Before the
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Washington, D.C.

In the Matter of	)	
	)	Docket No. 2014-03
Music Licensing Study: Second Request for Comments	)	

COMMENTS OF
SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS
and
AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA
in response to
SECOND REQUEST FOR COMMENTS

The Screen Actors Guild – American Federation of Television and Radio Artists ("SAG-AFTRA") and the American Federation of Musicians of the United States and Canada ("AFM"), (together, "Artists' Unions"), submit these comments in response to the Copyright Office's Notice of Inquiry dated July 23, 2014 ("NOI"), in which, pursuant to its Music Licensing Study, the Copyright Office sought additional comments regarding whether and how existing music licensing methods serve the music marketplace.

In particular, the Artists' Unions address question 3 posed by the NOI:

> *Question 3: Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non-usage-based forms of compensation (e.g., advances against future royalty payment and equity shares).*

In keeping with our response to the initial NOI, we once again focus our lens on the Section 114 statutory license, which has proved to be a significant means not only of increasing compensation to sound recording performers – including royalty artists, session vocalists and session musicians ("Artists") – but also of increasing the efficiency and transparency with which Artists are paid. The experience of the Artists and the Artists' Unions strongly suggests that expanding the Section 114 statutory license would be an effective means of enhancing the transparency of compensation to Artists.

The Best Way to Enhance Transparency in Payments for Digital Streaming of Sound Recordings is to Expand the Statutory License

Our initial comments described in some detail the significant benefits provided by the Section 114 statutory license. Not only has the statutory license's ease of use and level playing field for large and small companies fostered phenomenal growth in digital radio, but it also has benefited Artists, sound recording copyright owners and digital music services alike. It additionally has guaranteed that Artists will share equally with copyright owners in the licensing proceeds derived from this burgeoning market, and that their shares will be paid to them directly by SoundExchange[1] and will not be subject to recoupment. Moreover, the collective management structure developed within SoundExchange to administer the statutory license is characterized by joint artist-owner control, a high level of efficiency, and transparent collections and payments.

Each of these elements is lacking when sound recording copyright owners enter into direct licenses for uses that they consider to be outside of the statutory license. The artists' shares are not necessarily equal to the owners' shares as required by Section 114(g), but are set by contracts which may leave many emerging and other royalty artists without bargaining leverage at the mercy of disadvantageous terms, and which frequently will provide no payments in respect of session musicians and vocalists.[2] Whatever the individual royalty artist's share, it will not be paid directly, it will be subject to recoupment, and it will only be verifiable (if at all) through a complex and expensive individual audit under the royalty contract.

Moreover, the structure of direct license deals can create uncertainty regarding which benefits of the deal are subject to being shared with Artists at all. Direct license deals increasingly have been reported to include "breakage" – advance payments or guaranteed payments in excess of the per-performance royalty earned under the license – equity shares, promotion or other non-usage based elements.[3] While some labels have reported that they

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[1] As we described in our initial comments, pursuant to Section 114(g)(2)(D), SoundExchange pays 45% of statutory license proceeds directly to the featured artists; pursuant to Section 114(g)(2)(B) and (C), SoundExchange pays the non-featured artists' 5% share to the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund, the administrator which identifies the non-featured artists and pays them directly.

[2] While AFM and SAG-AFTRA have agreements with the major labels that require payments to be made for the benefit of session musicians and vocalists based on receipts from non-statutory digital licenses, these payments are smaller than those required by Section 114(g)(2)(B) and (C), and there are no such contractual provisions for non-union recordings.

[3] *See*, *e.g.,* Hannah Karp, "Artists Press for Their Share" *The Wall Street Journal*, July 21, 2014, http://online.wsj.com/news/articles/SB10001424052702303833804580023700490515416; Testimony of Darius Van Arman before the Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet, Hearing on Music Licensing under Title 17, Part Two, June 25, 2014, http://judiciary.house.gov/_cache/files/0f007c39-4b39-4604-8c62-79e58af436a8/final-a2imdariusvanarman0621.pdf; Bobby Owsinski, "The Clear Channel – Warner Music Deal: Not What It's Cracked Up to Be" *Forbes,* September 16, 2013;

will share "breakage" with their Artists, such sharing is not required by law, and any resulting artist payments may be subject to recoupment and less transparent than payments under the compulsory license. And unlike the rate-setting proceedings under the statutory license, where Artists' interests are represented by the collective – SoundExchange – which they co-own, Artists do not control the direct license deals entered into by their labels.

Given the above, the Artists' Unions believe that the best and simplest way to enhance transparency in the payments to Artists for the digital streaming of sound recordings is by expanding the Section 114 statutory license so that the benefits of the statutory license – including efficiency, transparency and equality for Artists – are realized. This is not to say that the statutory license rate should be the same for services offering low and high functionality; the rates should be varied, with increases that reflect the value of greater functionality.

Wherever Direct Licensing of Sound Recordings is Allowed, Transparency Can Be Increased By Requiring Direct Payment of the Artist Share Through SoundExchange

Under current law, a copyright owner is permitted to enter into a direct license with a music service that is eligible for the statutory license. In our initial comments, we expressed grave concern about the detrimental effect on Artists of such direct licensing. We noted two examples: first, the example of music services that sought lower license rates in return for bypassing SoundExchange and paying the entire license fee to the copyright owner (which would then be free to share the fee with Artists in accordance with royalty contracts on terms less favorable than those of Section 114), and second, the example of direct licenses for "customized" music services, in which the license rate might be higher than the Section 114 rate (to reflect the value of "customized" functionality), but for which the value to Artists would be less wherever they were not entitled to direct payment, non-recoupment, and transparency. These latter licenses often include within their terms transmissions that are otherwise eligible for the statutory license, so that the direct license displaces the statutory license for the licensed service.

While the best way to secure transparency for Artists is through the Section 114 statutory license, when direct licensing occurs, it is possible to retain some of the benefits of the statutory license – equal shares for Artists, direct payment, non-recoupment, and some improved level of transparency – by requiring 50% of the compensation under such licenses to be paid by the service to SoundExchange for direct payment to Artists in accordance with the provisions of Section 114(g)(2).

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http://www.forbes.com/sites/bobbyowsinski/2013/09/16/the-clear-channel-warner-music-deal-not-what-its-cracked-up-to-be/; Ben Sisario, "Clear Channel-Warner Music Deal Rewrites the Rules no Royalties" *New York Times,* September 12, 2013, http://www.nytimes.com/2013/09/13/business/media/clear-channel-warner-music-deal-rewrites-the-rules-on-royalties.html?_r=0.

Some copyright owners already engage in a form of this practice, pursuant to private agreements with the Artists' Unions and SoundExchange, when they enter into direct licenses with music services that cover, in whole or in part, uses that are otherwise eligible for the statutory license. Their licensees pay the Artists' share under the license to SoundExchange instead of to the label, the Artists' share is set at the 50% share established by Section 114, and SoundExchange pays it directly to Artists in accordance with the Section 114(g)(2) allocations. Provisions that would have codified that practice were contained in the Performance Rights Act as introduced and then reported in the Senate (S. 379, https://beta.congress.gov/111/bills/s379/BILLS-111s379rs.pdf) and the House of Representatives (H.R. 848, https://beta.congress.gov/111/bills/hr848/BILLS-111hr848rh.pdf) in 2009. Specifically, the private agreement and the 2009 bills required "50% of the total royalties that the [service] … is required to pay" for transmissions otherwise eligible for the statutory license to be paid to SoundExchange, for direct payment to Artists in accordance with the statutory license scheme.

The Importance of Disclosure

Question 3 focuses on the most basic improvement that can be made: requiring the disclosure of *all* compensation negotiated in licenses for the digital streaming of sound recordings, including usage-based or per-performance fees, and any and all non-usage-based forms of compensation, including advances against future royalty payment, flat guarantees, promotional benefits and equity shares. To the extent that any terms for the digital streaming of sound recordings are set outside the clear and transparent administration of the statutory license, those terms – all of them – should be readily available to Artists and their representatives.

Conclusion

Our focus on the benefits to Artists, and their concerns, flows naturally from our role as the Artists' Unions. But it is not founded merely on self-interest. As we said at the outset of our initial comments, it is the creative work of the Artists we represent that brings American music to life, and that (together with the creative work of songwriters) serves as the foundation of the sound recording, radio and digital music industries. Economic equity for Artists is essential if they are to survive and thrive as artists – and that, in turn, is essential for the health of the industries that are dependent upon their creative work.

Respectfully submitted:

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