Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In The Matter of:

Notice and Recordkeeping for
Use of Sound Recordings
Under Statutory License

Docket No. RM 2002-1

JOINT REPLY COMMENTS OF XM SATELLITE RADIO INC. AND SIRIUS SATELLITE RADIO, INC.

XM Satellite Radio, Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") (collectively referred to as the "Preexisiting Satellite Services") proposed in their initial comments to use their existing recordkeeping systems – developed at great expense and based on the previous rulemaking by the Copyright Office – to provide "reasonable notice" to copyright owners of "the use of their recordings," as provided by Section 114(f)(4)(A).[1] In stark contrast, the Recording Industry of America ("RIAA") seeks in its comments *not* the "reasonable notice" provided for by statute, but rather a rule requiring, in its own words, "complete information" consisting of "all of the relevant information from the [sound recording]." *Comments of the Recording Industry Association of America* at 46 (hereinafter "RIAA Comments"). As explained in detail in the Preexisting Satellite Services' initial comments ("Initial Comments"), RIAA's original proposal would have resulted in very substantial and unnecessary costs for XM and Sirius; and, now

[1] Unless otherwise noted, all statutory references are to Title 17 of the United States Code.

RIAA, along with the American Federation of Musicians of the United States and Canada ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") have proposed *additional* requirements to serve the extra-statutory and unjustifiable goals of "completeness" and "uniformity." The Copyright Office should reject RIAA's reporting requirements as unreasonable and clearly not contemplated by the statute and, instead, adopt the proposal for "reasonable notice" made by the Preexisting Satellite Services, attached hereto as Exhibit 1.

I. RIAA'S PROPOSED AMENDED REPORTS OF USE FAR EXCEED THE STATUTORY MANDATE FOR "REASONABLE NOTICE"

In its Initial Comments, the Preexisting Satellite Services agreed to provide copyright owners with: (i) a detailed report of the sound recordings performed on their respective services from their original programming; and (ii) the cue sheet information provided to the Preexisting Satellite Services by their third party content providers. As subscription services, the Preexisting Satellite Services recognized that detailed reports of use were likely to be needed and designed their systems accordingly. For the Preexisting Satellite Services, the debate now centers on whether they should be required to expend substantial resources to modify their systems in the name of the illusory goals of "completeness," "uniformity," and "compliance."

Under this guise of "completeness," RIAA has now altered its position and increased the amount of information that it proposes in the reports of use, while deleting its request for a separate listener log ("RIAA Amended Rule"). The Preexisting Satellite Services have shown, however, that the information they have already agreed to provide (which is contained in their existing systems) more than satisfies the "reasonable notice" requirement of the statute.

A. RIAA Misconstrues the Statutory Mandate

RIAA simply misconstrues the level of recordkeeping that Congress intended "reasonable notice" to encompass. RIAA characterizes the information required under its amended proposed rule as "comprehensive," *RIAA Comments* at 66, "complete," and consisting of "all of the relevant information from [the sound recording]." *RIAA Comments* at 46. However, one only need review RIAA Exhibits G-1 through G-10 to realize that compliance with the RIAA Amended Rule would require tracking virtually every data element found on a commercial CD. "All of the relevant information" is far different than "reasonable notice."

When given an essentially identical Congressional mandate in Section 118, the musical composition compulsory license for noncommercial broadcasters,[2] the Librarian created a realistic system of recordkeeping that recognized the burden that reporting detailed playlist information entails.[3] At most, certain Section 118 licensees are required to make a "good faith" effort to provide, upon request, reports of use identifying "title, author, publisher, type of use and manner of performance ... to the extent such information is reasonably obtainable." 37 C.F.R. § 253.3(e). The Copyright Office should be guided by this prior interpretation of "reasonable" as like provisions in similar statutes should be interpreted to have the same meaning. *See FAIC Securities, Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1984); *see also* 2B Norman J. Singer, Sutherland Statutory Constr. §51.02 (6th ed. 2000)(explaining application of *in pari*

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[2] Section 118(b)(3) provides, "[t]he Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities." 17 U.S.C. § 118(b)(3).

[3] For instance, NPR and non-NPR stations with fewer than 6 full-time employees are exempt from recordkeeping requirements. *See* 37 C.F.R. §§ 253.3(e)(4) & (5). Similarly, Section 118

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materia as a canon of statutory construction). The slight difference in rights between Section 118 and the sound recording statutory license certainly do not justify the far more burdensome requirements proposed by RIAA.

Moreover, when promulgating the Interim Rules, the Copyright Office concluded that "reasonable notice" meant reporting far fewer data elements than RIAA now seeks. Though the Preexisting Satellite Services do not believe the Interim Rules reflect a conclusive determination of what is "reasonable," they are certainly a more sensible measure of reasonableness than the unsubstantiated assertions made by RIAA.[4]

The Preexisting Satellite Services believe that the system of reporting they have proposed, which combines elements from both the Section 118 license and the Interim Rules for the Section 114 license, would provide the "reasonable" notice required by the statute for XM and Sirius. The reporting requirements for Section 118 recognize the broadcast-like environment in which many of the digital audio services operate, and the Copyright Office should thus draw on those rules for guidance. Certain different data points are reasonable to identify a sound recording than are reasonable to identify a musical composition, and the Copyright Office should therefore look to the existing Interim Rules and the points made in the Initial Comments for further guidance. The resulting rules will facilitate the identification of the sound recording

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licensees – when they are required to report at all – are only required to provide data covering one week per year. *See* 37 C.F.R §§ 253.3(e), 253.5(e), 353.6(c).

[4] As explained in the Initial Comments, the Interim Rules resulted from intense negotiations among the affected parties (often facilitated by the Copyright Office) to which the Preexisting Satellite Services were not a party.

"without hampering the arrival of new technologies." S. Rep. No. 104-128 at 15 (July 10, 1995).

B. RIAA Has Failed To Provide Any Objective Evidence That Its Proposal Is Reasonable

At various points in its Petition and Comments, RIAA characterizes the "complete" data it has requested as "readily available," *RIAA Comments* at 43, and contends that the reporting of same "will not create a material burden for the services." *RIAA Comments* at 65. However, RIAA has not provided any evidentiary support for these self-serving claims.

RIAA's initial request for such detailed reporting was based on the assertion that the requested recordkeeping came from a "standard form license agreement" that allegedly "evolved" from its negotiating experience with Section 112 and 114 licensees. *Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings in Certain Digital Audio Services* at 6 (May 24, 2001)("RIAA Petition"). Based on that assertion, the Copyright Office issued a Notice of Proposed Rulemaking ("NPRM") largely adopting the proposal submitted by RIAA.[5] RIAA has failed, again, to produce a single agreement (or even a summary of terms) demonstrating the "reasonableness" of these recordkeeping requirements; in fact, RIAA no longer relies on these purported "standard agreements" as they are nowhere mentioned in RIAA's comments. Without some objective foundation, the Copyright Office can only view RIAA amended proposed rules as nothing more than the "wish list" that it is.

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[5] "In support of its request for the detailed information, RIAA argues that the information it seeks from the Services is 'easily provided, [] not burdensome, and in fact, is currently provided

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C. A Similar Request For Numerous Data Elements Was Squarely And Correctly Rejected By The Rate Court

In its comments, RIAA concedes that its request for the numerous data points to identify a particular sound recording is based on the premise that additional data elements will "facilitate . . . identification." *RIAA Comments* at 36. But as the Preexisting Satellite Services stated in their Initial Comments, the validity of such an argument was soundly rejected when proffered to the Rate Court by another performing rights organization.[6] Moreover, as RIAA has conceded, the vast majority of sound recordings can be identified by title, artist and album information. *See* Docket No. 2000-9, CARP 1 & 2, Tr. 11828-30 (Kessler). In addition, the Preexisting Satellite Services would respond to any reasonable inquiries from any designated agent concerning data entry errors. Alternatively, SoundExchange could periodically issue a list of common data entry problems so that services could pay particular attention to those problem areas. It would, however, be the proverbial tail wagging the dog for an existing system to be reconfigured simply to address an occasional incorrect entry.

In its comments, RIAA contends that the provision of the additional data it proposes is relatively simple to obtain for services that have been able to develop technologies for things

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by a number of licensees who have obtained licenses through negotiations with the RIAA and/or SoundExchange.'" NPRM at 5763.

[6] *United States v. ASCAP (In re Application of Salem Media et al.)*, 981 F. Supp. 199 (S.D.N.Y. 1997). ASCAP proposed that per program licensees (whose fee depended on the identity of the musical works performed) report: "(1) title; (2) name of composer, author, and publisher; (3) name of performing artist; (4) name of record company; and (5) all other information as to composer, author and publisher in full as shown on the label." *Id.* at 221. The court found that "ASCAP's reporting requirements are excessive" despite ASCAP's argument that "the more information the station gives us, the easier it is to identify the work," *Id.* The court then scaled back ASCAP's proposed reporting requirement to include only (a) title and (b) performer, composer, *or* publisher. *Id.* at 222.

such as "targeted advertising," "streaming music," or "digitiz[ing] entire libraries." *RIAA Comments* at 43. RIAA's easy dismissal of the great and wasteful burden that would be imposed by a need to redesign existing systems rings hollow in the face of its characterization of renting a relatively small amount of office space as "tremendous cost." *RIAA Comments* at 24. Moreover, before computer programs can be designed to extract and report the data, someone must locate, organize and enter all the requested data from hundreds of thousands (and in the case of the Preexisting Satellite Services, millions) of sound recordings, manually. The enormity of the initial labor intensive task cannot be overstated. Despite RIAA's claims to the contrary, the data is not "readily available." No publicly available existing database of complete sound recording information provides the data needed to create the requested reports of use. The service must review and enter the information available from the medium on which the sound recording is provided. Often the medium simply does not contain all of the information that RIAA now requests, requiring services to manually research and enter missing information.

II. THE PROPOSED AMENDED REPORTING REQUIREMENTS REMAIN BURDENSOME AND REDUNDANT

A. The Proposed Uniform Reports Would Require the Preexisting Satellite Service To Expend Valuable Resources To Report Information Unnecessary for the Calculation and Distribution of Royalties

In its amended proposal, RIAA suggests a "uniform report of performances." *RIAA Comments* at 27. RIAA's suggested implementation of this uniform report, however, is flawed. Rather than creating a Uniform Report based on the least common denominator, RIAA suggests that all services create a comprehensive, uniform report, containing many different fields, whether or not certain data elements will be meaningfully populated by the service. As explained below, a number of the proposed fields are not relevant for the Preexisting Satellite

Services. It would be a terrible waste of resources for the Preexisting Satellite Services to reconfigure their current databases and reports to accommodate data fields that will be populated with nothing more than a placeholder.

RIAA requests that each line of a report contain all the information regarding the service, transmission, and sound recording identifier information. This request is premised on the possibility that a header or footer containing generalized information that may apply to the entire report may become disassociated with a particular performance. Again, complying with this particular request would force XM and Sirius to reconfigure their existing databases and reporting systems to accommodate a contingency that may never happen. With prudent handling of data files, SoundExchange should surely be able to ensure that misplaced files are a rare occurrence.

B. The Elimination of the Listener Log Does Not Justify the Increase of Data Elements in the Reports of Use

The Preexisting Satellite Service have already shown in their initial comments why many of the data elements originally proposed by the RIAA and listed by the Copyright Office in the NPRM were burdensome and unnecessary, and thus now comment only on the new or clarified data elements requested by the copyright owners. The Preexisting Satellite Services reiterate that their existing systems and the proposals made in their Initial Comments provide more than enough information to provide copyright owners with "reasonable notice" of use of their sound recordings.

1. Category of Transmission

RIAA requests that one of the fields on its proposed report contain a designation of the "type of transmission" in order to calculate the license fee owed by the service. The Preexisting

Satellite Services offer two types of services. The category of transmission designation would be either "SDARS" (for the satellite offering) and, presumably, "WI" for their Internet offering. As a practical matter, the Preexisting Satellite Services are likely to create two separate reports. The Preexisting Satellite Services would be willing to indicate the transmission category, generally, somewhere in the report or on the cover transmitting the report to SoundExchange; but indicating that information on *each line* of the report would require XM and Sirius to create and populate new fields of information in their databases. Given that the data element is constant on each report, an expenditure of resources in such an effort would be wasteful and unecessary.

2. Influence Indicator

As the webcasting CARP decision made clear, whether a service allows a listener to exert some control over programming is irrelevant in determining the licensing fee provided the service complies with the statutory license. *See In re Digital Performance Right in Sound Recordings and Ephemeral Recordings,* Docket No. 2000-9, CARP DTRA 1 &2, Report of the Copyright Arbitration Royalty Panel at 81-82 (Feb. 20, 2002). RIAA believes that the use of certain listener influence features, such as a skip button "may" render certain services ineligible for the statutory license. *RIAA Comments* at 51 (emphasis added). On that speculative basis, RIAA requests that all services indicate whether the service employs user influenced technology. The final determination regarding the eligibility of user-influenced services for the statutory license will not be made in this forum, and no matter what the ultimate determination is, the Preexisting Satellite Services submit that this field is unnecessary.

Moreover, this would be another instance in which a field would be populated with a constant number. As the Preexisting Satellite Services indicated in their initial comments, SDARS is a one-way, broadcast-like technology similar to over-the-air television and radio. As

such, the user cannot influence the programming. Sirius simulcasts its SDARS programming on the Internet and does not allow for an influence indicator. XM streams looped portions of its programming that similarly does not allow for any listener influence.

3. Total Number of Performances

RIAA withdrew its request for a separate listener log; however, RIAA now requests that licensees essentially gather much of the information formerly contained on the listener log to provide SoundExchange with the number of performances on a sound-recording-by-sound-recording basis. Whether this information is provided in a separate listener log or as part of the reports of use, it is difficult (and in some instances, impossible) to gather. Moreover, there is very little potential benefit in providing this detailed listener information.

RIAA recognizes the technical impossibility of this calculation for the Preexisting Satellite Services but would still require that XM and Sirius create and populate a data field with the number "1." Again, this number is nothing more than a placeholder. It would be a terrible waste of resources to require the Preexisting Satellite Services to reconfigure existing systems to accommodate a constant figure.

It is similarly impossible for the Preexisting Satellite Services to track, on their *Internet* programming, the total number of performances on a sound-recording-by-sound-recording basis. Sirius and XM currently track only generalized information regarding the daily number of hits and average length of a website visit. With this aggregate data, it is possible to determine the average number of listeners to a service and thus to calculate the appropriate royalty. SoundExchange can distribute those royalties either using the average provided by the service or using the same methodology it must use for the preexisting subscription services and the

royalties attributable to SDARS, as it is impossible for those services to provide any specific listener information. As evidenced by SoundExchange's existing methods of distribution, information regarding the number of listeners to a particular sound recording is simply not necessary for the accurate distribution of royalties.

4. Non-Featured Performer Information

AFM and AFTRA propose that statutory licensees provide "the names of all non-featured singers and musicians on each sound recording whenever the services are in possession of that information." *Comments of the American Federation of Musicians of the United States and Canada and The American Federation of Television and Radio Artists* at 2 (hereinafter "*Union Comments*"). The task of locating, entering and reporting this level of information is daunting: this one field could have two or ten or twenty entries. Given the number of names that could be entered in this field, the possibility of data entry error is high and, necessarily, the information will require independent verification from another source. The expenses to the services would be enormous and the ultimate result would be of little use to copyright owners.

Moreover, the burden to provide this information clearly does not rest with the services. Section 114(f)(4)(A) provides that statutory licensees will provide *copyright owners* with "reasonable notice." Section 114(g)(2) provides that the *copyright owners* shall then allocate licensing proceeds in the prescribed manner to non-featured musicians and vocalists. The copyright owner, not the statutory licensees, has a responsibility to determine proper allocation.

5. Marketing Label

RIAA now clarifies that record label means "marketing label." RIAA concedes, however, that "[i]n many cases the marketing label is duplicative of the track label information

that has already been requested." *RIAA Comments* at 58. RIAA provides no justification for requesting this duplicative information except that it is simply another data point that RIAA would like to collect. Again, it cannot be over-emphasized that the standard is "reasonable notice," not "all of the relevant information from the [sound recording]."

III. RIAA'S PURPORTED JUSTIFICATION FOR THE EPHEMERAL LOG IS SO SPECULATIVE AS TO BE LUDICROUS

RIAA's only support for its proposed detailed and burdensome ephemeral log is that the "copyright owners *may* decide to allocate royalties based upon the number of reproductions made by a service rather than using the proxy of performances made by a service." *RIAA Comments* at 61 (emphasis added). This is disingenuous. The non-subscription services CARP set the ephemeral recording license fee as a percentage of the total performance license fee; and payments to copyright owners on any basis *other* than the number of performances could therefore result in certain owners receiving less than the revenue generated by their sound recordings. Although it is theoretically *possible* that SoundExchange may nonetheless decide to distribute ephemeral royalties based on the number of copies, the Preexisting Satellite Services should certainly not be required to create extensive databases and reports on a remote possibility that would, in any event, result in a misallocation of fees.

IV. THE PARTY MOST CAPABLE OF PROVIDING THE INFORMATION SHOULD DO SO TO FACILITATE THE ADMINISTRATION OF THE STATUTORY LICENSE

RIAA asserts that the services are in the best position to provide the necessary data to the copyright owners. *RIAA Comments* at 65. But the virtual avalanche of comments filed with the Copyright Office makes it evident that obtaining and reporting this information is far from a simple task. If copyright owners provided some minimal assistance, SoundExchange could do

its job perfectly adequately with the data that the Preexisting Satellite Services have agreed to provide.

No doubt, record labels have an up-to-date list of the sound recordings they control. If they provided that information to SoundExchange, the collective could then match up that information to the reports of use that the Preexisting Satellite Services have agreed to provide. This would surely result in a highly accurate distribution; after all, copyright owners of approximately 90% of all sound recordings sold in the United States have designated SoundExchange to collect these statutory royalties. *Union Comments* at 6, n.1. With its members providing the information that conveniently rests in their databases, SoundExchange could altogether avoid "researching each sound recording submitted through publicly available Internet resources or publications of releases." *RIAA Comments* at 29.

RIAA characterizes itself in its initial comments, as some kind of "white knight," alleging: "SoundExchange stepped forward to provide the service of collecting and distributing statutory royalties even though it had no obligation to do so. Copyright owners could have insisted upon receiving distributions directly from each service, as is their right." *RIAA Comments* at 65. It is more accurate to state that RIAA jumped at the opportunity, arguing in the previous rulemaking that "[t]he RIAA is in a unique position to represent all sound recording copyright owners with respect to performance rights royalties." *In re Notice and Recordkeeping for Subscription Digital Transmission, Docket No. RM-96-3*, Reply Comments of the Recording Industry Association of America at 2 (Aug. 12, 1996). It is not clear, however, that in the absence of this "white knight" collective that each copyright owner would be paid directly. Such an outcome is not "reasonable" and would render the statutory license useless. More appropriately, the Copyright Office or the CARP would have established a cable and satellite

distribution mechanism in which license fees were paid into a pool and then copyright owners were forced to battle for their requisite share in lengthy distribution proceedings, such as the methods used for cable and satellite royalties. In that instance, the copyright owners would be forced to bear costs of litigation, which would likely be prohibitively expensive for the small labels and unjustifiably expensive for major labels. While the existence of a collective facilitates the distribution of royalties for everyone involved, the mere existence of a voluntary collective should not relieve copyright owners from providing a modicum of readily available information that will facilitate the statutory licensing process and spare the Preexisting Services from burdensome and unnecessary expenses.

V. CONCLUSION

For all the above reasons, as well as the reasons stated in the Preexisting Services' initial comments, the Library should adopt the proposal for "reasonable notice" in Exhibit 1 hereto.

Respectfully submitted,

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April 26, 2002

EXHIBIT 1

Proposed Amended Regulations

§ 201.35 -- Notice of Use of Sound Recordings under Statutory License.

(a) *General.* This section prescribes rules under which copyright owners shall receive notice of use of their sound recordings when used under either sections 112(e) or 114(d)(2) of title 17 of the United States Code, or both.

(b) *Definitions.*

(1) A *Notice of Use of Sound Recordings under Statutory License* is a written notice to sound recording copyright owners of the use of their works under section 114(d)(2) or section 112(e) of title 17 of the United States Code, or both, and is required under this section to be filed by a Service in the Copyright Office.

(2) A *Service* is an entity engaged in either the digital transmission of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code or both. For purposes of this section, the definition of a service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). A Service may be further characterized as either a preexisting subscription service, preexisting satellite digital audio radio service, new subscription service, non-subscription transmission service or a combination of those:

(i) A *preexisting subscription service* is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(ii) A *preexisting satellite digital audio radio service* is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made

available on a nonsubscription basis in order to promote the subscription service.

(iii) A *new subscription service* is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(iv) A *non-subscription transmission service* is a service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under subsection 114(d)(1) and are made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(c) *Forms and content.* A Notice of Use of Sound Recordings under Statutory License shall be prepared on a form that may be obtained from the Copyright Office website or from the Licensing Division, and shall include the following information:

(1) The full legal name of the Service that is either commencing digital transmission of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both.

(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.

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

(5) Identification of each license under which the Service intends to operate, including the identification of each of the following categories under which the Service will be making digital transmissions of sound recordings: preexisting subscription services, preexisting satellite digital audio radio service, new subscription service and non-subscription transmission service.

(6) The date or expected date of the initial digital transmission of a sound recording to be made under the section 114 statutory license and/or the date or the expected

date of the initial use of the section 112(e) license for the purpose of making ephemeral recordings of the sound recordings.

(7) Identification of any amendments required by paragraph (f) of this section.

(d) *Signature*. The Notice shall include the signature of the appropriate officer or representative of the Service that is either transmitting sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Notice, and by the date of the signature.

(e) *Filing notices*; *Fees*. The original Notice and three copies shall be filed with the Licensing Division of the Copyright Office, and shall be accompanied by the filing fee set forth in § 201.3(c) of this part. Notices shall be placed in the public records of the Licensing Division. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE, Washington, DC 20557-6400.

(1) A Service that, prior to [the effective date of the final rule], has already commenced making digital transmissions of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code, or both, and that has already filed an Initial Notice of Digital Transmission of Sound Recordings under Statutory License, and that intends to continue to make digital transmissions or ephemeral phonorecords following [the effective date of the final rule], shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office no later than 60 days following [the effective date of the final rule].

(2) A Service that, on or after [the effective date of the final rule], commences making digital transmissions and ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office no later than 60 days following the making of the first ephemeral phonorecord of the sound recording and no later than 60 days following the first digital transmission of the sound recording.

(3) A Service that, on or after [the effective date of the final rule], commences making only ephemeral phonorecords of sound recordings, shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office no later than 60 days following the making of the first ephemeral recording under the statutory license.

(f) *Amendment*. A Service shall file a new Notice of Use of Sound Recordings under Statutory License within 45 days after any of the information contained in the Notice on file with the Licensing Division has changed materially, and shall indicate in the space provided on the

form provided by the Copyright Office that the Notice is an amended filing. The Licensing Division shall retain copies of all prior Notices filed by the Service.

§ 201.36 -- Report of Use of Sound Recordings under Statutory License.

(a) *General.* This section prescribes rules under which Services shall provide copyright owners with reports of use of their sound recordings under either section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both.

(b) *Definitions.*

(1) A Report of Use of Sound Recordings under Statutory License ("Report of Use") is a report required under this section to be provided by a Service that is transmitting sound recordings under statutory license.

(2) A *Service* shall have the same definition as provided in § 201.35(b)(2) of this part.

(3) An *AM/FM Webcast* . . . .

(4) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses, either by settlement agreement reached under section 112(e)(3), section 112(e)(6), section 114(f)(1)(A), section 114(f)(1)(C)(i), section 114(f)(2)(A), or section 114(f)(2)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(5) An *Incidental Performance* is a performance that both (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(c) *Service.* Reports of Use shall be delivered to Collectives designated under the applicable statutory license 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 112(e)(3), section 112(e)(6), section 114(f)(1)(A), section 114(f)(1)(C)(i), section 114(f)(2)(A), or section 114(f)(2)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 112(e)(4), section 112(e)(6), section 114(f)(1)(B), section 114(f)(1)(C)(ii), section 114(f)(2)(B), or section 114(f)(2)(C)(ii) 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 the final rule becomes effective].

(d) *Posting.* In the event that no Collective is designated under the applicable 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 limit a sound recording copyright owner's access to the Reports of Use solely to those portions that report transmissions of sound recordings in which that owner owns copyright. 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 (A) not to use information in the Report of Use for purposes other than royalty collection and royalty distribution, (B) not to disclose such information to any person, both without the express consent of the Service providing the Report of Use, and (C) to be bound by subsection (h) of this section.

(e) *Content.*

(1) *Heading.* A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading.

(2) *Playlists.* For a Service making digital transmissions of sound recordings pursuant to a statutory license under 17 U.S.C. 114(d)(2), each report of use shall include a Service's "Intended Playlist" or "Actual Playlist" for each channel on each day of the reported month.

(i) In the case of transmissions of sound recordings made pursuant to a statutory license under 17 U.S.C. 114(d)(2) by a Service that is a preexisting subscription service . . . .

(ii) In the case of transmissions of sound recordings made pursuant to a statutory license under 17 U.S.C. 114(d)(2) by a Service that is a preexisting satellite digital audio radio service in the same transmission medium used by such Service on July 31, 1998, and any transmission, in whole or in part, of such transmission in any other medium, the Service shall provide an Intended Playlist or Actual Playlist, at the Service's option, which Playlist shall include the name of the Service or entity and a

consecutive listing of every performance (other than an Incidental Performance) of a recording and shall contain the following information:

(A) (1) the sound recording title;

(2) the featured recording artist, group, or orchestra;

(3) the retail album title where reasonably available;

(4) the record label where reasonably available;

(5) the date of transmission; and

(6) the approximate time of transmission.

(B) In the case of programming provided to preexisting satellite digital audio radio service providers by third parties, the preexisting satellite digital audio radio service providers shall make good faith efforts to cause such third parties to furnish the information provided in paragraphs (e)(ii)(A)(1)-(6) of this section, however, that preexisting satellite digital audio radio service providers may pass through such information received from third parties without review or modification, and such delivery shall be deemed performance by preexisting satellite digital audio radio service providers of their reporting obligations hereunder.

(C) In the case of channels transmitting news, talk, sports or other similar programming, no Playlist requirements shall apply. Rather, the Service and the Collective(s) shall agree upon commercially reasonable estimates of the sound recordings performed in that programming.

(iii) In the case of all other Services not covered by paragraphs (e)(2)(i) and (e)(2)(ii) of this section . . . .

(3) *Listenership Information.* In the case of a Service that transmits sound recordings pursuant to a statutory license under 17 U.S.C. 114(d)(2) over a bi-directional digital computer network (such as the Internet) that uses equipment capable of measuring the number of recipients, the Service shall report its average number of concurrent listeners during the month using any measure reasonably calculated to provide such measure of average concurrent listeners. Such methods may include, without limitation, a direct measure of average concurrent listeners or a measure of aggregate tuning hours combined with the number of hours during such month that such transmissions were available.

(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.

(h) *Confidentiality.*

(1) *Access.* If one or more Collectives have been designated under the applicable statutory license, access to information in the Reports of Use shall be restricted to (i) those employees, agents, consultants and independent contractors of the Collectives, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder, who are not also employees or officers of a copyright owner or performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the information; (ii) independent and qualified auditors, subject to an appropriate confidentiality agreement; and (ii) in connection with a bona fide fee dispute, subject to an appropriate confidentiality agreement, outside counsel, consultants, and other authorized agents of the parties to the dispute, and the courts. In the event that no Collective is designated under the applicable statutory license, or if all designated Collectives have terminated collection and distribution operations, a sound recording copyright owner, subject to an appropriate confidentiality agreement, also may have access to (A) those portions of the Reports of Use that report transmissions of sound recordings in which that owner owns copyright or (B) at the Services, option, in lieu of providing partial access, the complete Reports of Use.

(2) *Use.* Copyright owners and their 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, without express consent of the Service providing the Report of Use. Copyright owners and their Collectives shall implement procedures to safeguard all confidential information in the Reports of Use using a reasonable standard of care, but no less than the same degree of security used to protect confidential information belonging to such copyright owners or Collectives.

(i) *Documentation.* All statutory 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 the effective date of the final rule, the Service shall serve upon all designated Collectives and retain for a period of three years from the date of transmission records of use to the extent available, 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, Intended Playlists or Actual Playlists for those periods.

(j) *Good Faith Errors.* Good faith reporting errors or inadequacies will not deprive a Service of a statutory license nor subject the Service to other penalties. In the event of a good faith reporting error identified by a Collective, the Service and the Collective shall cooperate to resolve such error.

(k) *Transition Period.* During the one year period commencing on [the effective date of the final rule], the reporting obligation on a Service shall be limited to making commercially reasonable efforts to provide the information required in this Section.