



# ANNOUNCEMENT

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

## NOTICE OF PROPOSED RULEMAKING.

### NOTICE AND RECORDKEEPING FOR NON-SUBSCRIPTION DIGITAL TRANSMISSIONS

The following excerpt is taken from Volume 64, Number 211 of the *Federal Register* for Tuesday, November 2, 1999 (pp. 59140-59141)

#### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 201

#### [Docket No. RM 99-5B]

#### Notice and Recordkeeping for Non-subscription Digital Transmissions

**AGENCY:** Copyright Office, Library of Congress

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Copyright Office proposes extending the date by which a non-interactive, non-subscription service currently making digital transmissions of sound recordings must file an initial notice of digital transmission with the Copyright Office from October 15, 1999, to December 1, 1999.

**DATES:** Comments must be received by the Copyright Office on or before November 17, 1999.

**ADDRESSES:** An original and ten copies of the comments shall be hand delivered to: Office of General Counsel, Copyright Office, LM-403, James Madison Memorial Building, 101 Independence Avenue, SE, Washington, DC 20559-6000, or mailed to: David O. Carson, General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024.

#### FOR FURTHER INFORMATION

**CONTACT:** David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

#### SUPPLEMENTARY INFORMATION:

#### Background

On October 28, 1998, the President signed into law the Digital Millennium Copyright Act of 1998 ("DMCA"). Among other things, the DMCA expanded the section 114 compulsory license to allow a nonexempt, eligible non-subscription transmission service and a preexisting satellite digital audio radio service to perform publicly a sound recording by means of certain digital audio transmissions, subject to compliance with notice and recordkeeping requirements. 17 U.S.C. 114(f).

For purposes of promulgating regulations governing the notice and recordkeeping requirements, the Office published a notice of proposed rulemaking in August, 1999, seeking to amend 37 CFR 201.35(f)--the interim regulation that requires the submission of an initial notice of digital transmission. The proposed change required each non-subscription service to file an initial notice of digital transmission prior to its first transmission, or in the case of those services already making such transmissions, prior to October 15, 1999. 64 FR 42316 (August 4, 1999). On September 2, 1999, the Recording Industry of America, Inc. ("RIAA") filed the only comment to the proposed change supporting, in general, the Office's proposal to amend the date by which a nonexempt, eligible non-subscription service already in operation could file a timely initial notice. Because there was no opposition to the proposed interim rule change, the Office set October 15, 1999, as the date by which non-subscription services currently making digital transmissions had to file its initial notice. 64 FR 50758 (September 20, 1999).

On October 15, 1999, the National Association of Broadcasters ("NAB") filed a petition with the Copyright Office, seeking an extension of the date for filing these initial notices until December 1, 1999. NAB makes this request because it believes that many potentially affected parties were unaware of the need to file an initial notice by the October 15, 1999, date, and consequently, missed the filing deadline, thereby

jeopardizing their opportunity to rely upon the statutory license. NAB also suggests that the Office need not have proceeded at such a swift pace to amend the notice requirements when the rates and terms for the section 114 license have yet to be set. However, NAB is not proposing any change to the published schedule for the rate setting proceeding. See 64 FR 52107 (September 27, 1999).

In a response to the NAB petition, RIAA raised no objection to NAB's proposal to extend the date for filing initial notices from October 15, 1999, to December 1, 1999, although it stated that it would strongly oppose any extension beyond that date and any change to the November 1, 1999, filing date for the Notices of Intent to Participate in the rate setting proceeding. RIAA states that it needs the information supplied by the initial notices and the Notices of Intent to Participate in order to complete the industry-wide negotiations, the aim of which is to set rates and terms for the section 112 and 114 statutory licenses. See 63 FR 65555 (November 27, 1998).

NAB's reasons for requesting the extension are supported by the facts. Since October 15, 1999, the Copyright Office has received several hundred initial notices and expects additional filings to continue. Thus, it appears that many of the potentially affected parties were unaware of the rule change that set a date certain by which services currently operating under the section 114 statutory license had to file an initial notice of digital transmission of sound recordings.

In recognition of the apparent breakdown in the process to disseminate the information regarding the filing requirement to those parties most affected by the interim rule change, the Office is proposing to amend its interim regulation in accordance with NAB's suggestion and to adopt the proposed December 1, 1999, date as the deadline for filing initial notices.

In any event, the Office will accept all initial notices filed with the Licensing Division of the Copyright Office. However,

the Office takes no position on the legal sufficiency of any filing made with the Office that does not conform with the filing requirements announced in 37 CFR 201.35(f). A service should be aware that the date-specific filing deadline for non-subscription services is significant only if it has made a digital transmission under the statutory license prior to that filing date. Any preexisting entity, just as any new entity which chooses to make use of the license at a future time, may file its initial notice after these dates, so long as it files its initial notice with the Licensing Division prior to the first transmission of a sound recording.

For these reasons, and because the Office considers it likely that there will be no substantive objections filed and that the Office will promulgate a final rule extending the deadline to December 1, services that have commenced making eligible non-subscription

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transmissions and that have not yet filed initial notices are encouraged to file their initial notices prior to promulgation of the final rule and in no event later than December 1, 1999.

#### **Regulatory Flexibility Act**

Although the Copyright Office, located in the Library of Congress which is 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 considers the effect of a proposed amendment on small businesses. For that reason, the Register is seeking to amend yet again 37 CFR 201.35(f) in order to allow small business entities that are eligible for the statutory license to make a timely filing of its initial notice of digital transmissions. The Register is seeking the amendment at the request of the NAB, an organization that represents the interests of numerous small broadcasters who were heretofore unaware of the filing requirements, and with the expectation that the NAB will make its members aware of the filing requirement and the proposed new deadline.

#### **List of Subjects in 37 CFR Part 201**

Copyright.

#### **Proposed Regulation**

For the reasons set forth in the preamble, it is proposed that part 201 of title 37 of the Code of Federal Regulations be amended as follows:

#### **PART 201--GENERAL PROVISIONS**

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

**Authority:** 17 U.S.C. 702.

2. Section 201.35(f) is amended by removing the date "October 15" and inserting in its place "December 1".

Dated: October 27, 1999.

**David O. Carson,**  
*General Counsel.*

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