



February 6, 2020

*Submitted via regulations.gov Docket No. USTR–2019–0023*

Mr. Daniel Lee  
Acting Assistant United States Trade Representative  
for Innovation and Intellectual Property  
Office of the United States Trade Representative  
600 17th Street, N.W.  
Washington, D.C. 20508

**Re: SoundExchange, Inc. Written Comment in Response to USTR’s Request for Comments and Notice of Public Hearing Regarding the 2020 Special 301 Review, 84 Fed. Reg. 70613 (Dec. 23, 2019)**

Dear Mr. Lee:

This submission by SoundExchange, Inc. (SoundExchange) is made in response to the above-captioned Federal Register Notice, which requested public comments regarding intellectual property protection and market access barriers in U.S. trading-partner countries, as part of the 2020 “Special 301” review.

This filing focuses on particular market access barriers that have been imposed on American musical performers and producers in a handful of countries where the full payment of royalties has been denied for uses of American sound recordings<sup>1</sup> on traditional broadcasts, public performances (e.g., “spins” in bars, restaurants and other public venues) and some digital uses. In these territories, “local” performers and musical producers are being fully compensated for such uses, while American performers and producers are being denied payments for the exact same uses. This discriminatory treatment is a denial of full national treatment in contravention to the purpose and principles of national treatment obligations found in multilateral treaties and trade agreements, and other bilateral commitments to the United States in each of these countries.

The territories identified in this filing for review under Special 301 are: the **United Kingdom; Australia; Canada** (on the USTR’s 2019 Watch List); **France; Japan; and the Netherlands** (collectively, the Six Territories).<sup>2</sup>

In the absence of full national treatment, the total amount of monies being denied to American performers and producers in these Six Territories is \$170 million annually.

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<sup>1</sup>“Sound recordings” (the U.S. term for musical recordings) and “phonograms” (the term in many foreign countries) are used interchangeably throughout this filing.

<sup>2</sup>Note, there are other foreign territories similarly denying payments to American performers and producers, but the Six Territories are the largest markets for the music industry where this is occurring, and thus the focus of this filing.

From these Six Territories, in 2018 SoundExchange received approximately \$3.8 million in payments, while making a combined \$100 million in payments to the Six Territories.<sup>3</sup>

### SoundExchange and its Role in the Music Ecosystem

SoundExchange—a non-profit organization incorporated in 2003—was formed by and for the recorded music industry to administer royalties for digital transmissions of recorded music. It provides services for royalty payments for sound recordings and publishing, serving as a critical backbone to today’s digital music industry. The organization collects and distributes digital performance royalties on behalf of more than 202,000 recording artists’ and master (i.e., sound recording) rights owners’ accounts. It collects these royalties on behalf of major and independent record labels, performers and their representatives (managers and agents), and unions representing musical performers. Since its founding, SoundExchange has paid out more than \$6 billion in royalties to over 170,000 artists and rights owners globally. It currently administers royalties from over 3,000 digital radio services (such as Sirius XM, Pandora, and iHeart Radio).

In every musical recording, there are two copyrighted works, each with separate rights holders. The first work is the sound recording—it is the result of the fixation of music on any medium (vinyl, disks, tapes etc.), owned usually by a record label, but it can also be owned or co-owned by the performer(s). The second work is the musical composition—consisting of musical notations and lyrics, owned by composers, lyricists, and music publishers. In the United States, SoundExchange administers rights in the sound recordings for the statutory license—for non-interactive digital services—allowing services to stream artistic content while paying a fixed rate for each play.<sup>4</sup> These services include both satellite radio providers and webcasters who pay SoundExchange when they stream music because their uses are covered by the statutory license. Public performance royalties for songwriting (e.g., compositions) are collected and distributed by performing rights organizations such as ASCAP, BMI and SESAC in the United States. Royalties for downloads (e.g., the reproduction right) of sound recordings are paid directly by the services that offer downloads, and not administered by SoundExchange.

Even limited to non-interactive musical streaming services and digital radio, sound recording digital transmission royalties in the United States alone resulted in SoundExchange collecting \$1.127 billion and disbursing \$953 million in 2018. Studies by the industry give a fuller picture of the growing market for streaming services and digital radio and the role of SoundExchange globally. According to the September 2019 International Federation of the Phonographic Industry (IFPI) Global Music Report (the “2019 IFPI Report”) using 2018 data, total global revenue for music (digital and physical formats and services) was \$19.1 billion. The 2019 IFPI Report notes that there are now thousands of streaming services offering over 50 million recordings worldwide, and revenue for some services is growing at exponential rates (four-fold between 2014 and 2018).

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<sup>3</sup>In total, SoundExchange collected \$25 million from abroad in 2018.

<sup>4</sup>17 U.S.C. § 114. SoundExchange also administers direct licensing of recordings for some music services (that are not under the statutory license in §114), and it administers licenses for a Canadian music publishing society, but neither of those activities are relevant to this filing.

In 2018, SoundExchange paid all foreign performers and producers 12% of the total U.S. payments it distributed, or \$115 million of \$953 million (verified by the payments made to non-U.S. addresses). Of that \$115 million, SoundExchange made payments to these Six Territories of nearly \$100 million.

Although SoundExchange collects foreign monies only via foreign collective management organizations (CMOs) through reciprocal agreements, SoundExchange makes payments to performers and producers overseas through both CMOs via those agreements, or by direct payments to performers and producers. In the United States, SoundExchange administers the statutory license, collecting and distributing digital streaming monies (i.e., for webcasting and satellite radio) to American and foreign producers and performers. Outside of the United States, SoundExchange represents American producers and performers for all of their eligible sound recording performance rights that are collectively managed by CMOs. This includes monies for digital streaming and digital radio as well as for traditional broadcasting (radio and television) and other public performances (playing recordings in bars, restaurants and other public venues). The CMO agreements allow SoundExchange to pay foreign performers and producers U.S. royalties via their own local CMOs, while collecting monies from those CMOs for SoundExchange's own member performers and producers in the United States. SoundExchange has reciprocal CMO agreements with each of the Six Territories to facilitate payments across borders.

#### Denial of Full National Treatment and Royalties as a Market Access Barrier

The federal statute requires the Special 301 review to identify “foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection.”<sup>5</sup> SoundExchange relies on copyright and neighboring rights laws to administer musical rights in the United States and abroad. The details below explain, in each of the Six Territories, the acts, practices, and policies of our key trading partners that serve as barriers to market access and deny the payment of hundreds of millions of dollars to American performers and producers, in short by denying full national treatment. [Appendix A](#) provides the full text of the relevant treaties regarding national treatment and rights obligations pertaining to sound recording producers and performers.

National treatment is a bedrock underlying principle of all copyright and neighboring rights treaties, and has been since 1886 in the Berne Convention for the Protection of Literary and Artistic Works (“Berne”).<sup>6</sup> The principle, when applied to copyright and neighboring rights agreements, requires works and recordings of non-national authors, producers, and performers to be protected, at a minimum, at the same level of protection as the works and recordings of national authors, producers and performers. Full national treatment ensures that one set of laws in a country equally

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<sup>5</sup>19 U.S.C. § 2242(a)(1) (West, through P.L. 116-91).

<sup>6</sup>Berne Convention for the Protection of Literary and Artistic Works, art. 5, Sep. 9, 1886, as revised at Paris on Jul. 24, 1971, and as amended on Sep. 28, 1979, S. Treaty Doc. No. 99-27 (1986), 828 U.N.T.S. 221 (Berne) (“when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors”). Note that, although the Berne Convention has broad national treatment obligations, it only pertains to “works” and not neighboring rights, meaning it does not include the rights of producers of sound recordings or performers.

protects domestic and foreign works and recordings, thus simplifying and harmonizing the protection of copyrighted works and recordings across national boundaries, including the payment and collection of royalties, which provides fairness in the global marketplace for domestic and foreign rights holders. The Six Territories deny full national treatment to American producers and performers because these countries are not paying them for the same uses that these countries are paying their own national producers and performers.

All of the Six Territories are World Trade Organization (WTO) members, and thus bound by the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). Although Article 3 of TRIPS requires national treatment protection, it has this exception: “In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement.”<sup>7</sup> TRIPS Article 14 only provides for a first fixation and reproduction right for producers of sound recordings and performers (as well as a limited right of broadcast for live performances). It does not provide for a transmission or public performance right for sound recordings. The public performances of sound recordings on streaming services and digital radio—which did not exist when the TRIPS language was completed in the early 1990s—are thus not a protected right *per se* by TRIPS.

All of the Six Territories are members of the WIPO Performances and Phonograms Treaty (WPPT). The WPPT does provide for broader rights, including a digital transmission right for sound recording producers and performers. It also has broader national treatment obligations pertaining to producers and performers than TRIPS. The WPPT national treatment obligation is as follows in Article 4:

- (1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.
- (2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.<sup>8</sup>

The rights, relevant to digital music services, are found in Article 15(1) of the WPPT:

Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of

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<sup>7</sup>Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (WTO TRIPS Agreement) (providing national treatment “subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits”; *see also* WTO TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto”).

<sup>8</sup>WIPO Performances and Phonograms Treaty, art. 4, Dec. 20, 1996, 2186 U.N.T.S. 203; 36 I.L.M. 76 (1997) (WPPT).

phonograms published for commercial purposes for broadcasting or for any communication to the public.

Thus, reading Articles 4 and 15 of the WPPT together, national treatment is the norm for sound recording producers and performers, which also includes a “right to equitable remuneration” (i.e., a non-exclusive right) for broadcasting or any communication to the public. This latter set of rights applies to digital music services, including streaming services and digital radio, even if they are non-interactive services subject to statutory license rates, as under the U.S. Copyright Law (Section 114).<sup>9</sup>

The WPPT Article 15 rights are subject to a “reservation.” This allows countries, if they explicitly take a reservation upon accession to the WPPT, to provide less protection to treaty-partner producers and performers. The Article 15(3) reservation allows countries to “apply the provisions of paragraph [15](1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.”

Only four of the Six Territories—Australia, Canada, France and Japan—have taken Article 15(3) reservations, as detailed in Appendix B. Two countries—the Netherlands and the United Kingdom—have not taken the reservation. The United States also took an Article 15(3) reservation to limit payments under Article 15(1) to U.S. law, so payments are made to producers and performers for all available rights under Title 17.<sup>10</sup> Article 4(2) of the WPPT limits the required national treatment obligations if “another Contracting Party” (i.e., the United States) takes a reservation.<sup>11</sup> The Six Territories are using this exception to deny full national treatment to American foreign producers and performers for many of the rights and services that the United States does provide (e.g., the digital transmission rights), and they are doing so even though the United States is granting full national treatment to their producers and performers.

With or without the WPPT reservations, all Six Territories are denying full national treatment for other non-digital uses, including broadcasting and public performances in other venues (bars and restaurants), even though they are paying for these uses to their own nationals (producers and performers) and for sound recordings first fixed in their territories. This is a matter

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<sup>9</sup>Based on WPPT art. 2 definitions, WPPT art. 15 covers traditional broadcasting of a sound recording (on radio or TV) and digital streaming (via the Internet or by satellite). See WPPT, *supra* note 8, art. 2 (“broadcasting” defined as a “transmission by wireless means” including by “encrypted signals” and “transmission by satellite”; “communication to the public” defined as a transmission by “any medium, other than by broadcasting.”).

<sup>10</sup>See WPPT Notification No. 8: WIPO Performances and Phonograms Treaty: Ratification by the United States of America, Sep. 14, 1999, [https://www.wipo.int/treaties/en/notifications/wppt/treaty\\_wppt\\_8.html](https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_8.html) (“Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.”)

<sup>11</sup>See WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, Comment #PPT-15.10 (2003), available at [https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf) (“The general obligation to grant national treatment is confirmed in Article 4(1) of the WPPT which explicitly mentions the right to equitable remuneration provided for in Article 15 as being covered by the obligation to grant national treatment. Article 4(2) only allows exception to this obligation if another Contracting Party makes use of the reservations permitted by Article 15(3).”).

of choice, not law. Germany and Italy, for example, are also members of the WPPT (and WTO TRIPS), and they provide full national treatment to American performers and producers for broadcasting, public performances and digital streaming services, while the Six Territories deny that treatment.

SoundExchange collects monies in the United States which it disburses for American and foreign performers and producers in 89 other countries, including, as noted, in each of the Six Territories. Utilizing its reciprocal agreements, SoundExchange can collect and disburse royalties for American producers and performers for uses abroad. SoundExchange is providing full national treatment to performers and producers of non-U.S. sound recordings from the Six Territories for musical public performances (referred to in the industry as “plays”) on American satellite or webcasting services covered by the statutory license (17 U.S.C. §§ 106(6), 114). This means that SoundExchange is paying performers and producers in all Six Territories for all streaming services and digital radio uses for which SoundExchange collects for American performers and producers—and at the exact same rates as for domestic recordings—even though American performers and producers are being denied some of their monies from the Six Territories. Additionally, U.S. Copyright Law does not discriminate in its treatment of foreign producers’ and performers’ rights, nor does it deny access to and the ability to collect royalties for uses in the United States, unlike certain laws and practices in the Six Territories that explicitly permit discriminatory treatment.

In fact, since U.S. ratification of the WTO TRIPS Agreement, the U.S. Copyright Law has provided *more* extensive protection for older foreign sound recordings, than it provided to U.S. recordings and producers and performers. Section 104A, adopted as part of implementation of the 1994 Uruguay Round Agreement provided the full panoply of rights for pre-1972 and post-1972 foreign sound recordings (and producers and performers) equally under federal copyright law (Title 17). Pre-1972 American recordings (and producers and performers), however, were limited in the scope of protections to state and common laws.<sup>12</sup> Although Title II of the Music Modernization Act, the CLASSICS Act, added significant protections beyond state laws for American pre-1972 recordings, it did not provide full federalization for them fully equivalent to the protections afforded foreign sound recordings since 1994.<sup>13</sup>

#### Details of Treatment of American Producers and Performers in the Six Territories

In each of the Six Territories, American sound recordings and their creators—producers and performers—are eligible for protections in these countries as a result of U.S. adherence to one or more multilateral agreements and treaties including the WTO TRIPS Agreement and the WPPT, or bilateral or regional trade agreements. This merely provides a “point of attachment” to be protected, but the treaties and national laws define the scope of protection. Thus, eligibility for protection does not guarantee that the scope of that protection will be based on full national treatment, and equal to the protections and payments given to domestic recordings and their producers and performers. In fact, in each of these Six Territories, payments are currently being

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<sup>12</sup>See 17 U.S.C. §104A (2016). *See also* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

<sup>13</sup>See Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, Title II (2018).

withheld or uncollected either with respect to performers, producers or both, denying full national treatment.

Here are more details about the treatment in each of the Six Territories:

A. United Kingdom

American performers are denied full national treatment in the U.K. They are only paid for certain digital streaming services but denied traditional broadcast and public performance royalties (e.g., uses in bars and restaurants), unless their recordings were made in the U.K. or other Rome Convention territories.

Background: The U.K. Copyright, Designs, and Patents Act of 1988, as amended (U.K. Copyright Act) provides producers of sound recordings with exclusive broadcast rights and a right of communication to the public (e.g., a right of public performance) for their sound recordings. The exclusive right applies to American producers as well, so they enjoy full national treatment, equivalent to their British producer counterparts.

But, performers are treated differently. Regulations implementing the U.K. copyright law further limit payments to a “single equitable remuneration” under Article 15. The regulations also limit rights in a performance to a “qualifying performance” by a “qualifying individual” or that take place in a “qualifying country” (Sections 181 and 206 of the U.K. Copyright Act). In this way, qualifying performers enjoy an equitable remuneration right against a producer who exploits their performance rights via broadcast or other public performances. However, American performers (for sound recordings fixed in the United States) are expressly not qualified for this remuneration in the U.K. and thus do not enjoy full national treatment equivalent to their British performer counterparts.

The WPPT entered into force in the U.K. on March 14, 2010. As noted, the U.K. did not take a national treatment reservation (Article 15(3)) when it acceded to the WPPT. The U.K. is also a member of the Rome Convention, effective since May 18, 1964. However, the U.K. took several reservations under that Convention, most notably to limit certain uses for performers (but not producers) to a right of equitable remuneration (in lieu of an exclusive right), and only on phonograms produced by Rome Convention territories (so, not including American recordings)—thus the traditional broadcast rights for performers are granted on the basis of reciprocity, not national treatment.

In short, American performers are not paid at all for broadcasts or other public performances, with the exception of payments for recordings first fixed in the U.K. or another Rome Convention country. U.K. performers and producers (and other Rome Convention country members) are paid for these uses.

For digital streaming services, including simulcasts of traditional broadcasts, American producers and performers are paid directly via CMOs. The withholding of payments for traditional broadcast and public performances from most American performers is a denial of full national treatment.

## B. Australia

American producers are denied full national treatment in Australia. There are no public performance rights for performers for streaming services, and there are limited payments to producers for those services, as well as for traditional broadcasts.

Background: The Australian Copyright Act of 1968, as amended, grants producers an equitable remuneration right for broadcast and public performance of sound recordings. It does not grant performers any sound recording performance rights. Under the law, non-Australian recordings are eligible for protections only if published in Australia.

Australia is a member of WPPT, effective on July 26, 2007. It took several reservations to the Treaty: (i) that it would not apply the criterion of “publication”; and (ii) to Article 15(3) that it would not apply the Article 15(1) rights to broadcasts or other transmissions. Australia is also a member of the Rome Convention, which entered into force there on September 30, 1992. Australia noted in its reservations to the Convention that it would: (i) only apply the criteria of nationality and fixation; and (ii) limit payments, including equitable remuneration payments, for radio and other broadcasts (although the breadth of these restrictions now appears at odds with the Copyright Act of 1968, as amended).

American producers are generally eligible for payments for digital streaming activities. However, for traditional broadcasting (radio, TV) and public performance royalties (plays in bars, restaurants and other public venues), American producers are only eligible for payments for recordings published in Australia, which means that few American producers are actually being paid. For American performers, Australia denies any equitable remuneration payments for digital services, broadcasting and other public performances, thus denying all payments.

## C. Canada

American producers and performers are denied full national treatment in Canada. Other than for recordings first fixed in Canada or another Rome Convention country (i.e., not the United States), and for certain digital uses, Canada denies royalties for public performances for recordings of performers and producers whether by traditional broadcast or public performance (e.g., bars and public places). It is also denying monies for the use of older American recordings (pre-1972 recordings).

Background: The Canadian Copyright Act, as amended, grants phonogram producers and performers equitable remuneration rights for communication to the public and public performances (Section 19). The right to communicate works to the public—“by transmission”—is a broad right that covers broadcasts and wire and wireless communications. However, foreign producers and performers, while eligible for equitable remunerations for broadcasts, and streaming services, are in general, only eligible if the sound recording is fixed in Canada or another Rome Convention country.

Canada is a member of the WPPT, effective on August 13, 2014. It took several reservations to the WPPT including: (i) not applying the criterion of “publication” for phonograms;

and (ii) in Article 15(3) not applying the Article 15(1) rights (of broadcasting or communication to the public) for the retransmission of phonograms.

Canada is also a member of the Rome Convention, which entered into force there on June 4, 1998. Canada took a reservation noting that it would not apply the Treaty's equitable remuneration provisions with respect to recordings that were first fixed or first published in a Rome Convention territory, although this seems to contradict the express language of Article 20 of the Copyright Act. American producers and performers may qualify for traditional equitable remuneration rights for broadcast and public performance, but only for sound recordings fixed in Canada or another Rome Convention country.

Applying the WPPT and Rome reservations, Canada has denied payments to American producers and performers for traditional broadcasts and some digital services (and for older recordings). At present, the Canadian CMO does pay American producers and performers streaming and digital radio royalties (that SoundExchange receives via its CMO agreement), but only for reciprocal digital uses.

The U.S.-Mexico-Canada Agreement (USMCA), once fully implemented, will require Canada to provide full national treatment in accordance with Article 20.8 (*see* Appendix A for the full text). Thus, once the USMCA is in force, Canada will be required to make full payments to American performers and producers for traditional broadcasts, digital services, and any other public performances under Canadian law (including payments for the use of older pre-1972 recordings as well).

#### D. France

American producers and performers are denied full national treatment in France. American producers and performers are not paid royalties for traditional broadcasts or public performances unless the recording is produced by a French or other Rome Convention national. American producers and performers do receive digital streaming royalties.

Background: The Intellectual Property Code of France provides sound recording performers and producers equitable remuneration rights for broadcast and public performance (the right of communication to the public).

France is a member of WPPT, effective from March 14, 2010. France took only one reservation under the WPPT, to not apply the "publication" criterion, only finding eligible recordings based on the nationality or place of first fixation; it took no reservations to Article 15(3). France is also a member of the Rome Convention, effective from July 3, 1987 (it took a reservation to that treaty as well). Under its reservation to Rome, France only applies the equitable remuneration rights of broadcast and public performances to phonogram producers who are nationals of other Rome Convention members ("nationality criterion"), and only grants those rights on the basis of reciprocity not national treatment, so based upon whether French nationals are granted rights in the territory of the foreign national who is seeking protection in France.

In this way, American performers and producers are eligible for digital radio royalties (e.g., webcasting). American performers are eligible for payments for traditional broadcasts (terrestrial radio) and other public performance royalties if the performer appears on a recording produced by a French national or other Rome Convention national. However, this treatment denies eligibility for payments for American producers for traditional broadcasts altogether, giving American performers those monies only for French (or other Rome Convention country) produced recordings.

American performers and producers do not receive full national treatment in France. Instead, using the WPPT as the point of attachment, French societies will only pay American performers and producers on reciprocal rights. Sound recording remuneration rights are administered in France by four CMOs: ADAMI (featured performers), SPEDIDAM (non-featured performers), SSCP (major label record companies), and SPPF (independent record companies).

#### E. Japan

American producers and performers are denied full national treatment in Japan. There are no full public performance rights for performers and limited payments to producers.

Background: The Copyright Law of Japan grants producers and performers an equitable remuneration right for certain public performances of their sound recordings—this extends to broadcasting, cablecasting, and for secondary uses such as simultaneous rebroadcasting and cable retransmissions. (Articles 95, 96 and 97). It is not, however, an exclusive public performance right.

Japan is a member of the WPPT as of October 9, 2002. Japan made reservations to the WPPT upon accession, and then modified its reservations, first on January 21, 2008, and again on May 27, 2019. Initially, Japan reserved its rights and denied the Article 15(1) public performance rights to interactive uses of phonograms. But, the 2019 modified reservations now make that applicable to interactive and non-interactive services by “broadcasting, cablecasting (wire diffusion) or ‘automatic public transmission of unfixed information.’”

However, Japan will only provide these rights to non-Japanese recordings and producers and performers on the basis of reciprocity. Thus, American performers and producers do not receive full national treatment in Japan. There are no payments for American producers or performers for traditional broadcasts in Japan. Both American producers and performers are eligible and paid for streaming royalties (via the WPPT) on the basis of reciprocity.

Japan is also a member of the Rome Convention, which entered into force there on October 26, 1989. Japan took reservations to: (i) only recognize the criteria of nationality and fixation; and (ii) only apply equitable remuneration to phonograms whose producers were nationals of Japan or other Rome Convention countries and only on the basis of reciprocity.

#### F. The Netherlands

American producers and performers are denied full national treatment in the Netherlands. Neither American producers nor performers are paid for traditional broadcast or public

performances unless their recording is first fixed in the Netherlands or another Rome Convention country. Both American producers and performers are paid for digital streaming services.

Background: The Copyright Act and the Neighboring Rights Act of the Netherlands grants performers and producers equitable remuneration rights for the broadcast and public performance of sound recordings. Article 32(2) of the Neighboring Rights Act grants foreign producers of sound recordings these rights based on residency in the Netherlands or based on nationality—from a European Union (or E.E.A.) country, but also a national or legal entity adhering to the Rome Convention or the Geneva Phonograms Convention. The United States is a member of the Geneva Phonograms Convention. However, the remuneration rights are only provided as a matter of reciprocity (i.e., material reciprocity) for broadcasting and other sound recording uses.

The Netherlands is a member of WPPT, effective from March 14, 2010. The Netherlands took no reservations to the WPPT.

The Netherlands is also a member of the Rome Convention, which entered into force there on October 7, 1993. Under the Rome Convention, performers are protected in the Netherlands: (i) if the performance took place in a Rome Convention territory; or 2) the performance is incorporated in a phonogram that is otherwise protected by the Convention. The Netherlands recognizes the Rome qualifications criteria of nationality, fixation, and publication. However, for purposes of traditional broadcasts (and other related public performances), the laws limit payments based on reciprocity, meaning only for remunerations for phonograms produced in Rome or by other Rome Convention nationals, and only to the extent those territories protect Dutch performers and producers.

#### Terrestrial Public Performance Rights – Not an Excuse for Denying Any Monies

Some of the CMOs and governments of the Six Territories argue (usually privately) that they deny full national treatment to American producers and performers because the U.S. Copyright Law does not provide a full public performance right for sound recordings—American or foreign recordings. This is a red herring argument for denying payments for broadcasting, other public performances, or for musical streaming services (i.e., any digital services).

It is true that the United States is one of the very few countries that does not have a broad public performance right for sound recordings. Having such a right would include public performances via “terrestrial” broadcasts such as radio or other over-the-air broadcasts. The United States should have this exclusive right, and the U.S. Copyright Office and other U.S. Government agencies, have long advocated for it.<sup>14</sup> SoundExchange has been at the forefront in the fight for performance royalties for traditional terrestrial radio, so that performers and producers of sound

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<sup>14</sup>See U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 138 (2015) *available at* <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (“The Office has long supported the creation of a full sound recording performance right . . . afforded to other classes of works under federal copyright law”).

recordings would be fairly compensated when their creative works are used by traditional radio. But, there has been long-standing opposition to this right from broadcasters and others.

In lieu of this broad public performance right, Congress in 1995 (and later revised) established a more limited—digital transmission—right for producers and performers of sound recordings.<sup>15</sup> Sections 106(6) and 114 are the basis for the collection of monies by SoundExchange for musical streaming services, whether by webcasting or via satellite, so long as the services are non-interactive. Interactive services of digital transmissions are subject to a full exclusive public performance right and these licenses are negotiated directly by the sound recording producers and any such services. The statutory license that SoundExchange administers does not extend to those services.

There are at least two reasons why the absence of a terrestrial right in the United States is a red-herring in the denial of payments to American performers and producers abroad for broadcasts, public performances or digital transmissions in the Six Territories. First, digital transmissions, including non-interactive music streaming services and digital radio, are protected in the U.S. and by international treaties (i.e., the WPPT), and foreign performers and producers enjoy full national treatment in the U.S. for these services. Second, streaming services and digital radio are a major source of income now for American and foreign producers and performers of sound recordings (and a rising source of this income as noted by the IFPI Report), far exceeding terrestrial broadcasts. Thus, terrestrial broadcasting, while important, is and should be unrelated to removing the market access barriers that the Six Territories are using to deny payments to SoundExchange for American producers and performances.

There is no legal, equitable or logical reason to deny full national treatment for American producers and performers, or to withhold payments to SoundExchange for non-U.S. streaming services and digital radio, broadcasts or other public performances. SoundExchange is making full payments to foreign producers and performers for all of the same uses and services, i.e., public performances on non-interactive streaming services and digital radio as for American producers and performers. The Six Territories should agree to do the same thing for all uses in their countries.

#### SoundExchange Special 301 Recommendations for Six Territories

For all of the reasons noted above, SoundExchange recommends that **Canada** be retained on the Watch List in 2020. In particular, Canada should fully implement the USMCA national treatment obligations and provide full payments to American producers and performers for music streaming services and digital radio in Canada, as well as for traditional broadcasts and other public performances, and for all recordings.

In accordance with U.S. law, the President must certify to Congress that Canada (and Mexico) are in full compliance with the USMCA obligations before the agreement can go into

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<sup>15</sup>Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (amending 17 U.S.C. §§106, 114). This was later amended several times, including most notably by the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-34, 112 Stat. 2860.

force in the United States.<sup>16</sup> That certification should be withheld until Canada either commences payments or expressly acknowledges it will make payments imminently in accordance with the USMCA and afford full national treatment for American producers and performers for broadcasts, streaming and digital radio, and other communications to the public (e.g., all public performances) in Canada.

For the other countries—the **United Kingdom; Australia; France; Japan; and the Netherlands**—SoundExchange recommends that USTR should prioritize this issue and engage in bilateral discussions with each of these countries, with the goal of each country applying full national treatment for American producers and performers.

In addition, USTR should prioritize this issue in trade agreement discussions, and make compliance with full national treatment principles an essential element of U.S. trade policy regarding intellectual property rights (IPR). The full national treatment obligations of the USCMA (including the language of Article 20.8) should be “model” national treatment language to be used in other agreements.

#### Conclusion

SoundExchange appreciates the opportunity to submit these comments. SoundExchange also appreciates the efforts of USTR and other inter-agency officials to correct this imbalance of payments in the Six Territories, as detailed in this filing.

We look forward to continuing to working with USTR and others in the U.S. Government on these matters.

Respectfully submitted,

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<sup>16</sup>The 2015 Trade Priorities Act requires the President to certify that Mexico and Canada have “taken measures necessary to comply” with all USMCA obligations. Bipartisan Trade Priorities Act of 2015, Pub. L. No. 114-26, §106(a)(1)(G) (codified at 19 U.S.C. § 4205(a)(1)(G)).

## APPENDIX A

### WTO TRIPS AGREEMENT

#### **Article 3: National Treatment**

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (FN. 3) of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

FN. 3: For the purposes of Articles 3 and 4, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

#### **Article 14: Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations**

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall

provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

## **WIPO WPPT TREATY**

### **Article 4: National Treatment**

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

### **Article 15: Right to Remuneration for Broadcasting and Communication to the Public**

(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.<sup>7, 8</sup>

<sup>7</sup>**Agreed statement concerning Article 15:** It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

<sup>8</sup>**Agreed statement concerning Article 15:** It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.

## **U.S.-CANADA-MEXICO AGREEMENT**

### **Article 20.8: National Treatment**

(1) In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals of another Party treatment no less favorable than it accords to its own nationals with regard to the protection (FN. 2) of intellectual property rights.

FN. 2: For the purposes of this paragraph, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter. Further, for the purposes of this paragraph, “protection” also includes the prohibition on the circumvention of effective technological measures set out in Article 20.66 (Technological Protection Measures) and the provisions concerning rights management information set out in Article 20.67 (Rights Management Information). For greater certainty, “matters affecting the use of intellectual property rights specifically covered by this Chapter” in respect of works, performances, and phonograms, include any form of payment, such as licensing fees, royalties, equitable remuneration, or levies, in respect of uses that fall under the copyright and related rights in this Chapter. The preceding sentence is without prejudice to a Party’s interpretation of “matters affecting the use of intellectual property rights” in footnote 3 of the TRIPS Agreement.

## **APPENDIX B**

### **SIX TERRITORIES: RESERVATIONS TAKEN TO ART. 15(3) OF THE WPPT**

#### **Australia Reservation**

The instrument of accession was accompanied by the following declarations:

- In accordance with Article 3(3) of the Treaty, this State has declared that it will not apply the criterion of publication concerning the protection of phonograms.
- Pursuant to Article 15(3), Australia will not apply the provisions of Article 15(1) in respect of:
  - (a) the use of phonograms for (i) radio broadcasting, and (ii) radio communication to the public within the meaning of the first sentence of Article 2(g), and
  - (b) the communication to the public of phonograms by way of making the sounds of the phonograms audible to the public by means of the operation of equipment to receive a broadcast or other transmission of the phonograms. (see WPPT Notification No. 67)

#### **Canada Reservation**

The instrument of accession was accompanied by the following declarations:

- Pursuant to Article 3(3) of the Treaty, the Government of Canada will not apply the criterion of fixation with regard to exclusive rights of producers of phonograms;
- Pursuant to Article 3(3) of the Treaty, the Government of Canada will not apply the criterion of publication with regard to the remuneration right of Article 15(1) of the Treaty; and
- Pursuant to Article 15(3) of the Treaty, the Government of Canada will not apply Article 15(1) of the Treaty with regard to the retransmission of phonograms." (see WPPT Notification No. 86)

#### **France Reservation**

The instrument of accession was accompanied by the following declarations:

In accordance with Article 3(3) of the Treaty, this State has declared that it will not apply the criterion of publication concerning the protection of phonograms. (see WPPT Notification No. 78)

#### **Japan Reservations**

Japan made the following declarations and reservations:

Declaration made on May 27, 2019:

Pursuant to Article 15, paragraph 3 of the Treaty, the Government of Japan will apply the provisions of Article 15, paragraph 1 of the Treaty in respect of the direct or indirect use of the phonograms made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and a time individually chosen by them for broadcasting, cablecasting (wire diffusion) or “automatic public transmission of unfixed information”. (see WPPT Notification No. 99)

Declaration made on January 21, 2008:

Pursuant to Article 15(3), Japan will apply the provisions of Article 15(1) to the extent that Party grants the protection provided for by Article 15(1); and Japan will apply the provisions of Article 15(1) in respect of the direct or indirect use of the phonograms published for commercial purposes for broadcasting, cablecasting or “automatic public transmission of unfixed information”; and in respect of the direct or indirect use of the phonograms made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them for “automatic public transmission of unfixed information”. (see WPPT Notification No. 68)

Declarations made upon accession:

1. In accordance with Article 3(3) of the Treaty, this State has declared that it will not apply the criterion of publication concerning the protection of phonograms.
2. Pursuant to Article 15, paragraph 3 of the Treaty, the Government of Japan will apply the provisions of Article 15, paragraph 1 of the Treaty in respect of direct uses for broadcasting or for wire diffusion.
3. Pursuant to Article 15, paragraph 3 of the Treaty, as regards phonograms the producer of which is a national of another Contracting Party which has made a declaration under Article 15, paragraph 3 of the Treaty, the Government of Japan will apply the provision of Article 15, paragraph 1 of the Treaty to the extent that Party grants the protection provided for by the provisions of Article 15, paragraph 1 of the Treaty.
4. Pursuant to Article 15, paragraph 3 of the Treaty, the Government of Japan will not apply Article 15, paragraph 1 of the Treaty to the phonograms made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and a time individually chosen by them.

(see WPPT Notification No. 38)

Declarations 2 and 4 were modified on January 21, 2008 and May 27, 2019. (see WPPT Notification No. 68 and No. 99)

**Netherlands: No reservations**

**United Kingdom: No reservations**