



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

INTERIM REGULATIONS.

NOTICE AND RECORDKEEPING FOR DIGITAL SUBSCRIPTION TRANSMISSIONS

The following excerpt is taken from Volume 63, Number 121 of the
Federal Register for Wednesday, June 24, 1998 (pp. 34289-34297)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 96-3B]

Notice and Recordkeeping for Digital Subscription Transmissions

AGENCY: Copyright Office, Library of
Congress.

ACTION: Interim regulations.

SUMMARY: The Copyright Office of the Library of Congress is issuing interim regulations on the requirements by which copyright owners shall receive reasonable notice of the use of their works from digital subscription transmission services, and how records of such use shall be kept and made available to copyright owners. The Digital Performance Right in Sound Recordings Act of 1995 requires the Office to adopt the regulations.

EFFECTIVE DATE: The interim regulations are effective July 20, 1998.

FOR FURTHER INFORMATION

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SUPPLEMENTARY INFORMATION:

This is a synopsis of the Interim Rule in Docket No. RM 96-3B, adopted June 15, 1998. The full text of the Interim Rule is available for inspection and copying during normal business hours in the Public

Information Office of the Copyright Office, Room LM-401, and in the Public Records Office of the

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Licensing Division of the Copyright Office, Room LM-458, James Madison Memorial Building, First and Independence Avenue, S.E., Washington, D.C. 20559-6000. The full Interim Rule is also available via the Copyright Office homepage at <http://www.loc.gov/copyright>.

The regulations are issued on an interim basis due to the developing nature of the digital transmission service industry and of the technology which will be employed in accommodating the reporting requirements. In two years, the Office will provide another opportunity for comment before issuing final regulations.

Background

On November 1, 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("the Act"). Public Law No. 104-39, 109 Stat. 336 (1995). The Act gave to sound recording copyright owners an exclusive right to perform their works publicly by means of a digital audio transmission. 17 U.S.C. 106(6). Certain digital transmissions were exempted from the scope of the right, 17 U.S.C. 114(d)(1), while nonexempt digital subscription services were given the opportunity to qualify for a statutory license. 17 U.S.C. 114(d)(2). Congress directed the Librarian of Congress to establish regulations under which copyright owners may receive reasonable notice of the use of their sound recordings under the statutory license, and under which entities performing the sound recordings shall keep and make available records of such use. 17 U.S.C. 114(f)(2).

The Sec. 114 License for Nonexempt Subscription Transmissions

A nonexempt digital subscription service transmission is subject to statutory licensing in accordance with 17 U.S.C. 114(f) if the transmission is not part of an interactive service, does not exceed the "sound recording performance complement," does not give an advance program schedule or prior announcement of titles to be performed, does not automatically cause the receiving device to switch from one program channel to another, and includes information encoded by authority of the copyright owner identifying the title, the featured artist, and related information. 17 U.S.C. 114(d)(2). The "sound recording performance complement" is a limit on the number of selections that can be played from one phonorecord, boxed set, or featured artist within a three-hour period. See 17 U.S.C. 114(j)(7).

Digital subscription transmission services that qualify for the statutory license may reach a voluntary agreement as to rates and terms with sound recording copyright owners, or may petition the Librarian of Congress to convene a copyright arbitration royalty panel (CARP) to set rates and terms for those entities that have not reached voluntary agreement. 17 U.S.C. 114(f)(1)-(2), and (4). On June 4, 1996, no voluntary agreement having been reached, the parties petitioned the Librarian to convene such a CARP.¹ Rates and terms set by the CARP will apply to all copyright owners and

¹ On November 28, 1997, the CARP convened by the Librarian issued its report determining rates and terms for the license for the period from the effective date of the Act. Report of the Copyright Arbitration Royalty Panel. In re: Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmission of Sound Recordings, No. 96-5 (Nov. 28, 1997). The Librarian issued an order accepting in part the CARP Report, and establishing additional terms. See discussion infra, The 1997 CARP Proceeding Under Section 114.

subscription services not subject to voluntary agreement. 17 U.S.C. 114(f)(2)-(3). However, Congress also directed the Librarian of Congress to establish regulations by which copyright owners may receive reasonable notice of the use of their sound recordings under statutory license, and under which records of such use shall be kept and made available by the entities performing the sound recordings. 17 U.S.C. 114(f)(2). Anyone performing a sound recording publicly by means of a nonexempt subscription transmission under section 114(f) may do so without infringing the exclusive right of the sound recording copyright owner by complying with the notice requirements that the Librarian prescribes by regulation and by paying royalty fees in accordance with the law. 17 U.S.C. 114(f)(5).

Rulemaking on Notice and Recordkeeping

On May 13, 1996, the Copyright Office published a Notice of Proposed Rulemaking in the **Federal Register** requesting comments on the requirements by which copyright owners should receive reasonable notice of the use of their works from subscription digital transmission services and how records of such use should be kept and made available to copyright owners. The Office asked commentators to consider both the adequacy of notice to sound recording copyright owners and the administrative burdens placed on digital transmission services in providing notice and maintaining records of use. 61 FR 22004 (May 13, 1996).

Initial Comments and Reply Comments

The Office received a total of four comments and three reply comments, as well as one surreply and one comment to the surreply. Comments were submitted by the Recording Industry Association of America (RIAA) (representing member companies who manufacture or distribute more than 90 percent of legitimate sound recordings sold in the United States), and three digital music subscription services operating in the United States: DMX, Inc. (DMX); Muzak, Inc. (Muzak); and Digital Cable Radio Associates/Music Choice (DCR) ("commenting parties"). The Initial and Reply Comments are fully summarized in the text of this Interim Rule and Order, and were also discussed in a second Notice of Proposed Rulemaking (NPRM), published on June 24, 1997. See 62 FR 34035 (June 24, 1997). The comments addressed a wide range of proposals for notice and records of use, including: an initial notice filed with the Copyright Office to indicate commencement of transmission under statutory license; quarterly reports of use including data to indicate which sound recordings were performed and the number of times (summary frequency data); whether reports

should be served on a single collective rights organization ("Collective") such as RIAA's, rather than on individual copyright owners; data fields to identify sound recordings; and maintenance of records. The comments also addressed matters not prescribed in the Act, such as confidentiality, auditing, and statements of account.

Meetings To Facilitate Agreement on Notice and Recordkeeping Requirements; and Issues Identified in Discussions Among the Parties

On November 14, 1996, the Copyright Office met with the parties to facilitate agreement on notice and recordkeeping requirements under section 114, and to discuss the proper regulatory and recordkeeping role for the Office. In attendance were 15 individuals representing RIAA, DMX, Muzak, DCR, and the Copyright Office. The Office distributed at the meeting a list of principles it accepted: for example, Services would file with the Office an initial notice indicating transmission of sound recordings under statutory license. Following the meeting, the Office circulated a draft meeting summary, and received additional written comments in response. A

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second meeting with the parties took place on January 23, 1997.²

In the comments and meeting discussions, the parties considered how reports of use would be kept or made available for sound recording copyright owners who were not members of a Collective, who could not be located, or who refused delivery. While Services believed the Office should designate a Collective and not permit individual copyright owners not to join, RIAA expressed concern about its Collective administering rights for non-member copyright owners, due to contractual and fiduciary duties to its members. The commenting parties addressed whether Services should provide playlist samples or error logs to verify compliance with the sound recording performance complement, and whether the Act requires Services to affirmatively report compliance with the complement. Following the meetings, however, a Service proposal to produce each quarter the entire intended playlist, instead of summary frequency data or error logs, was deemed generally acceptable, provided an agreeable definition for "intended playlist" were reached. The commenting parties also continued to discuss data fields to

² The comments, meeting summaries, and meeting handouts are available in the Public Information Office of the Copyright Office, Room LM-401, James Madison Memorial Building, Washington, D.C.

identify sound recordings performed.

The Second NPRM and Request for Further Comments

On June 24, 1997, the Copyright Office published a second Notice of Proposed Rulemaking (NPRM), presenting certain preliminary decisions and asking the parties for further comments. See Notice of Proposed Rulemaking, 62 FR 34035 (June 24, 1997). For example, the Office announced that it would accept an optional initial notice from Services; concluded that Services should keep and make available records to permit monitoring of the performance complement; asked how Services would make records of use available to unaffiliated sound recording copyright owners; concluded that copyright owners whose identity and location is known should be served directly with reports of use; inquired whether Services planned to serve quarterly intended playlists on small and individual copyright owners, or if there were an alternative reporting mechanism; inquired whether copyright owners should be permitted to waive complement information in favor of summary frequency data for their recording only; sought comment on estimated costs for providing intended playlists to different parties; stated a requirement that Services maintain records of use for three years; and announced that it would issue no regulation on audits. The Office provided a 60-day comment period.

The Further Comments

In response to the request for Further Comments in the June 24, 1997, NPRM, the Office received comments from: RIAA; DMX; DCR; the National Music Publishers' Association, Inc. (NMPA); and Creative Engineering Concepts, Inc. (CECI). CECI is the developer of an automated signal recognition technology employed nationwide and internationally by Broadcast Data Systems, LP, to identify sound recordings and advertisements using features and characteristics of the audio patterns.

1. Initial Notice

RIAA argued that the single-page initial notice filed by Services with the Copyright Office should be mandatory, not optional, so that copyright owners can identify prospectively entities that will transmit under statutory license.

2. Reports of Use

The commenting parties agreed that Services should provide quarterly reports of use consisting of their "intended playlists" for the quarter.

a. Definition of intended playlist. All commenting parties agreed that the intended

playlist should report every sound recording "scheduled" to be transmitted; in addition, RIAA recommended that the intended playlist report every sound recording "actually" transmitted. RIAA also recommended that the intended playlist be defined to include a detailed report of any Service system failures resulting in transmission of unscheduled sound recordings. DMX suggested that the definition prescribe data fields and sound recording identifiers to be included in the playlist.

b. Reporting system failures resulting in deviations from the intended playlist. RIAA said Services should report system failures, including time and duration, and titles of substitute sound recordings transmitted in place of those scheduled. DMX said it does not automatically generate error logs in event of system failure, and that errors causing deviations from intended playlists are rare. DMX noted that logs were proposed to evaluate summary frequency data and playlist samples; providing complete intended playlists vitiates their necessity.

c. Certification of reports. RIAA said reports of use should contain a certification signed by a Service representative attesting under notary or penalty of perjury to accuracy. DMX said at most the regulation should require a statement that the report reflects information believed to be accurate and maintained in ordinary course of business.

d. Reporting compliance with the performance complement. DCR reasserted that the Act does not impose an obligation on Services affirmatively to report compliance with the performance complement.

e. Data fields and sound recording identifiers. RIAA, DCR and DMX generally agreed that the intended playlist reports should include the following eight data fields: channel, sound recording title, featured artist, album title, record label, catalog number, transmission date, and transmission time. In addition, RIAA sought four other identifiers: the CD track number, the Service name, the International Sound Recording Code (ISRC), and the "sound recording identifier" used by Selector (the software program Services employ to generate their intended playlists). However, CECI also described its technology to automatically identify sound recordings "using features and characteristics of the audio patterns," and to monitor sound recording usage. CECI already administers a network of remote monitoring systems collecting channel number and other data; the technology is used by record companies, broadcasters and others, to verify airplay, generate statistics, control distribution and determine royalty payments. This could be adapted within about six months to automatically document use of sound recordings and other copyrighted works by Services, verify compliance with the

performance complement, and generate reports of use.

f. Compilation albums and non-music and foreign programming. RIAA said the standard reporting requirements would clearly apply to retail compilation albums, such as movie soundtracks, and should also apply to non-retail but commercial compilation albums, such as disc jockey compilation albums, because in such cases Services possess and make available to their subscribers information regarding the retail album. RIAA said the regulations should not distinguish between foreign and domestic programming. In earlier comments, Services sought to limit regulation of non-stereo, retransmitted foreign-originated programming, or retransmitted programming consisting

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of less than one-half music, such as sports or talk radio, but in their Further Comments professed no plans for such programming.

3. Central Collective

The Further Comments urged the Office to designate a central Collective and not impose a requirement of direct service to small, independent copyright owners. Services argued severe costs and administrative burdens associated with the reporting scheme in the NPRM would cripple them, and that direct service would force them to mainstream programming. DMX said use of collectives is common practice internationally with respect to collection and distribution of royalties for performance of sound recordings.

a. Alternative reporting mechanism. Services did not wish to identify individual copyright owners and provide separate reports that would also permit complement monitoring. DCR said no alternative to the intended playlist would provide comparable information, and the only alternative was to designate an independent second Collective for copyright owners not wishing to join RIAA. CECI volunteered to be an alternative Collective for small independent copyright owners. DMX urged the Office to mandate a single Collective, but, recognizing burden and expense of providing independent copyright owners with either intended playlists or individually tailored summary reports, DMX suggested three alternative reporting methods, and five "safeguards" it sought if direct service were required. DMX said Services should be able to choose among the methods and vary them by agreement or according to recipient, and that unserved copyright owners should make their identity and location known to Services by registered letter.

b. RIAA Collective as central repository. In Further Comments, RIAA said it now agreed to become the central repository for

all copyright owners, including non-RIAA members. RIAA said it would now agree to receive all reports of use and royalties from Services. Because it now sought to be the central Collective, it said many questions in the second NPRM were moot; for example, there is no need for an alternative to the intended playlist, and no need for separation of reports. Because the Collective now planned to identify and locate copyright owners of all sound recordings performed under the license and to distribute to all entitled copyright owners, there was no need to define copyright owners "whose identity and location is known" to trigger a direct service requirement. RIAA said it required complete and uniform data to operate a royalty distribution system. It rejected summary frequency data because it lacks complement information and said all copyright owners are entitled to the same notice of use. RIAA said it would deduct costs from royalties to cover administrative expenses. Royalties that could not be distributed for unlocated copyright owners would, after three years of escrow, be used to offset costs of locating non-members.

4. Details Relating to Records of Use

The Further Comments addressed a number of details relating to records of use, including formats of reports, access and confidentiality, audits, maintenance of records, costs of maintaining and providing records, and retroactivity of recordkeeping requirements.

a. Reporting and maintaining records of use; format. RIAA and DCR agreed that reports of use should be provided within 30 days of the close of each quarter; DMX preferred no later than 45 days following the end of the quarter. The commenting parties agreed that Services should be required to retain reports of use for three years, and that reports should be provided on a common machine-readable medium. DMX generally accepted the file format suggested by RIAA.

b. Confidentiality. The commenting Services agreed that provision of intended playlists may raise confidentiality concerns. One said Services should be able to elect to provide intended playlists, summary frequency data, or Internet-posted past playlists (in either a password-protected or publicly available area). RIAA said playlists are available to anyone willing to monitor programming, but suggested that instead of requiring a confidentiality agreement, the regulation should limit the information's dissemination and utilization.

c. Access and audits. While announcing that it would not promulgate audit regulations, the Office in the June 24, 1997, NPRM inquired whether some regulation on access were needed and how Services would make records available to copyright owners who had not been served. DMX suggested that audits of Services be limited to once a

year, and that copyright owners be able to view information held by a Collective, subject to fees. NMPA urged the Office to expressly establish audit requirements in its forthcoming regulations on notice and recordkeeping under section 115.

d. Costs. RIAA said it would deduct costs from royalties to cover administrative expenses, while royalties that could not be distributed to unlocated copyright owners would be escrowed for three years before reverting to the general royalty account for distribution, or being used to offset costs to Collective members of trying to locate non-members. RIAA said costs of serving the Collective or copyright owners, and of retaining reports for three years, should be borne by Services. DMX said Services should bear costs of maintaining intended playlists, but the cost of preparing and delivering reports of use to a Collective or record company, including reasonable labor and computer time, should be deducted from royalty payments.

e. Effective date and transition period. DCR and DMX said reports of use should not be required from the license's creation on February 1, 1996, through adoption of regulations. DCR said retroactive recordkeeping would require millions of records. DCR and DMX said the Office should recognize a transition period of two years before full compliance with notice and recordkeeping rules is required. RIAA sought use data for periods preceding issuance of regulations, and said the regulation should not recognize a formal transition period.

The 1997 CARP Proceeding Under Section 114

As noted, following a period of voluntary negotiation concerning rates and terms for the section 114 statutory license, the parties petitioned the Librarian of Congress on June 4, 1996, to convene a copyright arbitration royalty panel (CARP). See 17 U.S.C. 114(f)(1)-(2); Initiation of Voluntary Negotiation Period, 60 FR 61655 (Dec. 1, 1995); Initiation of Arbitration, 62 FR 29742 (June 2, 1997). On November 28, 1997, the CARP convened by the Librarian issued its report determining rates and terms for the license for the period from the effective date of the Act. Report of the Copyright Arbitration Royalty Panel, In re: Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmission of Sound Recordings, No. 96-5 (Nov. 28, 1997) (Report). The Report established, inter alia, the following terms:

(1) Collective: The CARP determined that "any notices and payments required by the CARP 'should be submitted to a single private entity or government agency that will distribute the funds to sound recording copyright owners.'" Because RIAA requested that it be designated as the single entity and because Services did not object, the

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Panel determined "that the RIAA Collective shall serve as that single private entity." Report para. 184. See also para. 205.

(2) Maintenance of certain records: The CARP said Services shall maintain accurate records on matters directly related to the payment of license fees for a period of three years. Report Paras. 192, 209.

(3) Audits: Interested parties may conduct a single audit of a Service during any given year. Report Paras. 193, 210.

(4) Confidentiality: RIAA must establish safeguards to avoid disclosure of confidential financial and business information. Paras. 191, 208.

On January 27, 1998, the Librarian concluded on the recommendation of the Register that he could not adopt the Report to the extent that certain of the findings and conclusions were arbitrary and contrary to law. Notice and Order, Docket No. 96-5 CARP DSTR (Jan. 27, 1998). See 17 U.S.C. 802(f). Setting aside the Panel's final determination in part, to reject the Panel's rate and certain of the terms, the Librarian issued an Order published in the Federal Register, accepting each of the terms set forth above. See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 FR 25394 (May 8, 1998). The Librarian's Order also established the following additional terms.

(5) Audits: Interested parties may conduct one audit of the RIAA Collective during any given year. 37 CFR 260.6.

(6) Costs: The RIAA Collective may deduct, from royalties it distributes, reasonable costs incurred in administration of the distribution of royalties, so long as the reasonable costs do not exceed actual costs incurred by the collecting entity. 37 CFR 260.3(d). The Collective also may use unclaimed funds to offset the cost of administering collection and distribution of royalties. 37 CFR 260.7.

The CARP proceeding and Librarian's final determination upon review of the CARP Report therefore resolved until at least the year 2001 some of the issues that were the subject of comment in the present rulemaking, including the establishment of a single Collective, auditing, confidentiality, and deduction of costs.

Discussion and Conclusions

The Act directs the Librarian to establish regulations under which copyright owners may receive reasonable notice of use of their sound recordings under the license, and under which entities performing sound recordings shall keep and make available records of use. 17 U.S.C. 114(d)(2). Congress meant to inhibit neither the arrival of new technologies nor the operation of existing digital audio services. S. Rep. No. 128, 104th Cong., 1st Sess. 15 (1995); Cong.

Rec. S950 (daily ed. Jan. 13, 1995) (statement of Sen. Feinstein). The Office has considered both adequacy of notice to copyright owners and administrative burden for Services providing notice and records. See 61 FR 22004 (May 13, 1996).

1. Initial Notice

Digital subscription services transmitting sound recordings under the statutory license will file an initial notice with the Copyright Office consisting of Service name, address, telephone number, and information on how to gain access to the online website or home page of the Service or entity, where information may be posted under these regulations concerning the use of sound recordings under statutory license. The notice will be placed in Copyright Office records where copyright owners may access the information concerning use of sound recordings under the license. The filing will be required to assist copyright owners and Collectives locate entities transmitting under the license. Services will file the initial notice any time prior to commencement of transmission under the license or within 45 days of the regulation's effective date, and update the filing within 45 days of a change in the information reported. The notices shall be accompanied by a filing fee.

2. Designation of a Single Collective

Digital subscription services will also be required to provide detailed reports of their use of sound recordings under the license, but will not be required to serve copyright owners individually. Although the Office suggested in its second NPRM that it did not have authority to designate a single Collective to serve as a central repository and might have to require Services to serve reports of use directly on copyright owners or their agents, the Services urged the Office to designate a single Collective. Services argued that the costs of direct service upon owners of the 10 million songs performed by each Service annually would cripple them and cause them to eliminate all but "mainstream" programming in order to limit the number of copyright owners served. One Service observed that use of collective administration for performance of sound recordings is common practice internationally.

The Office recognizes that collective administration may be preferable where a large number of works are used, no single use is of great value, and owners cannot be easily located. In such cases, a central clearinghouse creates efficiencies of scale. The Office continues to question whether it would be appropriate, as part of an isolated rulemaking on notice and recordkeeping pursuant to 17 U.S.C. 114(f)(2), to require that notice of use of sound recordings be served on a single Collective rather than on all sound recording copyright owners.

However, a single Collective (the RIAA Collective) has now been designated by a CARP and confirmed by an Order of the Librarian for purposes of receiving royalty payments and statements of account. In this notice and recordkeeping proceeding, RIAA said that its Collective would serve as central repository for reports for all sound recording copyright owners, regardless of membership in RIAA; commenting Services accepted the RIAA Collective as suitable for this role. The purpose of the CARP proceeding was to determine reasonable terms and rates under the statutory license. See 17 U.S.C. 114(f). The CARP's designation of a single Collective to receive royalty payments and statements of account as a term of the license simplifies the Office's task in this notice and recordkeeping proceeding. Rates and terms determined in the CARP proceeding are binding on all Services and sound recording copyright owners. 17 U.S.C. 114(f)(2). Because Services will send royalty payments and statements of account to a single Collective rather than to individual copyright owners, records of use should be sent to the Collective, which will distribute royalties to copyright owners based on the information in the records of use.³ As one Service noted, reports of use determine royalty payments and should logically accompany them.

The Librarian's Order of May 8, 1998, establishes rates and terms for the statutory license through December 31, 2000. See 17 U.S.C. 114(f)(1). The RIAA Collective will serve as the collective administration organization through

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that date. Negotiations on rates and terms for years 2001 through 2005 will commence in January 2000. 17 U.S.C. 14(f)(4)(B).⁴

In summary, the regulation directs Services to serve records of use upon the Collective or Collectives identified in Copyright Office records as having been designated through the CARP process or by settlement agreement. Because Services will serve records of use for all sound recording copyright owners upon the designated Collective[s], there is no need for a definition of sound recording copyright owners whose identity and location is known, or other

³ While most copyright owners are likely to utilize the designated Collective, a copyright owner and Service may reach separate arrangements in place of requirements imposed by the CARP or Copyright Office for royalties and records of use. Section 114(f)(3) provides: License agreements voluntarily negotiated at any time between one or more copyright owners of sound recordings and one or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress. 17 U.S.C. 114(f)(3).

⁴ Because future negotiations or CARP proceedings may result in designation of more than one Collective, the regulations anticipate the possibility that there may be multiple Collectives. Of course, it is also possible that future negotiations or CARP proceedings result in some payment mechanism other than a Collective.

regulations concerning a direct service requirement. As discussed below, in the event that no Collective is designated, or if all designated Collectives terminate collection and distribution operations, Services will be required to post records of use online, with appropriate safeguards to protect confidentiality. Interested parties will have an opportunity to comment on these issues before final regulations are issued in late 2000.

In order to effectuate the statutory mandate that "copyright owners" may receive reasonable notice of the use of their sound recordings under this section, 17 U.S.C. 114(f)(2), the Collective should make certain information publicly available. In order to receive records of use, designated collectives will file with the Copyright Office and post and make available online a notice containing the following information: the Collective name, address, and telephone number; a statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and information on how to gain access to the Collective's online website or home page, where information may be posted under these regulations concerning the use of sound recordings under statutory license. The address of the Collective website will be made available on the Copyright Office website. In addition, the Collective will post and make available online, for the duration of one year, an annual report on how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses.

3. Reports of Use

Reports of use will be monthly, and shall consist primarily of the Service's Intended Playlists for each channel and each day of the month. Reports of use shall be due on the twentieth day after the end of each month, commencing with the month succeeding the month in which these regulations become effective. The commenting parties agreed that reports of use should consist of the Intended Playlists. Not all Services can produce an actual playlist or error log, and the proposal to provide samples to test playlist reports was not found acceptable. The Intended Playlists accomplish all of copyright owners' reporting objectives, including provision of information with which copyright owners can generally monitor compliance with the sound recording performance complement in section 114(j)(7).

The Office considered arguments of DCR and other Services that the Act imposes no obligation to affirmatively report compliance with the complement, but reaffirms its earlier judgment. The Office notes that conforming to the performance complement is a condition of the statutory license, and a

Service that complies with the regulatory notice requirements and pays the statutory royalties thereby avoids infringing the copyright owners' exclusive rights. 17 U.S.C. 114(d)(2), (f)(5). The Office determines, therefore, that it is within its rulemaking authority under section 114(f)(2) to require reporting of complement information. See *Cablevision Sys. Dev. v. Motion Picture Ass'n*, 836 F.2d 599 (D.C. Cir. 1988) (Copyright Office had authority to issue regulations interpreting statute). The Office believes that the presence and specificity of the performance complement indicates Congress' intent that records of use include data to test compliance. While section 114(j)(7) provides that transmissions from multiple phonorecords exceeding the performance complement's numerical limitations will nonetheless conform to the complement if the programming of multiple phonorecords was not "wilfully intended" to avoid the numerical limitations, a pattern of regular conduct might provide evidence of the requisite intent.

The Intended Playlists shall consist of a consecutive listing of every sound recording scheduled to be performed, for each of the Service's channels and each day during the reported month. This definition reflects the true nature of the Intended Playlist, as a listing of sound recordings scheduled to be played. The regulation requires that the Intended Playlist include every recording scheduled to be transmitted, rather than those scheduled and actually transmitted, because the comments and facilitated discussions established that Services are not able to provide an actual playlist, and that Intended Playlists already include overscheduled recordings (about an extra song per hour) to assure continuity, and are therefore highly reflective of recordings actually transmitted. Services shall report system failures causing deviations from the Intended Playlists, including the date, time and duration of any such system failure, but during the interim regulatory period, will not be required to also report the titles of sound recordings transmitted in place of those scheduled on the intended playlist. The facilitated discussions indicated that not all Services can provide an error log, and that system failures causing deviations from the playlist are rare events occurring on a single channel for limited periods. Efforts during such events are likely focused more on repairing the malfunction than on recordkeeping of titles. However, if system failures appear to increase in frequency or duration, or become opportunities for wholesale complement violations, then the Office will reconsider its position.

The Reports of Use shall include the following data fields and sound recording identifiers that all commenting parties agreed to: channel, sound recording title, featured artist, album title, record label catalog number, transmission date, and transmission

time. Although one Service argued that the Act creates no duty to report date and time, the Office believes that Congress intended Services to report complement information; moreover, given that Service's argument that only "willfully intended" transgressions will violate the complement, the Intended Playlists' scheduled dates and times would presumably help establish Service's intentions in this regard. In addition to the eight data fields, the Reports of Use will also include: Service name, because the source of the report should be clear independent of mailing labels or informal labeling of computer files; and, where feasible, the International Sound Recording Code (ISRC), because this identifier, when embedded in sound recordings, facilitates automatic identification and royalty administration worldwide. The required data fields will not include the Selector sound recording identifier, or any other identifiers relating to

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particular private monitoring systems, because the Office does not wish to incorporate proprietary standards of a particular company while the transmission, reporting, and copyright management technologies are rapidly developing. There are no separate requirements for compilation albums, except that in the case of compilation albums created for commercial purposes, Services should report the name of the retail album identified by the Service for the sound recording. During the interim period, there are no separate requirements for non-music or retransmitted, foreign-originated programming, because the Services reported no current plans to transmit such programming. The Reports of Use should be provided on a common machine-readable medium, such as diskette, optical disc, or magneto-optical disc, in the ASCII delimited format set forth in the regulation, with all data for one record on a single line. Reports of Use must be accompanied by a statement by a Service representative, signed under penalty of perjury, that the Intended Playlist report reflects information believed to be accurate and maintained by the Service in its ordinary course of business.

4. Availability of Records

If no Collective is designated, or all designated Collectives have terminated collection and distribution operations, Services will be required to post their reports of use online on the 20th day after the end of each month and make them available to all sound recording copyright owners for a period of 90 days. The Office inquired whether Services consider their playlists to be confidential or trade secrets, and has given the matter considerable thought. The Office cannot state conclusively that there is no confidential trade secret interest in the

programming details incorporated in an Intended Playlist but notes that past Intended Playlists are publicly performed and are historical fact. Realistically, the Office has had to weigh any confidentiality interest against the Services' own competing interests in minimizing administrative burdens and costs, as well as copyright owners' interest in receiving information concerning use of their works. The regulation requires Collectives and copyright owners not to disseminate information in the reports to persons not entitled to it, or to utilize it for any purpose other than those the Act permits, including royalty collection, distribution, and determining compliance with statutory license requirements, without express consent of the Service. Services may require use of passwords for access to electronically posted reports, and may predicate provision of a password upon information relating to identity, location and status as a sound recording copyright owner, and upon a "click-wrap" agreement not to use the reported information without the Service's consent for any purpose other than those contemplated under the Act; however, Services must make passwords available free of charge or of other restrictions. In the event that no Collective is designated, and in the absence of direct service to notify them of use of their copyrighted works, all sound recording copyright owners should be able to gain access online to records of use of their sound recordings under the statutory license. Services will be required to provide the Copyright Office with information on how to gain access to Services' online reports of use. That information will be made available on the Copyright Office website.

Because section 114(f)(2) mandates requirements by which "copyright owners" may receive reasonable notice of the use of their sound recordings, provision must be made for individual copyright owners to have access to the Reports of Use, even where there are designated Collectives. Accordingly, Collectives receiving the Reports of Use must make copies of the reports available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. Any copyright owner exercising the right to inspect the Reports of Use must agree in writing to certain confidentiality restrictions.

Because rates and terms of payment are to be addressed through industry-wide settlement or a CARP, this notice and recordkeeping regulation will not address how copyright owners will contact Services to demand payment based on records of use in the event that all designated Collectives have terminated operations or in the event that, in a future settlement or CARP proceeding, no Collective is designated. Similarly, the regulation will not include requirements for statements of account, which are properly addressed as a license

term through negotiation or a CARP. Services will be required to maintain their reports of use for three years, the statutory period of limitations for copyright infringement actions. The regulation will not address the proposal for a yearly audit of records underlying the Reports of Use, which the Office generally sees as a matter of business and legal practice to be addressed through negotiation or a CARP.

The Office inquired about the costs of providing copyright owners with records of use. RIAA said that its Collective would deduct reasonable administrative costs as a percentage of royalties. The matter of costs is a question for resolution through negotiation or a CARP. See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 FR 25394 (May 8, 1998). However, collectives typically deduct administrative expenses. See *Recommendations of the Intergovernmental Committee of the Rome Convention, 1979 Copyright 103*, 109.⁵

5. Effective Dates

These regulations will be adopted on an interim basis for a period of two years, and will become effective on July 20, 1998. The regulations will recognize a transition period through August 31, 1998, before Services are required to comply fully with the recordkeeping rules. For the period February 1, 1996, through August 31, 1998, Services must make available records of use, but will have the option of producing either summary frequency data or full Intended Playlists.

6. Regulatory Flexibility Act

Although the Copyright Office, as a department of the Library of Congress and part of the legislative branch, is not an "agency" subject to the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Register of Copyrights has considered the effect of these interim regulations on small businesses. The Register has determined that the interim regulations would not have a significant economic impact on a substantial number of small entities that would require provision of special relief for small entities in the regulations, and that the interim regulations are, to the extent consistent with the stated objectives of applicable statutes, designed to minimize any significant economic impact on small entities.

List of Subjects in 37 CFR Part 201

Copyright.

Interim Regulations

⁵ Arguably, the RIAA Collective's expenses would be lower than typical collectives' because it will not be negotiating licenses but will simply collect and distribute royalties.

For the reasons set forth in the preamble, Part 201 of Title 37 of the Code of Federal Regulations is amended as follows:

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PART 201--GENERAL PROVISIONS

1. The authority citation for Part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Sections 201.35 through 201.37 are added to read as follows:

§201.35 Initial Notice of Digital Transmission of Sound Recordings under Statutory License.

(a) *General.* This section prescribes rules under which copyright owners shall receive initial notice of use of their sound recordings under statutory license under section 114(f) of title 17 of the United States Code, as amended by Public Law 104-39, 109, Stat. 336.

(b) *Definitions.* (1) An Initial Notice of Digital Transmission of Sound Recordings under Statutory License is a notice to sound recording copyright owners of the use of their works under section 114(f), and required under this regulation to be filed by a Service in the Copyright Office.

(2) A Service is an entity engaged in the digital transmission of sound recordings, pursuant to section 114(f) of title 17 of the United States Code.

(c) *Forms.* The Copyright Office does not provide printed forms for the filing of Initial Notices.

(d) *Content.* An "Initial Notice of Digital Transmission of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include the following:

(1) The full legal name of the Service commencing digital transmission of sound recordings under statutory license;

(2) The full address, including a specific number and street name or rural route, of the place of business of the Service. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location;

(3) The telephone number and facsimile number of the Service; and

(4) Information on how to gain access to the online website or home page of the Service, or where information may be posted under these regulations concerning the use of sound recordings under statutory license.

(e) *Signature.* The Initial Notice shall include the signature of the appropriate officer or representative of the Service transmitting sound recordings under statutory license. The signature shall be accompanied by the printed or typewritten name and title

of the person signing the Notice, and by the date of signature.

(f) *Filing.* A Service shall file the Initial Notice with the Licensing Division of the Copyright Office prior to the first transmission of sound recordings under the license, or within 45 days of the effective date of this regulation. Each Notice shall be accompanied by a filing fee of \$20. Initial Notices and amendments will be placed in the public records of the Licensing Division of the Copyright Office, and posted online where they will be accessible through the Copyright Office website. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, S.E., Washington, D.C. 20557-6400.

(g) *Amendments.* A Service shall file with the Licensing Division of the Copyright Office an amendment reporting a change in the information reported in the Initial Notice within 45 days of the change. An amendment shall be accompanied by a fee of \$20, and shall:

(1) Be clearly and prominently identified as "An Amendment to an Initial Notice of Digital Transmission of Sound Recordings under Statutory License";

(2) Identify the specific Initial Notice intended to be amended, by Service name and filing date, so that it may be readily located in the records of the Copyright Office;

(3) Clearly specify the nature of the amendment to be made; and

(4) Be signed and dated in accordance with this section.

§201.36 Reports of Use of Sound Recordings under Statutory License.

(a) *General.* This section prescribes rules under which Services shall serve copyright owners with notice of use of their sound recordings, what the content of that notice should be, and under which records of such use shall be kept and made available.

(b) *Definitions.* (1) A Collective is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1) or section 114(f)(4)(A) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(2) or section 114(f)(4)(B), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(2) A Report of Use of Sound Recordings under Statutory License is a report required under this regulation to be provided by the Service transmitting sound recordings under statutory license.

(3) A Service is an entity engaged in the digital transmission of sound recordings pursuant to section 114(f) of title 17 of the United States Code.

(c) *Service.* Reports of Use shall be served

upon Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated under the statutory license, either by settlement agreement reached under section 114(f)(1) or section 114(f)(4)(A) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(2) or section 114(f)(4)(B), or by an order of the Librarian pursuant to 17 U.S.C. 802(f). Reports of use shall be served, by certified or registered mail, or by other means if agreed upon by the respective Service and Collective, on or before the twentieth day after the close of each month, commencing with the month succeeding the month in which these regulations become effective.

(d) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a Service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Services shall post their Reports of Use online on or before the 20th day after the close of each month, and make them available to all sound recording copyright owners for a period of 90 days. Services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. Services may predicate provision of a password upon:

(1) Information relating to identity, location and status as a sound recording copyright owner; and

(2) A "click-wrap" agreement not to use information in the Report of Use for purposes other than royalty collection, royalty distribution, and determining compliance with statutory license requirements, without the express consent of the Service providing the Report of Use.

(e) *Content.* A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include a Service's "Intended Playlists" for each channel and each day of the reported month.

(1) The "Intended Playlists" shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

(i) The name of the service or entity;

(ii) The channel;

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(iii) The sound recording title;

(iv) The featured recording artist, group, or orchestra;

(v) The retail album title (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the Service for purchase of the sound recording);

(vi) The recording label;
(vii) The catalog number;
(viii) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(ix) The date of transmission; and
(x) The time of transmission.

(2) The Report of Use shall include a report of any system failure resulting in a deviation from the Intended Playlists of scheduled sound recordings. Such report shall include the date, time and duration of any such system failure.

(f) *Signature.* Reports of use shall include a signed statement by the appropriate officer or representative of the Service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(g) *Format.* Reports of use should be provided on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, and should conform as closely as possible to the following specifications:

(1) ASCII delimited format, using pipe characters as delimiter, with no headers or footers;

(2) Carats should surround strings;

(3) No carats should surround dates and numbers;

(4) Dates should be indicated by: MM/DD/YYYY;

(5) Times should be based on a 24-hour clock: HH:MM:SS;

(6) A carriage return should be at the end of each line; and

(7) All data for one record should be on a single line.

(h) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

(i) *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use. For reporting periods from February 1, 1996, through August 31, 1998, the Service shall serve upon all designated Collectives and retain for a period of three years from the date of transmission records of use indicating which sound recordings were performed and the number of times each recording was performed, but is not required to produce full Reports of Use or Intended Playlists for those periods.

§201.37 Designated Collection and Distribution Organizations for Records of Use of Sound Recordings under Statutory License.

(a) *General.* This section prescribes rules under which records of use shall be collected and distributed under section 114(f) of title 17 of the United States Code, as amended by Public Law 104-39, 109 Stat. 336, and under which records of such use shall be kept and made available.

(b) *Definition.* (1) A Collective is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1) or section 114(f)(4)(A) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(2) or section 114(f)(4)(B), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(2) A Service is an entity engaged in the digital transmission of sound recordings pursuant to section 114(f) of title 17 of the United States Code.

(c) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a "Notice of Designation as Collective under Statutory License," which shall be identified as such by prominent caption or heading, and shall contain the following information:

(1) The Collective name, address, telephone number and facsimile number;

(2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and

(3) Information on how to gain access to the online website or home page of the Collective, where information may be posted under these regulations concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, S.E., Washington, D.C. 20557-6400.

(d) *Annual Report.* The Collective will post and make available online, for the duration of one year, an Annual Report on how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses.

(e) *Inspection of Reports of Use by Copyright Owners.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner, and the copyright owner's written agreement

not to utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use. The Collective shall render its best efforts to locate copyright owners in order to make available records of use, and such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(f) *Confidentiality.* Copyright owners, their agents, and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

(g) *Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Copyright Office, and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such Service with information identifying the copyright owners it has served.

Dated: June 15, 1998.

Marybeth Peters,
Register of Copyrights.

Approved:
James H. Billington,
The Librarian of Congress.

[FR Doc. 98-16779 Filed 6-22-98; 8:45 am]

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