchased through an educational institution for \$199 and retails for \$399 for a home user, and Quattro Pro retails for \$89. *Id.* The free template available on SoundExchange's Web Site readily converts data entered into an Excel spreadsheet into ASCII and formats it to be compatible with SoundExchange's system. *See id.* ¶ A-2. The template for Quattro Pro should likewise easily convert data into ASCII and format it for the SoundExchange system. *Id.*

Because the SoundExchange template for Excel automatically converts report of use data into ASCII there should be no practical difficulties associated with the conversion process. *Id.* Preparing Excel spreadsheets is objectively straightforward and easy, especially with the

assistance of the SoundExchange template. *See id.* The same should be true for Quattro Pro once a template is developed. It therefore is not foreseeable that services would need technical assistance to prepare Excel or Quattro Pro spreadsheets and convert them into ASCII using the SoundExchange-supplied template. *See id.* ¶ A-3. In the event assistance in preparing an Excel spreadsheet is necessary, the Excel program includes a “Help” function and Microsoft offers technical assistance on its Web Sites and by telephone (free of charge for the first call).¹⁴ *Id.* Because SoundExchange is neither a developer nor distributor of either of the spreadsheets proposed by the Copyright Office, it should have no obligation to provide support for services’ use of the spreadsheets. We note, however, that SoundExchange would likely provide limited assistance to a service that called with a specific question, but do not believe it is appropriate or within the scope of the Board’s authority to adopt regulations that require SoundExchange to provide software support for third-party products.

B. Commercially Available Software

The Board has asked about the commercial availability of software that “could be used to compile reports of use,” the compatibility of any such software with SoundExchange’s system, and the cost of any such software. Supplemental Request, 70 Fed. Reg. at 43,365. Mr. Sleighter’s Declaration explains his understanding that one scheduling service, www.gomusic1.com, is planning to release software that will automatically generate SoundExchange-formatted reports of use for the sound recordings it schedules for performances. Sleighter Decl. ¶ B. Moreover, as SoundExchange has previously noted, the market (*i.e.*, software vendors) will likely develop products that facilitate reporting in accordance with Board regulations once those regulations are determined. *See* Reply Comments of the Recording Industry Association of America, Inc., Docket No. RM 2002-1A, at 43-48 (Apr. 26, 2002). For

¹⁴In addition, there are many reference materials that offer support for using Excel spreadsheets. *E.g.*, Curtis Frye, *Microsoft Office Excel 2003 Step by Step* (Microsoft Press 2003) (retailed on Amazon.com for \$16.49).

example, the two remaining preexisting subscription services, Muzak and Music Choice, prepare electronic reports of use utilizing software developed by a vendor to be compatible with SoundExchange's system after Copyright Office recordkeeping regulations were adopted for preexisting subscription services. Sleighter Decl. ¶ B. We do not know what those two services pay for use of the software. *Id.*

Also, a company named Websound developed an application for the creation of electronic reports of use that complied with SoundExchange's proposed specifications. We do not know if this product was ever commercially released or what its cost was, but during its development SoundExchange received reports of use created by the product and certified the application's compatibility with SoundExchange's systems. Based on these experiences, SoundExchange expects that the market would make available to licensees at market-determined prices the products necessary to comply with the reporting requirements adopted by the Board.

Finally, there are already many eligible nonsubscription transmission services, new subscription services and preexisting satellite digital audio radio services currently providing SoundExchange with electronic reports of use. SoundExchange does not know how these services are generating their reports of use but they are doing so in a manner consistent with SoundExchange's proposed specifications. *See id.*

C. Report Delivery

The Board inquires about the possibility of delivering reports of use to SoundExchange via a Web site. Supplemental Request, 70 Fed. Reg. at 43,365. As the Board notes, SoundExchange already supports four methods for the delivery of electronic reports of use: FTP, e-mail attachment, CD-ROM, and floppy diskette. Mr. Sleighter explains in detail that creating a Web site robust enough to accept reports of use from potentially thousands of services and secure enough to withstand viruses and hackers could cost between \$100,000 and \$950,000, depending on the Web site's functions. Sleighter Decl. ¶ C-1. It is important to highlight that any web-based reporting application will require custom-built software. SoundExchange is

simply unaware of any commercially available product that would enable electronic reports of use to be delivered through a Web site. A requirement to host a Web Site whereby services could drop off their logs or a requirement that would permit webcasters to view reports that they have submitted in the past would cause SoundExchange to incur further costs that would deplete royalties otherwise being paid to performers and copyright owners. This expenditure is unnecessary, especially given that Sound Exchange already offers FTP delivery of logs, which is more efficient than web delivery, and no more difficult.

We assume that the services would expect copyright owners and performers to pay these costs to accommodate the statutory reporting obligations of the services. SoundExchange does not believe copyright owners and performers should be required to have these costs deducted from their royalty payments, particularly when SoundExchange is already offering services four different options for delivering reports of use. The statutory license requires services to provide copyright owners with reasonable notice of the use of sound recordings. Copyright owners and performers have no statutory obligation to provide services with a record of the reports of use they deliver.

D. File Naming

The Board has asked “[w]hat is the ASCII standard for reporting days, months and years?,” “Is one way more cumbersome or expensive than the other?” and “What is required to be technologically capable of assigning file names of the length proposed in the NPRM?” Supplemental Request, 70 Fed. Reg. at 43,366. NRBMLC/Salem’s comments cited by the Board are mistaken in suggesting that there is a single ASCII standard for reporting days, months and years. Mr. Sleighter explains that organizations that regularly receive data electronically establish standard formats for dates so that incoming data will be read properly by their computer systems. Sleighter Decl. ¶ D-1.

SoundExchange established the DDMMYYYY format so that its software system will properly interpret dates submitted by services and, for example, not read 12012005 as

January 12, 2005 if the service was referring to December 1, 2005. *Id.* While the DDMMYYYY format is no less cumbersome or expensive than a YYYYMMDD format or a MMDDYYYY format, SoundExchange must receive the data in a single format; otherwise its system will not be able to read it correctly. *Id.*

The Board has also inquired “[w]hat is required to be technologically capable of assigning file names of the length proposed in the NPRM?” Supplemental Request, 70 Fed. Reg. at 43,366. Mr. Sleighter explains that most Windows and UNIX programs accommodate file names of 50 characters or more. The naming format proposed by the Copyright Office should not exceed 50 characters. *See* 70 Fed. Reg. at 21,706-07 (proposing that file names consist of “the name of the service submitting the file followed by the start and end date of the reporting period followed by an underscore and the transmission category code,” and giving as an example file name, “AcmeMusicCo.10102004-30042004_H.txt”, which contains 35 characters). Consistently formatted file names “will ensure that file names are consistent across all organizations and that each ASCII file, and each record within the file, can be tracked for each service submitting the reports of use.” Sleighter Decl. ¶ D-2.

E. File Extension

The Board inquires about the necessity of the “.txt” file extension and what difficulties saving files as .txt files would entail. Supplemental Request, 70 Fed. Reg. at 43,366. As Mr. Sleighter explains, the identification of fields with the .txt extension aids SoundExchange in its archival of files.

Digital audio services should experience no difficulty in using .txt file extensions for their reports. The Macro SoundExchange maintains on its template for Microsoft Excel spreadsheets automatically saves file as ASCII delimited text. The Macro prompts user to name the file, and automatically appends the .txt extension at the end of the file name. Sleighter Decl. ¶ E-2.

F. Delivery Address

The Board has asked whether Royalty Logic, Inc. (“RLI”) has standing to request copies of reports of use and what would be the expense and burden that would be associated with providing RLI with copies of reports of use. Supplemental Request, 70 Fed. Reg. at 43,366. Because RLI has not been designated by the Copyright Office to distribute royalty payments as a “Designated Agent,” *see* 17 U.S.C. 114(g)(3) (referring to the possibility of “designated agents” in addition to SoundExchange),¹⁵ it has no basis for claiming entitlement to receipt of reports of use. If a non-designated entity such as RLI could establish entitlement to copies of reports of use simply by requesting them during a rulemaking proceeding such as this, then any organization – a recording artist management company, or a non-U.S. based performing rights organization representing thousands of copyright owners and performers, for example – would be able to demand copies of reports of use based on nothing more than an appearance in a rulemaking proceeding. The logical consequence could be that hundreds, or even thousands, of similarly non-designated entities – one for each copyright owner and performer entitled to statutory royalties – would be entitled to copies of reports of use.

SoundExchange will not speculate on what the burden would be on the universe of section 112 and 114 statutory licensees if they were required to provide reports of use to each entity that represented at least one sound recording copyright owner or performer for the collection and distribution of statutory royalties. However, SoundExchange would not accept an obligation to provide each potential agent for copyright owners or performers with copies of reports of use submitted to SoundExchange; only services have the obligation to provide reports of use. *See* 17 U.S.C. §§ 114(f)(4)(B), 112(e)(4). Moreover, given the large number of reports of use that SoundExchange will receive upon the adoption of format and delivery regulations, a

¹⁵While RLI initially sought to become a Designated Agent in the most recent arbitration to set rates and terms for webcasting, it withdrew its petition for unexplained reasons. *See* 69 Fed. Reg. 5693, 5695 (Feb. 6, 2004).

requirement that it deliver copies to RLI and potentially others would be costly and unduly burdensome to the copyright owners and performers represented by SoundExchange.

There is no reason that this burden should fall on the copyright owners and performers rather than the users of the statutory license. SoundExchange therefore submits that RLI and any other agent for copyright owners and performers must receive reports of use directly from statutory services, but only if such entities are named a Designated Agent in a rates and terms arbitration proceeding.¹⁶

G. Files With Headers

The Board has asked for detailed information about files with headers, including how they are organized, what are the software requirements and costs associated with creating them, and whether there can be any flexibility in how information in a header is organized.

Supplemental Request, 70 Fed. Reg. at 43,367. The Declaration of Shane Sleighter offers detailed responses to each of the Board's questions. *See* Sleighter Decl. ¶ G.

We highlight here that SoundExchange agreed to offer headers as an optional method of submitting reports of use in order to accommodate the requests of certain webcasters. *Id.* ¶ G-1. Services wishing to deliver reports of use without headers may do so, as long as the reports are in a uniform format of pre-determined order. *Id.* The Macro on SoundExchange's Excel template automatically generates files without headers and is available for free to all services. *Id.* If services use headers, they must submit the header information in a specific order. *Id.* ¶¶ G-4 to

¹⁶The Copyright Office has long maintained that terms for statutory royalties, such as when and to whom they must be paid, are within the jurisdiction of an arbitration proceeding while recordkeeping was subject to the Copyright Office's rulemaking authority. *See, e.g., Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services, Final Rule*, 68 Fed. Reg., 39,837, 39,840 n.3 (July 3, 2003) ("The fact that more than one entity could serve as Designated Agents does not mean that there necessarily out to be more than one Designated Agent.") (citing 67 Fed. Reg. 45,329, 45,269 (July 8, 2002)); Letters from Copyright Office to Ms. Woods and Mr. Oxenford of 9/23/04 (copies attached hereto as Ex. R). Reports of use should follow payments and, as such, this rulemaking proceeding is not the appropriate forum to determine whether RLI is entitled to royalty payments or reports of use.

G-6. Because SoundExchange's system is based on EDI best practices, it is configured to accept data in a preset order.¹⁷ *Id.* ¶¶ G-4 to G-6.

H. Field Delimiters and Text Indicators

The Board has asked whether there are industry standards for use of field delimiters and text indicators, whether the Board's regulations should specify the ones to be used, and whether there is room for flexibility, including for commas and quotes to be used as field delimiters and text indicators, respectively. Supplemental Request, 70 Fed. Reg. at 43,367. Mr. Sleighter's Declaration explains that among larger businesses, XML is the standard for business-to-business data exchange and can accommodate various field delimiters and text indicators. Sleighter Decl. ¶ H. While smaller businesses commonly use ASCII files delimited with commas, the comma is not a workable delimiter for reports of use of sound recordings because the character appears in the identifying information of some sound recordings. *Id.*

The Copyright Office correctly recognized that with ASCII files, in order to be effective “[t]he field delimiter character must be unique and never found in the report's data content.” 70 Fed. Reg. at 21,709. Mr. Sleighter explains, by way of examples, why field delimiter and text indicator characters that may appear in the names of sound recording titles, album titles, and artist names – such as commas and quotes – would be unworkable for ASCII formatted files. *See* Sleighter Decl. ¶ H. If SoundExchange's system were programmed to recognize commas and quotes as field delimiters and text indicators, it would fail upon attempting to load records with commas and/or quotes in the data content. *Id.*

Recognizing the flexibility that SoundExchange offers where feasible, we observe that services wishing to select their own field delimiters and text separators may do so by delivering

¹⁷Mr. Sleighter explains that reports created with XML (eXtensible Markup Language) could present data in an alternate order that would be compatible with SoundExchange's system, but the cost of creating XML-formatted reports is most likely prohibitively expensive for smaller webcasters. Sleighter Decl. ¶ G-4.

reports with headers that identify the delimiters and text separators, provided the delimiters and text separators are unique and not found in data entries. For those who choose to deliver reports of use without headers, they must use a standard delimiter and text indicator specified in regulations so that SoundExchange's system will be able to receive and interpret those reports of use.

I. Data Fields

The Board asked for additional information regarding the proposed requirement that all data be in upper case, including the costs and benefits of such a requirement, whether SoundExchange's system will accept data in lower case and combination lower and upper case, and whether there are pertinent industry standards. Supplemental Request, 70 Fed. Reg. at 43,367. Mr. Sleighter explains that SoundExchange's system compares data from a particular record with information in SoundExchange's inventory of artists, album, performances, and labels as part of its consolidation of all the royalties owed a given copyright owner or performer for a particular performance. Sleighter Decl. ¶ I-1. SoundExchange's system matches data only if text strings match exactly, including in their case. *Id.* Reconfiguring the system to accept lower case and combination case data would degrade its performance substantially and add delay to the royalty allocation and distribution process. *Id.* Requiring SoundExchange to convert the case of data files submitted by services would also inject risk of error and uncertainty into they process. *See id.* ¶ I-2. Converting text to uppercase should be the burden of each individual service, as that service would only need to convert its data once, whereas SoundExchange would have to convert hundreds of files per reporting period.

While there are no industry standards for data fields, businesses typically agree to standards to reduce errors in data communications. *Id.* SoundExchange proposed all uppercase text so that it will receive uniformly formatted records of sound recording performances that its computer database can match with other records of performances of the same sound recording. *Id.* ¶ I-1. Many large organizations likewise require uppercase text in electronically transmitted

files. *E.g.*, Arizona Department of Health Services Hospital Discharge Data Reports at 1 of 13 (attached hereto as Ex. J); Wachovia Cash Management - ACH Formats at 5 (attached hereto as Ex. E).

J. Abbreviations

The Board has asked for information on whether abbreviations should be permitted in data fields of reports of use, and also about the possible utilization of a SoundExchange database of sound recording information in connection with reports of use. Supplemental Request, 70 Fed. Reg. at 43,367. Mr. Sleighter explains that SoundExchange's need for information in a uniform format precludes the use of abbreviations. Sleighter Decl. ¶ J-1. Again, SoundExchange's system will match records for identical sound recordings only if the records identify the sound recordings in exactly the same format. Developing a set of standard abbreviations would likely be cumbersome given the enormous number of sound recordings lawfully released in the United States in the addition to the large number of artists and copyright owners whose names might also be subject to abbreviation. And implementing such a system would be prone to error. *See id.* ¶ J-2.

Regarding a SoundExchange database of sound recording information, SoundExchange has created such a database from reports of use it receives from services which anyone can query free of charge. There are also commercial tools available for sound recording data. *See id.* ¶ J-3.

However, the availability of such a database should not make a difference in a service's reporting. The service necessarily possesses the required information for each sound recording it transmits. After all, it is the service that chooses the sound recording, and absent reports or use, SoundExchange would have no way of knowing which of the hundreds of the thousands of sound recordings in its database a given service performed. And as referenced above, services must display the artist name, sound recording title and album title simultaneously with the transmission of a sound recording, and therefore must be in possession of that information. *See*

17 U.S.C. § 114(d)(2)(C)(ix); H.R. Rep. No. 105-796, at 84 (1998), *reprinted in* 1998 U.S.C.C.A.N. 639, 660.

K. Files Without Headers

The Board has asked for information about files without headers, including whether there are relevant industry standards, what are the costs and benefits of headers, and whether the requirements for files without headers can be flexible. Supplemental Request, 70 Fed. Reg. at 43,367-68. The Copyright Office proposed the requirements for files without headers based on the success with which a similar regulation for preexisting subscription services' reports of use has operated. 70 Fed. Reg. at 21,709. It is appropriate to expect that the application of those requirements to the services implicated in this proceeding will meet with similar success.

Mr. Sleighter explains that the answers to the Board's questions about files without headers are similar to the answers to the Board's questions about files with headers. Sleighter Decl. ¶ K-1. Again, SoundExchange's system will work only if it receives information in a standard format. *Id.* ¶ K-2. SoundExchange's software systems were not built to accept multiple reports of use containing different data elements from a single service for a single reporting period, with the obligation to "overlay" the multiple reports into a single file. But even if SoundExchange could develop software that could combine multiple files, it should not be required to do so. Services bear the responsibility of providing copyright owners with notice of use of sound recordings, *see* 17 U.S.C. §§ 114(f)(4)(B), 112(e)(4), and taken separately, an individual file that does not contain complete information for a reporting period would not satisfy the statutory notice requirement. Such a process would also introduce risk of error and uncertainty into the royalty allocation and distribution process. For example, what if a service neglects to send all of its files for a reporting period? How could SoundExchange be sure that it has a complete submission? As the Copyright Office recognized, "[a]llowing submission of multiple files of data will . . . unduly burden the agent processing the data and likely result in confusion and a high error rate in attempting to overlay the data." 70 Fed. Reg. at 21,708.

Requiring SoundExchange to manipulate files in order to combine them could also expose SoundExchange to charges of file tampering. Such risk and uncertainty could be avoided entirely if each service compiled its own report of use into a single file prior to delivery to SoundExchange.

Regarding files in a "native form," SoundExchange's system cannot recognize such files if they do not conform to the format the system is configured to read, as discussed above.

Sleighter Decl. ¶ K-4.

* * * *

SoundExchange looks forward to working with the Board and statutory licensees on the implementation of final regulations consistent with the format and delivery specifications we have proposed.

Respectfully submitted,

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Dated: August 26, 2005