

**Before the  
U.S. Patent and Trademark Office and  
National Telecommunications and Information Administration  
U.S. Department of Commerce**

In the Matter of:

Request for Comments on Department of  
Commerce Green Paper, Copyright Policy,  
Creativity, and Innovation in the Digital  
Economy

Docket No. 130927852-3852-01

**COMMENTS OF SOUNDEXCHANGE, INC.**

SoundExchange, Inc. (“SoundExchange”) submits these Comments in response to the Request for Comments (“RFC”) on the Department of Commerce’s Green Paper concerning Copyright Policy, Creativity, and Innovation in the Digital Economy. 78 Fed. Reg. 61,337 (Oct. 3, 2013).

SoundExchange appreciates the work of the Commerce Department’s Internet Policy Task Force and the expression of that work in the Green Paper. New technologies have transformed the creation and dissemination of recorded music. As a result, more music is being created and consumed than ever before, and consumers can enjoy recorded music in many different forms, and from a multitude of sources, that were not available a decade ago. The business of creating and disseminating recorded music has also been transformed, from one almost entirely dependent on the distribution of physical products to one based on numerous business models and revenue streams. In such an environment, the issues addressed in the Green Paper are critical to SoundExchange and its constituents. The Green Paper represents an important step in the continuing dialog concerning development of the digital economy.

SoundExchange has played a key role in the ongoing transformation of the music industry. It was formed to help the music and creative community thrive in the digital age by simplifying the royalty collection and payment process. SoundExchange is the sole collective that has been designated by the U.S. Copyright Royalty Judges to collect and distribute sound recording performance and ephemeral reproduction royalties under the statutory licenses provided by Sections 112(e) and 114 of the Copyright Act. *See* 17 U.S.C. §§ 112(e), 114. It also collects and distributes foreign sound recording performance royalties on behalf of its members. An independent nonprofit organization, SoundExchange represents more than 90,000 artist and 28,000 rights owner accounts and administers payments from more than 2,200 different services operating under the U.S. statutory licenses. In the decade since its formation, SoundExchange distributed more than \$1.5 billion to creators and copyright owners.

While the music industry has come a long way in transitioning to the digital economy, there is room for improvement in the environment for licensing recorded music for online uses, and SoundExchange believes that the government could facilitate that process. In these Comments, SoundExchange suggests four ways in which the government could facilitate development of the licensing environment:

- Facilitating accurate and efficient identification of repertoire and creators, and online licensing and reporting, by continuing the Copyright Office's efforts to make the copyright registration process more useful in commerce and otherwise supporting development and use of copyright management information standards;
- Supporting collective licensing initiatives;
- Exploring means to promote statutory license compliance; and
- Eliminating the market distortion caused by the exemption for broadcasting.

We address each of these in turn.

**1. The Government Should Facilitate Accurate and Efficient Identification of Repertoire and Creators, and Online Licensing and Reporting, by Continuing the Copyright Office’s Efforts to Make the Copyright Registration Process More Useful in Commerce and Otherwise Supporting Development and Use of Copyright Management Information Standards**

The government could significantly improve the environment for licensing of music by supporting the development and use of standards for the content and transmission of copyright management information. An important way for the government to do that is to continue the Copyright Office’s efforts to collect standards-based identifying information as part of the registration process and to implement standards-based interoperability between the registration database and other systems. Greater development and use of standards would promote more accurate and efficient licensing and administration, both of which would increase the diversity of consumer offerings in the marketplace and put more money into the hands of creators.

As the Green Paper and RFC indicate, today’s outpouring of new creative works and easy flow of content across borders imply substantial operational complexity for businesses that rely on licensing of copyrighted works. Simply put, it is difficult to identify and keep track of all the new music being commercialized every day.

Across the digital economy, tremendous effort is devoted to identifying copyrighted works and reconciling different practices for reporting and collecting fundamentally similar information about uses of copyrighted works. SoundExchange has spent the last decade compiling a database of identifying information concerning approximately 6.5 million unique recordings that have been reported as used under the statutory licenses. However, new recordings are created and released all the time, and SoundExchange is also always learning of older recordings that have not previously been identified. Proper identification and matching of recordings are at the heart of what SoundExchange does, and it is a formidable challenge.

What might commonly be thought of as the key identifiers of a recording – featured artist name, track title, album title and label name – simply are not sufficient to distinguish unambiguously among the millions of recordings in existence for purposes of the modern licensing marketplace. Popular recordings frequently exist in different versions (e.g., ones with and without explicit lyrics, and edits of various lengths), and a featured artist frequently will have recorded the same song multiple times (e.g., a “studio” and “live” recording), sometimes with different performers and rights owners. In addition, many performing artists and songs have the same or confusingly similar names, and recordings are commonly distributed under license by record companies other than their copyright owner (e.g., in the case of so-called “compilation” and “soundtrack” albums).

A concrete and immediate step that the Administration can take to facilitate accurate and efficient identification of repertoire and creators, and online licensing and reporting, is to encourage and support the Copyright Office’s efforts to make the copyright registration process more useful in commerce. The Copyright Office’s registration database contains a huge amount of information about sound recordings. While it is neither comprehensive nor immediately current, it is a tremendous resource that could be made even more useful. The Copyright Office is currently working to improve the utility of the registration database in various respects. *See, e.g.,* U.S. Copyright Office, Technological Upgrades to Registration and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013). Of particular interest to SoundExchange are efforts to collect additional standards-based identification information through the registration and recordation processes and to increase the interoperability of Copyright Office systems with the systems of industry users to allow the Office’s database to be more readily accessed, searched

and synchronized with other data sources. SoundExchange applauds the Office's efforts in these areas.

Various standards have been adopted to assist with unambiguous identification of copyrighted works. Most important for SoundExchange's purposes is the International Standard Recording Code or "ISRC" (ISO 3901). ISRC is a unique identifier for sound recordings, capable of distinguishing recordings with the same or similar titles, and different versions of the same recording. ISRCs are widely used by record companies and most digital distribution companies for purposes of rights administration, and are used for reporting purposes in direct license arrangements. The licensing environment for sound recordings would be greatly improved if ISRCs were used even more widely by creators and distributors of recordings, and by users of recordings under statutory license.<sup>1</sup>

As a further example, the International Standard Name Identifier or "ISNI" (ISO 27729) is a new standard for unique identification of the creators of works (including both sound recordings and other types of works), helping both to address variations in spelling of a person's or entity's name and to distinguish persons or entities with the same or similar names. While it is not yet widely used, it has the potential greatly to assist license management, both under the statutory licenses and otherwise.

Other standards apply to the exchange of information for licensing and digital supply chain purposes. Most importantly, Digital Data Exchange or "DDEX" is a consortium focused

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<sup>1</sup> SoundExchange recently filed a petition with the U.S. Copyright Royalty Judges seeking various changes to the "notice and recordkeeping" regulations under the statutory licenses (37 C.F.R. Part 370), including use of ISRC in statutory license reporting where available. SoundExchange believes that all the proposals made in its petition would contribute to efficient operation of the statutory licenses, and hopes that the Judges will commence a rulemaking proceeding to consider them.

on standards for exchanging information about digital supply chain management, and particularly music metadata. Its standards are already widely used in connection with voluntary agreements for the dissemination of sound recordings, but further adoption for sound recording uses,<sup>2</sup> and adoption of similar standards applicable to other digital media supply chains hold considerable promise for improving the efficiency of licensing and reporting of usage.

The government could potentially make a significant contribution to further development of the music licensing marketplace by continuing the Office's efforts to improve the commercial utility of the data captured in the registration and recordation processes. In particular it would be beneficial if the Office captured and validated standards-based identifying information such as ISRCs and ISNIs as part of the registration process, and enabled greater interoperability with third party systems using standards-based methods such as DDEX standards.

More generally, companies may be reluctant to pursue standardization of the methods they use to communicate copyright management information out of fear that cooperative efforts among competitors could give rise to antitrust liability. However, the positive effects that standards generally have are well known. *E.g.*, U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, at 33 (Apr. 2007) (calling standards "one of the engines driving the modern economy" and a "fundamental building block for international trade"), *available at* <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>. As a result, standards set through a

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<sup>2</sup> Reporting of usage under the Section 112/114 statutory licenses is subject to the specific requirements of 37 C.F.R. Part 370. SoundExchange does not propose conforming those requirements to DDEX standards at this time, because that is probably not currently warranted for small-scale users of the statutory licenses. However, SoundExchange does anticipate working with larger users of the statutory licenses on a voluntary basis to try to migrate their reporting toward XML formats and DDEX standards.

proper standard-setting process have generally been viewed as procompetitive. U.S. Department of Justice and Federal Trade Commission, *Competitive Aspects of Collaborative Standard Setting*, at 5 (June 14, 2010), (“[T]ypically, the procompetitive benefits of standard setting outweigh the loss of market competition. For this reason, antitrust enforcement has shown a high degree of acceptance of, and tolerance for, standard-setting activities.”), *available at* <http://www.justice.gov/atr/public/international/269554.pdf>. Encouraging standardization of the methods used to communicate copyright management information would greatly improve the licensing marketplace, and is a classic and desirable role for government. The government may be able to promote standardization by using its influence to encourage participation in standard setting activities and adoption of standards, and by communicating clearly that standard setting under appropriate circumstances will be viewed as pro-competitive by agencies responsible for antitrust policy and enforcement.

## **2. The Government Should Support Collective Licensing Initiatives**

In the emerging digital marketplace, services commonly offer access to huge numbers of works, and as a result, they need licenses from many different copyright owners. Collective licensing is a proven way to accomplish such licensing efficiently.

Existing collective licensing organizations demonstrate that collective licensing works. The statutory licenses in Sections 112 and 114 of the Copyright Act, which are administered by SoundExchange, have made it easy for new services to launch with licensing of sound recordings in place, allowing for massive growth in the number of webcasting services over the past 10 years. That growth in turn has yielded a new revenue stream for copyright owners and artists that continues to grow in importance. Likewise, SoundExchange understands that ASCAP, BMI and SESAC together represent the vast majority of commercial musical works on a voluntary

basis, and that the Copyright Clearance Center likewise represents a large repertoire of literary works. These organizations show that collective licensing can allow users to clear rights and obtain licensing efficiently, thereby propelling innovative services forward, and likewise efficiently move payments into the hands of creators.

One way the government could encourage collective licensing is through antitrust policy. Even though the Supreme Court has recognized that collective licensing can have pro-competitive effects, *Broadcast Music v. Columbia Broadcasting System*, 441 U.S. 1, 19-24 (1979), antitrust considerations frequently have a chilling effect on consideration of possible collective licensing initiatives. It may be worth considering whether limited and carefully crafted antitrust exemptions for certain voluntary collective licensing activities would promote innovation in the digital economy while also preserving competition.

### **3. The Government Should Explore Means to Promote Statutory License Compliance**

The Task Force also should consider expanding the available enforcement mechanisms under the Section 112/114 statutory licenses. The Section 112/114 statutory licenses play a useful role in the digital economy by providing “efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.” *See* H.R. Conf. Rep. 105-796, at 79-80 (1998). However, that efficiency comes at the price of a copyright owner’s usual ability to choose to do business only with responsible partners, and to build into agreements mechanisms to provide reasonable assurance of performance. Statutory licenses are available to anyone, and essentially operate on the honor system.

Noncompliance with Section 112/114 statutory license requirements is commonplace. For 2012, about one quarter of Section 112/114 royalty payments were not made on time.

Section 112/114 licensees are also generally required to report to SoundExchange concerning their usage of sound recordings under statutory license. For 2012, 69% of licensees paying royalties and required to deliver such reports have not delivered at least one report that they were required to deliver. Worse still, 31% of such licensees have not delivered *any* such reports at all. In SoundExchange's audits of services, it has, for example, found services that have adopted business rules systematically to make exclusions from their payments or reported usage that are not permitted by the applicable regulations. While litigation is an option for addressing noncompliance, it is expensive and time-consuming, and so not practicable to employ against large numbers of licensees.

Noncompliance with statutory license requirements distorts the digital economy by denying creators and copyright owners the payments to which they are entitled by law, and allowing noncompliant services to compete unfairly with services that do comply with applicable requirements. If statutory licenses are to be part of the emerging digital economy, a richer set of remedial options should be available to encourage more widespread compliance. In particular, SoundExchange believes that compliance with Section 112/114 license requirements would be furthered if it were empowered to terminate reliance on the statutory licenses by services that are materially in breach of applicable requirements. Default termination is routinely provided for in commercial contracts, and while ASCAP's consent decree generally requires it to make licenses available to users requesting them, the ASCAP consent decree permits ASCAP to withhold a license from a user that is in material breach of payment obligations under a license. Second Amended Final Judgment at VI, *U.S. v. ASCAP*, No. 41-1395 (S.D.N.Y. June 11, 2001). The Section 112/114 license should similarly protect the interests of creators from widespread noncompliance by licensees.

#### **4. Congress Should Eliminate Distortion in the Sound Recording Licensing Market by Eliminating the Exemption for Broadcasting**

Finally, SoundExchange applauds the Internet Policy Task Force's support for extending the public performance right in sound recordings to broadcasting, and believes that doing so is the most important thing the government could do to improve the licensing environment for recorded music. While the RFC did not specifically seek comments concerning that issue, these Comments concerning the licensing environment for music would not be complete without some mention of it.

As the Green Paper explains, U.S. law has long disadvantaged sound recordings relative to other types of creative works. Thus, sound recordings were not granted federal copyright protection at all until 1972, and were not granted a public performance right until 1995. Green Paper, at 10-11. When Congress did provide a public performance right in 1995, it was significantly limited relative to performance rights in other types of works. Among other things, it is limited to performances by means of digital audio transmission, 17 U.S.C. § 106(6), and radio broadcasts are specially exempted, 17 U.S.C. § 114(d)(1)(A). By contrast, U.S. law has recognized a full performance right in musical works since 1897, Act of January 6, 1897, ch. 4, 29 Stat. 481 (1897), and every other developed country provides a broadcast performance right in sound recordings.

Exempting broadcast radio from the sound recording performance right is plainly unfair to performers. That unfairness has been repeatedly recognized by the Administration and the Copyright Office, so we do not address it in detail here. However, the effects of the exemption are much broader than that, since the exemption distorts the whole music marketplace in the digital economy. Because broadcast radio is uniquely privileged to use recorded music to its own commercial advantage without paying royalties like Internet, cable and satellite services,

“over-the-air broadcasters enjoy a competitive advantage over emerging digital services.” Green Paper, at 11. The broadcast radio exemption is in effect a subsidy of 1920s technology that limits the competitiveness of newer technologies in the digital economy.

Relatedly, while “substantial empirical evidence shows that sound recording rights are paid multiple times the amounts paid for musical work rights in most digital markets,” Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4089 (Jan. 24, 2008), the creators and copyright owners of sound recordings are paid infinitely less than the creators and copyright owners of musical works (zero) when their recordings are used by broadcast radio.

The absence of a performance right as to broadcast radio also distorts the international flow of sound recording royalties, and thus hurts the competitive position of the United States. SoundExchange sees this first hand. A portion of U.S. statutory license royalties paid to SoundExchange is attributable to foreign repertoire and is passed through to foreign performance rights organizations for distribution to foreign creators and rights owners. SoundExchange also tries to collect from those foreign performance rights organizations, on behalf of SoundExchange’s U.S. members, their share of foreign performance royalty income. However, because the U.S. sound recording performance right does not extend to radio broadcasting, SoundExchange is generally not able to collect royalties accrued for foreign radio broadcasts of U.S. sound recordings. The absence of a U.S. broadcast performance right has cost U.S. interests a significant amount in lost foreign performance royalty income.

SoundExchange believes that the most important thing the government could do to improve the online licensing environment and promote innovative new types of services is to

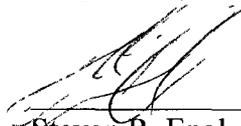
eliminate the distorting effects of the broadcast radio exemption through the enactment of a sound recording performance right as to broadcast radio.

**CONCLUSION**

SoundExchange appreciates the opportunity to provide these Comments and looks forward to further participation in the work of the Task Force.

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Respectfully submitted,



Steven R. Englund (DC Bar 425613)  
JENNER & BLOCK LLP  
1099 New York Ave., N.W.  
Washington, D.C. 20001  
(v) 202-639-6000  
(f) 202-639-6066  
senglund@jenner.com

*Counsel for SoundExchange, Inc.*

C. Colin Rushing (DC Bar 470621)  
Brad Prendergast (DC Bar 489314)  
Brienne Elpert (DC Bar 1002022)  
SoundExchange, Inc.  
733 10th Street, N.W.  
Washington, D.C. 20001  
(v) 202-640-5858  
(f) 202-640-5883  
crushing@soundexchange.com  
bprendergast@soundexchange.com  
belpert@soundexchange.com

*Of Counsel*