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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 2002-1A**

COMMENTS OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

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COMMENTS OF THE
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The Recording Industry Association of America, Inc. ("RIAA"), on behalf of itself and its member companies, which create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States and on behalf of SoundExchange[1], currently an unincorporated division of the RIAA, which has a separate, overlapping roster of members that are large, medium and small recording companies, respectfully submits these comments in response to the Copyright Office's Notice of Proposed Rulemaking on "the requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license and for how records of such use shall be kept and made available to

[1] SoundExchange licenses public performances and ephemeral recordings, and collects and distributes public performance and ephemeral recording revenue for such digital media as cable, satellite and the Internet. SoundExchange's board of directors is evenly divided between representatives of copyright owners and representatives of artists and nonfeatured musicians and vocalists. The board has voted to incorporate SoundExchange as a separate legal entity so that it is no longer a division of the RIAA.

copyright owners." Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (Feb. 7, 2002) (the "NPRM").

I. INTRODUCTION

In 1995, Congress amended the copyright laws through enactment of the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995) (the "DPRA"), granting copyright owners of sound recordings an exclusive right of public performance. Congress limited that exclusive right through the enactment of a statutory license for certain nonexempt transmissions. The statutory license enables entities making certain digital audio transmissions of sound recordings to have access to millions of sound recordings protected by U.S. copyright law merely by taking a few minutes to file one piece of paper in the Copyright Office, instead of having to negotiate individual license agreements with the thousands of sound recording copyright owners whose songs a service might want to transmit. This efficient mechanism provides a tremendous benefit to services operating under the statutory license, but it is only available to services that agree to abide by the terms of the statutory license.

In exchange for operating under the statutory license and enjoying the benefits of a blanket license, each statutory licensee agrees to do four things. First, they agree to pay the royalties that are established by the Librarian of Congress (the "Librarian"), including when the rate is not established until after the commencement of transmissions. 17 U.S.C. § 114(f)(4)(B). Second, they agree to comply with "such notice requirements as the Librarian of Congress shall prescribe by regulation." Id. Third, they agree to provide copyright owners with reasonable notice of use of their sound recordings. Id. § 114(f)(4)(A). Fourth, they agree to abide by the programming requirements, id.

§§ 114(d)(1)(C)(iv), 114(d)(2)(C)(i), and other terms set forth in the statute. Id. § 114(f)(4)(B)(i).

Copyright owners and performers did not impose the above statutory requirements. Rather, Congress adopted these requirements as a condition of operating under the statutory license or a statutory exemption. The requirements are, therefore, akin to a contractual obligation in a voluntary license. A service only receives the benefit of the statutory license or the statutory exemption if it agrees to abide by the terms of the statute. Thus, the requirement to provide detailed reports of use – the subject of this rulemaking proceeding – should come as no surprise to services. In fact, in addition to the general requirement in the statute, the Copyright Office's adoption of interim regulations for preexisting subscription services also provided statutory licensees and exempt services with notice of the types of reports of use that would be required under the Section 114 statutory license. See Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34,289 (June 24, 1998) (the "Original Determination"). Much of the data in the proposed regulations is identical to that required by the Original Determination. It is reasonable to conclude, therefore, that any service operating under a statutory license or exemption after June 24, 1998, the date the Copyright Office published the Original Determination, did so with full knowledge of its likely obligation to provide similar data reporting.

The determinations made by the Copyright Office in the Original Determination provide guidance for the Copyright Office in this proceeding. The Copyright Office previously ruled that services operating under the statutory license are obligated to provide:

- Identifying information for each sound recording performed;
- A consecutive listing of every sound recording scheduled to be performed; and
- Reporting sufficient for ensuring compliance with statutory requirements, such as the sound recording performance complement.

See id. at 34,294-95. The regulations adopted through this rulemaking should be consistent with the principles set forth in the bullet points above, and provide copyright owners and performers with information that enables them to be compensated individually for the use of their works and enforce the requirements of the statutory license or the statutory exemption.

Any claim that detailed reporting requirements will destroy webcasters or any other digital audio transmission service is unfounded. After the Copyright Office's Original Determination for preexisting subscription services, the "burden" of providing detailed reports of use did not thwart, hinder or cripple the development of such services. In fact, such services have continued to succeed since the Original Determination. Thus, history rather than hysteria should serve as a guide to the Copyright Office in this proceeding.

RIAA sets forth in these comments proposed regulations that build upon, but are slightly different than, the regulations proposed by the Copyright Office. See Section IV *infra*. RIAA believes that these alternative regulations will simplify the reporting obligations of services and provide collecting entities with the information needed to distribute royalties to copyright owners and performers and provide copyright owners with sufficient information to enforce the requirements set forth in Section 112 and Section 114 of the copyright laws.

II. DETAILED REPORTS OF USE ARE NECESSARY FOR ROYALTY COLLECTION AND DISTRIBUTION AND ENFORCEMENT OF STATUTORY REQUIREMENTS

Detailed reports of use are necessary for the collection and distribution of statutory royalties and the enforcement of certain statutory requirements, such as the sound recording performance complement, which applies equally to statutory licensees and certain statutorily exempt services. Without detailed reports of use, copyright owners and performers will not be compensated for the actual use of their creative works, and services' compliance with statutory requirements such as the sound recording performance complement will be "discretionary" as services will know that without data to test for compliance, there will be little risk of their being held liable for noncompliance. In order to prevent such injustices, the Copyright Office should adopt regulations that protect the rights of copyright owners and performers.

A. The Copyright Office Has Previously Ruled That "Reasonable Notice Of The Use Of Their Sound Recordings" Requires Detailed Reports Of Use

Each type of service operating under Section 114 is required to provide copyright owners with "reasonable notice of the use of their sound recordings." 17 U.S.C. § 114(f)(4)(A). The Copyright Office has already determined that detailed reports of use are necessary for the proper allocation of royalties among copyright owners. See Original Determination, 63 Fed. Reg. 34,289. The Copyright Office also determined that "reasonable notice" includes information sufficient for ensuring compliance with certain requirements of the Section 114 statutory license, including the sound recording performance complement. See discussion *infra* Section II.D. As the Copyright Office noted:

> [C]onforming 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 believes that the presence and specificity of the performance complement indicates Congress' intent that records of use include data to test compliance.

Original Determination, 63 Fed. Reg. at 34,294. In order to test for compliance with the sound recording performance complement, however, notice of all transmissions is needed. Samples or surveys of occasional transmissions on certain channels are insufficient, and would not provide copyright owners with information needed to test compliance on all channels at times selected by the copyright owner.

This rulemaking should build on the Original Determination (which the preexisting subscription services have generally complied with), correct inadequacies in the current reports of use and create a uniform reporting structure that applies to all services, regardless of the types of transmissions made. What this rulemaking should not provide, however, is an opportunity for services to argue that the sound recording performance complement has no meaning, that copyright owners are not entitled to comprehensive data that would enable them to ensure compliance with the sound recording performance complement or that the obligation to provide data collection and reporting should be borne by copyright owners and performers.

The services that participated in the matter of the Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (the "Webcaster CARP") are on record proposing that copyright owners should be responsible for tracking a service's usage of sound recordings. In their direct case submission, the broadcasters and webcasters in the Webcaster CARP proposed the following:

3. Information Regarding Use of Sound Recordings Under Statutory License

(a) It shall be the responsibility of any agent(s) designated to receive royalty payments under the statutory license to determine what sound recordings have been performed by services licensed under the statutory license to the extent such information is needed by the agent to fulfill its distribution obligations.

(b) In the event any designated agent wishes a service licensed under the statutory license to provide it with reasonable information regarding the sound recordings performed by the service, the agent shall reimburse the reasonable costs and expenses incurred by the service in collecting and providing the relevant information. In no event shall such information exceed that which is necessary to allow the agent to identify the applicable sound recordings.

Direct Case of Broadcasters and Webcasters in Webcaster CARP, Exhibit 3, Broadcasters/Webcasters Proposed Rates and Terms for Royalty Fees for the Digital Public Performance and Ephemeral Recording of Sound Recordings by Eligible Nonsubscription Transmissions (Apr. 11, 2001).

This proposal by the services participating in the Webcaster CARP should be rejected. First, the services seek to shift the burden of determining what sound recordings have been performed when it is the services who control the programming of performances. In addition, as transmissions are frequently made on "channels" that are created "on the fly" and made available only to the recipient of the transmission, it would be impossible for copyright owners to "determine what sound recordings have been performed" under such circumstances.[2] Second, the Copyright Office has already ruled in the Original Determination that certain information is needed from a service in order for an agent to distribute statutory royalties. Third, services are required to provide

[2] See Quote of Brad Porteus, Vice President, MTViRadio, MTVi Group, LLC in Section IV.D *infra* regarding the creation of unique playlists for each listener.

notice of use without reimbursement of costs because providing notice of use is a requirement of the license, not an option. Notwithstanding the many creative attempts of certain services to shift their obligation to comply with the statutory requirements to copyright owners and performers, neither the Copyright Office nor those entitled to royalties should be required to expend precious time and money in this rulemaking revisiting issues that the Copyright Office decided nearly four years ago, after an in-depth rulemaking proceeding.

B. Detailed Reports Of Use Are Necessary For Royalty Collection And Distribution

In order to fulfill the purpose of the statutory licenses – to compensate copyright owners and artists for the exploitation or reproduction of their works – one needs to identify the sound recordings actually performed or reproduced so that royalties are distributed to the copyright owners and artists entitled to receive such royalties. All of this information on performances or reproductions is in the control of the services. It is the service that programs the recordings that are performed. It is the service that obtains the recordings, "rips" those recordings to make reproductions for a database from which transmissions are made and enters the meta data for those sound recordings so that they are identifiable in the database. Indeed, many services often emphasize that they display information on specific sound recordings and links to retail websites so that listeners may purchase the transmitted sound recordings. Under the statute, some services are also required to "identif[y] in textual data the sound recording during . . . the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to

permit it to be displayed to the transmission recipient . . . ." 17 U.S.C. § 114(d)(2)(C)(ix).

In contrast, copyright owners and performers do not control any aspect of the public performance or reproduction of a sound recording and it would be unreasonable (and in many instances impossible) to require them to track, monitor, or collect data on the usage of their sound recordings by any service that may choose to operate under a statutory license. Therefore, the obligation to provide detailed reports of use that are necessary for royalty collection and distribution must be borne by the service exploiting the sound recording, an approach that is consistent with the Copyright Office's findings in the Original Determination.

1. Royalty Collection

In the Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002) (the "CARP Report"), the arbitrators established a rate structure that requires eligible nonsubscription transmission services to pay a statutory royalty for each "performance" of a sound recording. The CARP defined a "performance" as "each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener)." CARP Report, Appendix B, Rates and Terms for Eligible Nonsubscription Transmissions and the Making of Ephemeral Reproductions at § 1(l) (hereinafter "CARP Report, Appendix B").

Under the Webcaster CARP decision, eligible nonsubscription transmission services must report to the collecting entities for copyright owners and performers the actual number of performances during a given month. If a service plays one song on a channel that is received by 10 people, then the service must pay royalties for 10

performances. Similarly, if a service plays all or part of 10 songs on a channel received by one listener, then the service must pay for 10 performances. Each eligible nonsubscription transmission service must, therefore, provide copyright owners or collecting entities with statements of account that contain information that is sufficient to calculate the number of compensable performances that have been transmitted under the Section 114 statutory license. This includes information on the number of transmissions on each channel of programming offered by the service during each hour of each month.

The arbitrators in the Webcaster CARP, after receiving evidence over several months, including thousands of pages of briefs and hearing transcripts, also concluded that requiring a service to track and report all performances "would not significantly burden the services," even if the service had to report partial performances of sound recordings. CARP Report (Interim Public Version) at 107. The Copyright Office should similarly conclude that requiring services to report each transmission of any portion of a sound recording is not burdensome and, in fact, is needed by collecting entities to ensure proper payment of royalties when services pay on a per performance basis and for the allocation of royalties for distribution.

2. Royalty Distribution

To give meaning to the purpose of the statutory license and the requirement to provide copyright owners with notice of the use of their sound recordings, reports of use must contain more information than the gross number of performances. For example, if a service reported that it made 10,000 Internet-only performances during a month and had a liability of $0.0014 per performance, then a collecting entity would know that the service's liability was $14. But a collecting entity would have no basis for allocating any of that money. Under law, however, those royalties must be allocated in a particular

manner. Fifty percent of the royalties are allocable to copyright owners, 45% are allocable to the featured recording artist(s), 2½% are allocable to nonfeatured musicians and 2½% are allocable to the nonfeatured vocalists. See 17 U.S.C. § 114(g)(2)(A)-(C).

The obligation to report with specificity each digital audio transmission of a sound recording is not limited to services that pay royalties on a per performance basis. For example, preexisting subscription services pay royalties equal to "6.5% of gross revenues resulting from residential services in the United States." 37 C.F.R. § 260.2(a). But those royalties also need to be distributed to the performers and copyright owners whose recordings were exploited by the service. As the Copyright Office has already determined, in order for a collecting entity to distribute royalties accurately to those entitled to receive such royalties, the collecting entity must have sufficient information to distinguish among all sound recordings performed by all types of services, including unique sound recordings that have the same title and are performed by the same artist. For example, one artist can perform the same song multiple times on multiple albums (e.g., a studio album and a live album) and each album can have a different label owner or different nonfeatured performers, or both.

RIAA proposes in Section IV *infra*, revised regulations that adopt uniform reporting obligations for all services regardless of the type of transmissions made by such services. These proposed regulations will facilitate the prompt and efficient distribution of statutory royalties to the copyright owners, featured artists and nonfeatured musicians and vocalists entitled to receive such royalties.

C. The Breadth Of Programming Offered Under The Section 114 Statutory License Requires Detailed Reports Of Use

The ability to transmit sound recordings digitally via cable systems, satellite, the Internet or through wireless technologies is revolutionizing the industry of providing consumers with access to recorded music. Consumers are no longer limited to their local radio stations or compact discs, vinyl recordings or cassettes. Instead, a consumer can listen to the same radio station as she travels across the United States if she subscribes to one of the two preexisting satellite digital audio radio services. Or she can log on to the Internet and hear simulcast transmissions of radio stations from around the country or music from different decades, different cultures or different genres on one of the thousands of niche channels programmed by webcasters and broadcasters. Such offerings may be free to the listener or may require the payment of a subscription fee. A common trait of all of these services is that they chose to benefit from a statutory license (or an exemption) and to be subject to all of the requirements of the statute. As noted above, these requirements include paying a statutory royalty, complying with certain statutory conditions and providing copyright owners with detailed reports of use, a proposition established in the Original Determination and which has equal force today.

The royalties that stem from the Section 114 statutory license, for the first time in United States history, compensate artists and copyright owners for the public performance of their works. Accordingly, each transmission of a sound recording will result in an income stream for the copyright owner of the recording and the performers on such recording. This new income stream will benefit all copyright owners and performers – the big and small, and the famous and lesser known. But the only way to pay the copyright owners, featured artists and nonfeatured musicians and vocalists what

they are due for the exploitation of their recordings is to require reporting logs that detail each and every performance rendered, not simply a snapshot of what is played during a random time period on a random channel. This is especially true when one considers the breadth of music programming offered by digital music services, frequently on channels that are transmitted only to a single user for whom such channel was created using an algorithm that draws a playlist from a large universe of available sound recordings.

According to many of the witnesses who appeared in the Webcaster CARP, one of the great benefits of webcasting is that it provides music that is not available on over-the-air radio. These witnesses touted their ability to go deeper into catalogues and play highly themed genres, giving "promotion" to lesser-known performers who may not be affiliated with one of the major record companies. It is this very practice of offering such a varied range of music on an infinite number of channels that complicates the distribution of royalties, especially with regard to lesser known performers and smaller copyright owners. For example, webcaster witnesses testified that:

- "Echo's wide variety of music content gives it the ability to target a broader market than is generally reached by traditional broadcast radio." Written Direct Testimony[3] of Tuhin Roy, Executive Vice President in charge of Strategic Development, Echo Networks, ¶ 15.

- "Incanta exposes listeners to a diverse range of music not ordinarily available on broadcast radio." W.D.T. of Eric Snell, Chief Financial Officer, Incanta, Inc., ¶ 20.

[3] Hereinafter, references to written direct testimony in the Webcaster CARP shall be cited as "W.D.T." The W.D.T. of witnesses from BET.com, Comedy Central, Coollink Broadcast Network, Echo Networks, Inc., Everstream, Inc., Incanta, Inc., Launch Media, Inc., Listen.com, Live365.com, The MTVi Group LLC, MusicMatch, Inc., myplay, Inc., Netradio Corporation, RadioActive Media Partners, Inc., RadioWave.com, Inc., Spinner Networks, Inc., Univision Online, Westwind, and XACT Radio Network LLC (collectively the "Webcasters") can be located in Volume VI (Public Version) of the Direct Case filing of the Services in Docket No. 2000-9 CARP DTRA 1 & 2 (Apr. 11, 2001).

- "Services like Launch expand the exposure offered to new artists and to older 'catalogue' product, as well, compared to traditional radio. Launch's wide variety of musical offerings enables it to target a broader market than is generally reached by today's over-the[-]air radio." W.D.T. of Robert D. Roback, Co-founder and Director, Launch Media, Inc., ¶¶ 23-24.

- "We are not constrained by circumscribed playlists. Indeed, our stations' playlists pull from an almost limitless number of songs in rotation compared to the 40-80 on over-the-air stations. This allows Launch to play *all* types of recordings, including the newest, oldest, and most eclectic recordings that traditional broadcast radio now largely passes over. . . . The capacity for Internet webcasters like Launch to provide exposure for such otherwise largely neglected music is unparalleled." W.D.T. of David Goldberg, Chief Executive Officer, Launch Media, Inc., ¶¶ 8-9 (emphasis in original).

- "[B]ecause Live365 streams a much wider variety of music than traditional broadcast radio, it is able to promote, and expose listeners to, a far greater range and depth of music than broadcast radio." W.D.T. of John O. Jeffrey, Executive Vice President, Corporate Strategy and General Counsel, Live365, Inc., ¶ 12.

- "[RadioSonicNet's] ["RSN"] wide variety of music content gives it the ability to target a broader market than is generally reached by today's over-the-air broadcast radio. By targeting the music genres available on professional and guest DJ stations and allowing users to indicate their preferences on consumer-influenced stations, RSN is able to earmark specific types of new music to users that RSN knows are more likely to be interested in that music." W.D.T. of Brad Porteus, Vice President, MTVi Radio, MTVi Group LLC, ¶ 23.

- "Another feature of RSN programming which distinguishes it in a positive promotional way from current over-the-air broadcast radio offerings is the diversity of music that RSN offers. Many over-the-air radio stations offer extremely limited playlists. The majority of radio stations in the country play a very narrow selection of sound recordings, thus confining the promotional value of airplay to those limited recordings. For the most part, over-the-air radio has abandoned "niche" formats. RSN is strikingly different because we offer a much wider array of music and, at the same time, are able to target our offerings to better suit the "niche" music tastes of our listeners. Indeed, no matter what a person's taste in music, they will be able to find a station that appeals to them on RSN; this is simply not the case with over-the-air radio today." W.D.T. of Quincy McCoy, Vice President, Music and Radio Programming, MTVi Group LLC, ¶¶ 11-12.

- "RadioAMP offers over 400 channels of music programming . . . .The music channels are organized according to genres such as modern rock/alternative, folk, contemporary rock, etc., and sub-genres, e.g., big band, fusion, smooth jazz, swing, etc." W.D.T. of Charlie Moore, Vice President of Business Development, RadioActive Media Partners, Inc., ¶ 6.

- "Spinner currently offers listeners more than 150 unique internet radio channels spanning some 13 music genres ranging from Classical to Rap to Soundtracks. Spinner incorporates more than 300,000 songs in rotation. Generally, Spinner channels include more than 120 songs in rotation – roughly three times (or more) the number of songs that terrestrial radio stations typically have in their rotation." W.D.T. of Fred McIntyre, Executive Director, Business Development, AOL Music, ¶ 3.

The other transmission services that operate under the Section 114 statutory license or an exemption offer similar types of programming to those offered by the Webcasters whose testimony is noted above. For example, both of the preexisting satellite digital audio radio services offer highly themed channels of music programming. Detailed reports from these services – as well from all other services – are necessary to ensure that the correct copyright owners and artists are compensated when a service digitally transmits a sound recording. Providing less than detailed reports of use will ensure that smaller copyright owners and lesser-known artists will be denied the royalties that they are entitled to receive.

D. Detailed Reports Of Use Are Necessary To Enforce Statutory Requirements

As the Copyright Office recognized in its Original Determination, services operating under the statutory license must provide detailed reports of use to copyright owners so that they may enforce certain statutory requirements. See Original Determination, 63 Fed. Reg. 34,294. These requirements include limitations on program

length for certain transmissions[4] and the song frequency conditions set forth in the sound recording performance complement. See 17 U.S.C. § 114(j)(13).

While transmissions to business establishments are exempt from performance royalties and "not an infringement of section 106(6)," this is only the case "if . . . the transmission does not exceed the sound recording performance complement." Id. § 114(d)(1)(C)(iv). Nonexempt transmission services not eligible for the Section 114(d)(1)(C)(iv) exemption are covered by a statutory license, but statutory licensees must also comply with, among other things, the sound recording performance complement. See 17 U.S.C. § 114(d)(2)(C)(i). Therefore, services that operate under an exemption or a statutory license must provide information sufficient for determining the service's compliance with the sound recording performance complement.

Congress granted sound recording copyright owners the right to have performances of their sound recordings limited by the sound recording performance complement. As the only way to give meaning to that right is to require the reporting of comprehensive data on the transmission of each sound recording by exempt and statutory services, the Copyright Office should adopt regulations that provide copyright owners with information sufficient for ensuring compliance with the statutory requirements.[5]

[4] Certain programming is eligible for a statutory license provided that "the transmission (I) is not part of an archived program of less than 5 hours duration; (II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks; [or] is not part of a continuous program which is of less than 3 hours in duration." 17 U.S.C. § 114(d)(2)(C)(iii)(I)-(III).

[5] As the Copyright Office noted in the NPRM, the office proposed detailed reporting regulations "because the required information seems designed to accomplish the basic reporting objective of providing information with which copyright owners can generally monitor compliance with the terms of the licenses." NPRM, 67 Fed. Reg. at 5763.

III. RESPONSES TO ISSUES RAISED BY COPYRIGHT OFFICE

In this section, RIAA responds to the issues raised by the Copyright Office in the NPRM.

A. Requiring Statutory Licensees To File A New Notice Of Use

The Copyright Office has proposed requiring each service operating under the Section 114 statutory license to file a new Notice of Use.[6] NPRM, 67 Fed. Reg. at 5761-62. The Copyright Office believes that "many Services that have filed Initial Notices under the current regulation have ceased using the statutory license and, in many cases, have gone out of business altogether." Id. at 5762. The Copyright Office further stated that requiring the refiling of a Notice of Use "will make the Office's records more reliable." Id.

RIAA supports the Copyright Office's proposal to require services currently operating under the Section 114 statutory license or an exemption to file a Notice of Use that would provide current information about the service. Such information is particularly important for copyright owners because they frequently discover the use of their copyrighted recordings on various services and want to ensure that such services are operating under a license or an exemption and not infringing the copyright owner's exclusive rights. By having access to an updated Notice of Use, and assuming one that is identical or substantially similar to the one proposed by the Copyright Office, a copyright owner will be able to identify, among other things, the service making the public

[6] No service has previously filed a "Notice of Use" with the Copyright Office. Rather, services have filed an "Initial Notice of Digital Transmission of Sound Recordings Under Statutory License." For ease of reference, the notice shall be referred to herein as a "Notice of Use."

performances or ephemeral reproductions, its contact information and the nature of the license and category of service offered. In the absence of such information, copyright owners could be required to expend significant time and resources investigating the innumerable sources of music on the Internet to determine whether such services are operating under a statutory license or an exemption or infringing the copyright owner's rights. This is true whether a collecting entity or an individual copyright owner conducts the investigation. Each dollar spent investigating a service represents one dollar less that can be distributed to the performers and copyright owners who earned the royalties.

RIAA further believes that requiring services to provide a new Notice of Use places no material burden on a service. A service would simply have to download the proposed form from the Copyright Office's website or obtain a copy from the Copyright Office directly, complete the form, and return the completed form with the nonrefundable filing fee to the Copyright Office, Licensing Division. It is inconceivable that such a filing requirement could impose a material burden on a service that would outweigh the substantial benefits of the new Notice of Use.

B. Copyright Office Use Of A Standard Form Notice Of Use

The Copyright Office requested comment on the use of a standard form for the Notice of Use. Id. RIAA supports the proposal to require all services to file a standard form Notice of Use. As identified by the Copyright Office, a standard form will ensure "an accurate uniform record currently identifying all Services using these statutory licenses, indicating which licenses are to be used, the type of transmissions to be made under the section 114 license, and information concerning the date of first transmission or the date for making an ephemeral recording of a sound recording." Id. In addition, requiring a standard form will facilitate recordkeeping by the Copyright Office, reduce

errors in reporting and ensure that copyright owners have the information necessary to enforce their rights.

The proposed Notice of Use would also require a service to report the category of transmission it is operating for use of the Section 112 ephemeral license. As a service may operate under both Section 112 and 114, RIAA supports requiring services to identify under which statutory provision it operates.

C. Elements In Proposed Standard Form Notice Of Use; Layout; And Utility

The Copyright Office requested comment on the elements in the proposed form Notice of Use, the layout of the form Notice and the utility of the form document. Id. at 5763. RIAA endorses the form Notice of Use proposed by the Copyright Office, subject to some minor modifications. The proposed form Notice of Use sets forth the requested information in a simple manner and will ensure that copyright owners can readily determine the type of service operating under the statutory provisions. As to the specific elements in the proposed form Notice of Use of Sound Recordings under Statutory License, RIAA proposes the following minor changes:

- Change the titled of the document from "Notice of Use of Sound Recordings Under Statutory License" to "Notice of Use of Sound Recordings Under Statutory License or Business Establishment Exemption."

- Change "Non-subscription transmission service" in Sections 6(a) and 6(b) to "Eligible nonsubscription transmission service" to conform to the statutory language in Section 114(j)(6). Using a term that is not the defined statutory term may lead to confusion as to the type of service eligible for the statutory license.

- Change "Preexisting digital audio radio service" in Sections 6(a) and 6(b) to "Preexisting satellite digital audio radio service" to conform to the statutory language in Section 114(j)(10). Using a term that is not the defined statutory term may lead to confusion as to the type of service eligible for the statutory license.

D. Posting Notice Of Use On Copyright Office Website

The Copyright Office proposes to discontinue its practice of posting copies of each Notice of Use filed by a statutory licensee on its website. See id. RIAA opposes this proposed change in Copyright Office practice and strongly urges the continued posting of Notices of Use on the Copyright Office's website.

A Notice of Use is an important document that should be available publicly to all copyright owners of sound recordings, not just those that are located in the Washington, D.C. area. As most sound recording copyright owners are located outside the metropolitan Washington, D.C. area, posting of Notices of Use on a website will reduce the costs that companies would incur if their only option were to retain lawyers or some other entity to send to the Copyright Office to obtain these documents.

The ability to review a Notice of Use enables a copyright owner to determine whether a service that is making public performances of the copyright owner's sound recordings is operating under a statutory license or is infringing. There have been numerous instances where RIAA has accessed the Copyright Office's website to review filed Notices of Use in order to respond to inquiries from copyright owners. Copyright Owners have contacted the RIAA after finding their songs on various websites, requesting that the RIAA tell them whether the service exploiting those sound recordings is doing so in accordance with the statute. The RIAA has been able to respond promptly to these inquiries and confirm compliance with the notice requirements by reviewing the materials available on the Copyright Office website.

For those copyright owners who conduct their own investigations of a service's compliance with the statutory licenses, such as small copyright owners unaffiliated with a

major record company, access to the Copyright Office website facilitates their own enforcement activities. Availability of Notices of Use on a public website obviates the need to retrieve the documents directly from the Copyright Office, thereby avoiding the additional burden on the Copyright Office of handling these document requests.

RIAA believes that the burden to the Copyright Office of not posting the Notices would be significant. Without access to the posted Notices, individual copyright owners would resort to calling the Copyright Office to request facsimile transmissions of filed Notices of Use or simply to inquire as to whether a particular service has filed a Notice. Similarly, efforts by the Copyright Office to direct individual copyright owners to collecting entities would improperly shift costs to copyright owners and performers who would have to foot the bill for providing such a service, and, as those costs would be deductible administrative expenses, collecting entities would distribute fewer royalties to such copyright owners and performers.

Continuing to post Notices of Use on the Copyright Office's website would be consistent with certain goals expressed in Senate Resolution 21, which was submitted by Senator McCain for himself and Senators Leahy, Lott and Lieberman on February 14, 2001. Although not addressing the posting of the records of the Copyright Office or the Library of Congress, Senator McCain proposed "the public should have easy and timely access, including electronic access, to public records of the Congress" and that "the Congress should use new technologies to enhance public access to public records of the Congress." Directing the Sergeant-At-Arms to Provide Internet Access to Certain Congressional Documents, Including Certain Congressional Research Service

Publications, Senate Lobbying and Gift Report Filings, and Senate and Joint Committee Documents, S. Res. 21, 107th Cong. (2001).

To minimize its own costs, the Copyright Office should consider requiring statutory licensees to file a Notice of Use electronically. This would facilitate the posting of the Notice on the Copyright Office website. Services could simultaneously send a duplicate copy of the Notice with a signature through the U.S. Mail.

E. Filing Of Notice Of Use With Collecting Entities

The Copyright Office seeks comment on a "possible change to the requirement that all notices be filed in the Copyright Office." NPRM, 67 Fed. Reg. at 5763. The Copyright Office asks whether it "[w]ould be more efficient for a Service to file its Notice of Use directly with the designated collection entity, rather than with the Copyright Office" and "requiring the Collective to make the notices available to the public for inspection and copying." Id. RIAA strongly opposes these proposed changes to Copyright Office policies.

First, RIAA believes that the Copyright Office should be the official repository for all Notices of Use. As the government agency designated to oversee the administration of statutory licenses for copyrighted works, the Copyright Office should have these official records within its control and readily accessible to it. It is the entity best suited to retain the official records of services operating under a statutory license or exemption. The Copyright Office already receives numerous types of filings from both copyright owners and users, and there is no reason why the Copyright Office should not continue to receive filings of Notices of Use from entities that operate under Section 112 or Section 114. See e.g., 37 C.F.R. § 201.4 (Recordation of transfers and certain other

documents); Id. § 201.9 (Recordation of agreements between copyright owners and public broadcasting entities); Id. § 201.11 (Satellite carrier statements of account covering statutory licenses for secondary transmissions for private home viewing); Id. § 201.17 (Statements of Account covering compulsory licenses for secondary transmissions by cable systems); Id. § 202.3 (Registration of copyright); Id. § 202.19 (Deposit of published copies or phonorecords for the Library of Congress).

Second, while there may be some benefit to having services provide Notices of Use directly to collection entities, the collection entities should not be required to substitute for the Copyright Office in providing open access to documents that are required under Congressional mandate. The collection entities are private institutions that provide a benefit to services by incurring all of the costs for collection and distribution of statutory royalties. Copyright owners and performers are forced to pay all of the costs for enforcement, collection and distribution out of the royalties paid by services. These costs are not borne by the Copyright Office or the services. Requiring copyright owners and performers to incur additional costs by serving as a quasi-governmental body would be inappropriate and detrimental to the interests of the copyright owners and performers entitled to receive statutory royalties.

Notwithstanding the foregoing, RIAA would request that the Copyright Office require services to provide a Notice of Use directly to each designated collection entity at the same time that such Notice of Use is filed with the Copyright Office. Such simultaneous filing will ensure that collection entities are aware of the services operating under Section 112 and/or Section 114, and will impose little burden on the service, as the proposed Notice of Use is a single page. A service would merely have to duplicate its

original filing and mail that copy to each of the designated collecting entities. This would eliminate the cost to the Copyright Office of providing duplicate notices to collecting entities.

Third, it is improper and beyond the authority of the Copyright Office to require private entities to provide open access to their premises for the purposes of requiring "the Collective to make the notices available to the public for inspection and copying." NPRM, 67 Fed. Reg. at 5763. Additionally, SoundExchange does not have the facilities to offer members of the public access to documents of public record. There are no separate rooms available for the general public to review Notices of Use. Creating such "public reading rooms" would require renting additional office space in Washington, D.C. at a tremendous cost. There are also no photocopy machines that are operated on a pay-per-copy basis, which would be required if members of the public had to be given the facilities to reproduce documents filed with SoundExchange. In the post-September 11th environment, office security has become a principal concern for many companies, as it has for the government. One need only attempt to enter the Madison Building at the Library of Congress to notice the increased security that has been implemented at public facilities. Collecting entities should not be required to hire a security staff similar to that employed by the Library of Congress.

In contrast to the significant burdens that would be placed upon RIAA and the SoundExchange under the Copyright Office's proposal, the Copyright Office and the Library of Congress are already equipped to receive Notices of Use and make such Notices available to the public for inspection and copying. See 37 C.F.R. §§ 201.2 (Information given by the Copyright Office); 201.2(b) (Inspection and copying of

records). There are dedicated reading rooms open to the general public and the Copyright Office maintains photocopy machines that require each user to pay a fee for each reproduction made of any material on file with the Library.

RIAA does not believe that there is any scenario where it would be appropriate, efficient or acceptable to require collecting entities to make available to the public for inspection and copying the Notices of Use to be filed by statutory licensees. Such access is clearly a function best offered by the government.

F. Periodic Filing Of Notice of Use

The Copyright Office seeks comment "on the advisability of requiring periodic filings of the notices of use in order to establish a continually current and updated file of Services operating under either the section 114 and section 112 licenses." NPRM, 67 Fed. Reg. at 5763. RIAA believes that an annual filing of a Notice of Use is advisable for the reasons identified by the Copyright Office.

The Copyright Office should maintain updated Notices that provide current information about the services. If services are required to file an initial Notice and an amended Notice only in the event of a material change in the previously filed information, then there is a substantial risk that services will forget to file such amended Notices. On the other hand, if statutory services are required to file a Notice of Use during each year that the service operates under one or more of the statutory licenses, then the Copyright Office's files and website would have current information that would be available to all copyright owners and performers. RIAA agrees with the Copyright Office's position that regardless of the frequency with which a service must make

periodic filings of a Notice of Use, a service should be "required to update its filing within 45 days of a change in the information reported." Id.

The statutory licenses require that notice of use be given to copyright owners by users, and that such notice be reasonable. See 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A). Reasonable notice mandates that the copyright owners be able to identify, in a timely fashion and on a prospective basis, which services will be using their works. The proposed regulations would enable copyright owners to identify services, while imposing little if any burden on such services.

G. Payment Of Filing Fee

The Copyright Office currently requires a $20 fee to be filed with a Notice of Use. NPRM, 67 Fed. Reg. at 5763. The Copyright Office invited comment on whether "if the Office adopts a rule requiring Services to file the Notices of Use directly with the designated collective . . . there should be a filing fee and how much that fee should be." Id. For the reasons set forth in Section III.E *supra*, RIAA urges the Copyright Office to maintain its policy of requiring statutory licensees to file their official Notice of Use with the Copyright Office. If the Copyright Office maintains this policy and also requires services to provide a simultaneous copy of the Notice to each designated collecting entity, then RIAA does not believe that it is necessary for the Copyright Office to require a service to pay an additional filing fee to each such collecting entity.

On the other hand, if the Copyright Office requires services to file Notices of Use with collecting entities and not with the Copyright Office, and further requires collecting entities to make such Notices available for public inspection and copying, then RIAA believes that services should bear the total costs incurred by the collecting entity in

providing such access to the general public. These recoupable costs would not be deducted from the royalties to be paid by the services but would be a separate, additional fee payment that would have to be allocated among all operating services on a basis to be determined. The collecting entity should be permitted to recoup costs for, by way of example and not limitation, rent, utilities, cleaning services, taxes, filing expenses, security and equipment rental.

Again, RIAA believes it is inappropriate for collecting entities to be required to bear the costs of providing a service that is best offered by the Library of Congress and the Copyright Office. Requiring copyright owners and performers to pay for such services is contrary to law, has no basis in the Section 112 or Section 114 statutory licenses and is contrary to the Congressional intent to compensate copyright owners and performers for the use of their creative works through digital audio transmissions or the making of ephemeral reproductions.

IV. RIAA'S PROPOSED UNIFORM REGULATIONS FOR ALL STATUTORY LICENSEES

As noted above, RIAA proposes herein a uniform report of performances to be provided by all services operating under the Section 114 statutory license or the limitation on exclusive rights in Section 114(d)(1)(C)(iv). These proposed, revised regulations are attached as Exhibit A. A compare version detailing RIAA's edits to the proposed regulations contained in the NPRM is attached as Exhibit B. A spreadsheet showing the ordered layout of the uniform report of performances is attached as Exhibit C. There would also be a uniform report for the creation and destruction of ephemeral phonorecords created under the Section 112 statutory license. A spreadsheet showing the ordered layout of the ephemeral phonorecord log is attached as Exhibit D. In this section,

RIAA describes the specific regulations it is proposing and why the Copyright Office should adopt these regulations.

A. Overview of Royalty Collection And Distribution

The collection and distribution of statutory royalties is the principal function of a collecting entity. In serving as an agent for its members or clients, the collecting entity seeks to collect the full amount of statutory royalties payable by all statutory services and then distribute as much of those collected royalties to each of the entities entitled to share in those royalties, including copyright owners, featured artists and nonfeatured musicians and vocalists. The task of processing all of the reports of use that are delivered by statutory licensees is complex and time consuming. Following is a brief description of how SoundExchange processes reports of use from services.

The report of use is received or obtained in an electronic format, for example through use of a zip diskette, jaz diskette, CD-R or any other acceptable means. The data included in the report of use is loaded for processing in the SoundExchange royalty distribution system. As part of this process, a series of data integrity tests are performed that check for completeness of data, field formats, field length, etc. If the report of use fails this test, SoundExchange may or may not notify the service to submit a new and more complete report depending upon the degree of failure.

Additional tests are run on the reports of use to identify changes in volume of reporting from previous submissions. If changes exceed tolerance levels, SoundExchange must determine if the results were due to an incomplete report of use or if the nature of the programming of the particular licensee has changed. A final determination is made by manually reviewing the report of use or by communicating with the service.

If the report of use passes the load test, then SoundExchange manually performs comprehensive data analysis and research to ensure the correct match of the sound recording to the proper copyright owner. The amount of work involved in this evaluation and clean-up process cannot be overstated. It involves researching each sound recording submitted through publicly available Internet resources or publications of releases, mining previously reported, cleaned-up or evaluated information from the same or other statutory licensees, or the repertoire expertise of SoundExchange staff. This comprehensive research and evaluation process is time-intensive and critical in identifying the copyright owner and artist entities entitled to the distribution of performance royalties and ensuring that each and every copyright owner and artist, no matter how large or small, has the correct performances attributed to them.

As the Section 114 license gives a service the right to perform any sound recording that has "been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording," 17 U.S.C. § 114(d)(2)(C)(vii), there are an enormous number of sound recordings that may be reported to SoundExchange in any given month. The burden on SoundExchange of processing all of these sound recordings is frequently magnified by a service's failure to take the time to report the required information accurately or at all. For example, services will report a featured artist as "Various." This occurs most frequently when a sound recording is taken from a compilation album and the service fails to report the actual artist performing a transmitted sound recording from the several artists on the album. Another frequent problem is misreporting the featured artist for a classical sound recording as the composer (e.g., Beethoven or Mozart). In such an

instance, SoundExchange may have no basis for distributing those royalties to the orchestra or entity entitled to such royalties.

Once all of the information from the sound recording meta data has been received, researched and corrected, SoundExchange can perform a sound recording performance complement test to ensure that the service's transmissions are in compliance with the terms of the statute. Additional testing for statutory compliance can be run for requirements such as time limitations of archived programming. If the report of use fails the test, SoundExchange can notify the service of the violation so that the licensee can remedy the noncompliance and make appropriate modifications and corrections to their programs.

Before finalizing the performance data for distribution, various quality-assurance procedures are conducted. For example, tests are run to ensure performances have not been attributed to labels known not to own copyrights (such as compilation companies), to review any labels not associated with a copyright owner and to review copyright owners and artists whose accounts are on hold or have invalid addresses.

Finally, after all tests are complete, the data is ready to be processed for royalty distribution. Depending on whether SoundExchange has acquired the requisite tax information, bank routing information and mailing address for each recipient of statutory royalties, the funds are then distributed to copyright owners based on the reported Track Label (P)-Line information, to reported featured artists and the independent administrator(s) for nonfeatured performers.

The data elements included in RIAA's proposed regulations are intended to provide collecting entities with the information needed for identifying copyright owners

and performers in all instances. The request for comprehensive data is intended to ensure the ability to distribute royalties to all entitled copyright owners and performers, not just those for whom information is readily available. Moreover, the minimal burden imposed upon statutory licensees to provide the information requested on RIAA's proposed uniform report of performances is outweighed by the tremendous, additional burden that would be incurred by a collecting entity if it had to expend more time and money identifying copyright owners and/or featured performers, especially since it might not have access to the source product of the sound recordings used by the service.

B. The Proposed Reports Of Use Should Establish Uniform Reporting Obligations For All Services

The Copyright Office has proposed final regulations for the "Report of Use of Sound Recordings under Statutory License" to be filed by any service operating under the Section 112 and Section 114 statutory licenses: (1) preexisting subscription services; (2) preexisting satellite digital audio radio services; (3) new subscription services and (4) eligible nonsubscription transmission services. See NPRM, 67 Fed. Reg. at 5765. Although different regulations would apply to the preexisting subscription services (DMX/AEI, Music Choice and Muzak) than to all other types of transmission services under the Copyright Office's proposed regulations, the specific data elements to be provided by all services under those regulations are substantially similar. This is because similar data is required from all services in order to permit a collecting entity to collect and distribute royalties properly and to enforce the statutory rights of the copyright owners it represents.

1. RIAA's Reasons For Proposing Alternative, Uniform Report Of Use

When the RIAA petitioned the Copyright Office to adopt reporting regulations for certain types of statutory transmission services, it limited its petition to proposed regulations for eligible nonsubscription transmission services and new subscription services. See RIAA Petition for Rulemaking to Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings in Certain Digital Audio Services (May 24, 2001) (the "RIAA Petition"). In light of the Copyright Office's proposal to adopt regulations for all Section 112 and Section 114 statutory licensees, the RIAA herein submits for the Copyright Office's consideration slightly revised reporting requirements that would create a uniform report of performances for use by all services, including those services operating under the limitation on exclusive rights in Section 114(d)(1)(C)(iv), as such services must comply with the sound recording performance complement in order to be eligible for the statutory exemption.

Deviation from what was previously proposed – a separate playlist and listener log – is prompted by several conditions that have changed since the filing of the RIAA Petition. These changes are the result of: (1) the proposal of the Copyright Office to adopt notice and recordkeeping regulations that apply to all services making ephemeral phonorecords or digital audio transmissions under the Section 112 and/or Section 114 statutory licenses; (2) the rate mechanism adopted in the Webcaster CARP that requires the payment of a royalty for each transmission of any portion of a sound recording; (3) changes in the implementation of streaming technology that make the reporting of a uniform performance log preferable to the reporting of separate playlist and listener logs; (4) efforts to address the weaknesses and inefficiencies in the data reporting requirements

for the preexisting subscription services that have been discovered since the requirements were adopted in the Original Determination; (5) responses to concerns expressed by statutory licensees regarding the privacy of user information in a listener log[7] and the lack of source information for data to be provided in a report of use; and (6) efforts to ensure that copyright owners have the information necessary for ensuring compliance with the requirement for the statutory exemption in Section 114(d)(1)(C)(iv).

RIAA proposes adding only a few additional fields to the reports of use to be provided by services. These include fields for "Transmission Category," "Genre," "Type of Program" and "Influence Indicator," most of which are necessitated by the determinations in the CARP Report, discussed in Section IV.F.1 *infra*; the "Total Number of Performances," again necessitated by the determinations in the CARP Report, discussed in Section IV.F.2 *infra*; and only four additional fields for specific sound recordings, the "Track Label (P)-Line," the "Duration of the Sound Recording," the "UPC" and the "Release Year," discussed in Section IV.F.3 *infra*. The Original Determination required services to report the "Recording Label," see Original Determination, 63 Fed. Reg. at 34,297, without distinguishing between the "Marketing Label" and the "Track Label (P)-Line," discussed in Section IV.F.3. *infra*. SoundExchange worked directly with the preexisting subscription services to provide both the Marketing Label and the Track Label (P)-Line in order to facilitate copyright owner identification and correct distributions. The standard report of use currently being

[7] The Listener Log proposal was never intended to provide copyright owners with personally identifiable information on users. Rather, it was intended to make it easier for a service to report the total number of performances through the use of a report that would overlay the playlist and provide information on the number of users receiving transmissions.

provided by the preexisting subscription services provides a field for both types of label information. RIAA seeks now to codify the practice adopted by all preexisting subscription services.

2. A Uniform Report Of Use Provides Benefits To Both Services And Collecting Entities

Under the Copyright Office's proposed regulations, reporting requirements would vary depending upon the type of service making the digital audio transmission. RIAA's proposed revisions – which are substantially similar to those proposed in the RIAA Petition and the NPRM – would require each service to report transmissions on a uniform report of performances. The information on the proposed report of use is necessary to: (1) ensure proper payment of statutory royalties; (2) facilitate the accurate distribution of statutory royalties to copyright owners, featured artists and the independent administrator(s) for nonfeatured musicians and vocalists; (3) provide copyright owners with notice of use of their sound recordings, as is required under Section 112(e)(4) and Section 114(f)(4)(A); and (4) provide each copyright owner with information necessary to ensure a service's compliance with the requirements of the statutory license.

As the Copyright Office has noted, "it is likely that the basic requirements for notice and recordkeeping will be similar for all Services." NPRM, 67 Fed. Reg. at 5762. A uniform report of performances takes account of the similarities among the various types of services and has significant benefits for both services and collecting entities. First, the adoption of a single report of use would permit a service offering multiple types of transmissions (e.g., satellite digital audio radio service transmissions and eligible nonsubscription transmissions) to report all transmissions of sound recordings using a single reporting system, obviating the need for the service to incur the expense of

developing, purchasing or maintaining multiple mechanisms to capture playlists and listener logs depending upon the type of transmission made. The adoption of a single report will simplify the process of providing copyright owners with notice of the use of their sound recordings. Second, collecting entities would need to develop only one central, automated system to process a uniform report of use, rather than having to develop or purchase several systems to handle different types of reports of use from different types of transmission services. Third, the adoption of a uniform report of use would spur third-party vendors to develop reporting systems that can be marketed to any service operating under a statutory license or a statutory exemption. Fourth, the cost savings that a collecting entity would derive from having to develop or purchase only one automated system would reduce administrative expenses and permit distribution of a greater percentage of the statutory royalties collected to individual copyright owners, featured artists and nonfeatured musicians and vocalists.

3. SoundExchange's Experience In Distributing Royalties Under The Original Determination Justifies Modification Of Reports of Use

In processing over 85 million performances during the distribution of the preexisting subscription services royalties for the period February 1996 through March 2000, SoundExchange identified weaknesses in the reporting requirements adopted in the Original Determination. In some cases, usage logs provided by the preexisting subscription services contained incomplete, ambiguous or inaccurate information, limiting SoundExchange's ability to identify the correct copyright owner and/or artist. In order to prevent these identification problems, which require the expenditure of substantial resources that would otherwise be available for distribution to copyright

owners and performers, the RIAA has recommended the addition of a few additional data elements to the proposed regulations.

These additional elements should facilitate the proper identification of featured performers and copyright owners, especially in cases where the service reports fields with incomplete or inaccurate data. The simple fact is that the more data a service reports – particularly where such data is readily available to the service – the more cost effectively the statutory royalties can be distributed, thereby maximizing the royalties available for distribution.

4. A Uniform Report Of Use Should Be Adopted For All Services, Including Those Already Reporting Under The Original Determination

RIAA's proposed uniform report of performances would require preexisting services to make only minor adjustments to the interim report of use currently used by such services. However, even if the adjustments were more significant, the Copyright Office should not permit current business practices to impede the eventual implementation of regulations that create efficiencies for both services and collecting entities. In fact, the Copyright Office and the parties in that first proceeding recognized that experience and changes in the business of making digital audio transmissions might result in technological solutions to facilitate the reporting of the required data elements. It was for this reason that the rules were established on an interim basis. Moreover, there would be no commercial benefit to having different reporting regulations for different types of transmission services. To the contrary, such different regulations will necessarily increase the administrative costs of collecting entities and so reduce the royalties available for distribution.

While the uniform report of performances would contain data fields to be completed by all services, certain data fields may be left blank or completed in a different manner depending upon the type of service transmission. For example, a preexisting subscription service would not be required to provide the number of recipients receiving transmissions, assuming such information is not available for a transmission model that is similar to over-the-air radio (i.e., there is no feedback from a recipient's receiving device that informs the service that a particular transmission has been received). Rather, the number of performances for each sound recording would be reported as "one" (1). Similarly, commercial broadcasters offering the simultaneous Internet transmission of their over-the-air signal would report "zero" (0) performances if there were no listeners receiving a transmission of the particular sound recording. On the other hand, eligible nonsubscription transmission services, which establish a direct connection with the recipient[8], would need to provide information on each performance transmitted to a listener. See CARP Report, Appendix B, § 1(1). Exhibit E provides examples of completed uniform reports of performances for certain hypothetical services.

The proposed uniform report of performances would require services to report actual transmissions. RIAA believes that requiring a service to report actual transmissions ensures the distribution of statutory royalties to those persons or entities actually entitled to such royalties. Moreover, as many of the services operating on the

[8] See W.D.T. of Jonathan Zittrain, Professor, Harvard Law School, Expert Testimony on Behalf of Broadcasters and Webcasters, Vol. I (Public Version) (Apr. 11, 2001): "[E]ach user receives her own independent transmission, despite the fact that others may be 'tuned in' to exactly the same webcast and thus hearing the same thing. Such independent transmissions begin at the content provider's media server . . . and, as users request content, initiate a separate transmission to each user." Id. ¶ 18 (internal citation omitted); "[C]ontent is sent on to those users requesting it . . . [I]n general a separate transmission must be sent from the server to each individual client." Id. ¶ 20.

Internet create channels of programming on the fly, it is impossible to provide "intended playlists" as such playlists do not exist. While RIAA does not believe that it is appropriate to have some services report "intended playlists" on a uniform report of performances while others report "actual playlists," it recognizes that the preexisting subscription services have already established systems for reporting "intended playlists." So as not to disrupt current business practices, RIAA does not object to the preexisting subscription services being permitted to continue to report for a reasonable period of time their "intended" transmissions. RIAA urges the Copyright Office, however, to require the submission of "actual playlist" information on the uniform report of performances from all other services operating under the Section 114 statutory license or the limitation on exclusive rights in Section 114(d)(1)(C)(iv). In addition, RIAA believes that all services, including the preexisting subscription services, should provide copyright owners with notice of use on RIAA's proposed uniform report of performances rather than on reporting logs that are tailored to each type of statutory transmission. Therefore, preexisting subscription services would be required to report certain additional information on the specific sound recordings included in an intended playlist (e.g., marketing label, genre, the UPC and the release year, discussed in Section IV.F.3 *infra*), but such information would be identical to the information on sound recordings provided by all services.

C. Risks Of Reporting Too Few Data Elements In A Report Of Use

SoundExchange faced significant obstacles when it processed over 85 million performances for the first digital performance distribution in the fall of 2001, which covered royalties received from preexisting subscription services between February 1996 and March 2000. While the majority of the processing was handled by an automated

database system developed internally by SoundExchange, a significant number of performances were manually reviewed to ensure proper copyright owner and artist identification. A large percentage of the meta data garnered from the preexisting subscription services' reports of use contained either incomplete information or information that did not provide conclusive evidence as to copyright ownership. Due to this insufficient copyright ownership information, approximately 20% of the royalties paid by preexisting subscription services for the period February 1996 through March 2000 could not be distributed, thereby delaying payment of the royalties to the copyright owners and performers entitled to the money. Instead, SoundExchange retained the money in an interest-bearing, unallocated funds account. SoundExchange continues to expend time and money researching many of these performances and it hopes to distribute the remaining, historical royalties during its next distribution.

RIAA believes that the mere use of the proposed uniform report of performances would reduce the quantity of performances that services report either inaccurately or with insufficient information for accurate and prompt ownership confirmation and distribution. This is because receiving more data from a service – even if in some cases some of the data is incomplete – permits a collecting entity to conduct a more comprehensive search for copyright owner and performer information (e.g., the additional data provides more pieces to the puzzle). For example, RIAA estimates that if the preexisting subscription services reported their performances under the proposed uniform report of performances proposed by RIAA, see Exhibit A, over 50% of the unallocated and undistributed royalties could have been resolved in time for those royalties to be included in the initial distribution.

D. Services Already Use Technologies That Facilitate Detailed Reporting

The Copyright Office has already decided that services must provide copyright owners with the data necessary for ensuring compliance with the statutory requirements. See Original Determination, 63 Fed. Reg. 34,289, 34,294. Services will be able to provide these detailed reports of use needed for enforcing the statutory requirements through software already in use for making transmissions. Services already use computer algorithms and programming software to deliver music to listeners. Therefore, the requirement to compile in a database information that is already available in machine-readable format would create little, if any, burden on services. In addition, services frequently develop proprietary technologies (and in some cases patent-pending technology) to, among other things, facilitate the sale of advertising or to offer personalized programming, and such software should be adaptable for providing detailed reports of use. Numerous witnesses described their company's use of sophisticated software solutions during the Webcaster CARP:

- "[Echo Network's] proprietary Song Selection technology delivers music based on an algorithm that takes into account members' ratings and preferences, editors picks, chart hits and data describing correlations between artists and styles." W.D.T. of Tuhin Roy, Executive Vice President, Strategic Development, Echo Networks, Inc., ¶ 5.

- "Everstream has developed various proprietary technologies. These include software for managing online advertising. The Advertising Order Management System ("OMS™") allows advertisements to be configured to complex targeting parameters such as date ranges, days of the week, hours in a day and music formats." W.D.T. of Steven McHale, President and CEO, Everstream, Inc., ¶ 22.

- "Launch has developed, both internally and through acquisition, an extensive suite of software applications and database services intended to support the delivery of Internet radio to a very large audience in a manner which fosters music and artist discovery through proprietary 'suggestion engines,' which supports the publishing of new music to our entire network within hours, and which allows for *careful tracking and*

reporting, both individually and in aggregate, of music consumed through the service. Much of the software and database services created for these applications is proprietary, patent-pending and unique to Launch Media." W.D.T. of Robert D. Roback, Co-founder and Director, Launch Media, Inc., ¶ 28 (emphasis added).

- "The station's playlists are generated by a computer algorithm based on information provided by Listen's station programmers." W.D.T. of Rob Reid, CEO and Founder, Listen.com, Inc., ¶ 6.

- "The Live365 player is an audio player that is embedded in an Internet browser and is designed to display a pop-up window with various information and buttons, including artist, album and song information for the song being streamed as well as the prior two songs . . . . In addition, Live365 has created a playlist window that can be used with our own player as well as others in order to deliver the artist, album and song information." W.D.T. of John O. Jeffrey, Executive Vice President, Corporate Strategy and General Counsel, Live365, Inc., ¶ 10.

- "A computer algorithm develops the actual playlist, ensuring that literally each listening session is a unique and unpredictable sequence of songs from playlist-to-playlist and listener-to-listener. Literally, each time someone listens to any of the stations, a unique song sequence is generated dynamically on the fly." W.D.T. of Brad Porteus, Vice President, MTVi Radio, MTVi Group LLC, ¶ 7.

- "The algorithm takes into consideration the user's submitted preferences in building sound recording playlists based on the relative weights of the settings. The identity and order of sound recordings played is determined according to criteria designed to ensure compliance with the DMCA's statutory license requirements." Id. ¶ 10.

- "[RadioSonicNet] licenses much of its software technology, including the streaming, from third-parties. However, it has also developed significant technology in-house at considerable expense, including certain database tables, the algorithms that produce the playlists and the logic that allows the incorporation of listener preferences, and its own proprietary encoding and ripping software." Id. ¶ 38.

- "To ensure compliance with the mandates of the DMCA, myplay developed software which examines the playlist created by the user for compliance with the sound recording performance complement and augments or otherwise adjusts the playlist if it is non-compliant." W.D.T. of David Pakman, President of Business Development and Public Policy, myplay, Inc., ¶ 5.

- "[RadioAMP] has developed a comprehensive content management and delivery infrastructure for delivery of customized audio and video content to a target audience of listeners on behalf of third party clients. RadioAMP has built a scaleable system that allows us to create custom solutions using a common/shared infrastructure." W.D.T. of Charlie Moore, Vice President of Business Development, RadioActive Media Partners, Inc. ("RadioAMP"), ¶ 15.

- "Spinner has developed a computerized content management system that ensures compliance with the eligibility requirements of the statutory license under the Digital Millennium Copyright Act." W.D.T. of Fred McIntyre, Executive Director, Business Development, AOL Music, ¶ 5.

- "XACT's patent-pending Music Scheduling Algorithm ("MSA") technology programs music based on the actual playlist of the XACT affiliate." W.D.T. of David Juris, President and CEO, XACT Radio LLC, ¶ 7.

Detailed reporting would also not appear to be a problem for many terrestrial broadcasters simulcasting their AM or FM signals over the Internet. According to a story in the Wall Street Journal on Monday, February 25, 2002, many stations already use software and hardware that could be utilized to provide the data set forth in the proposed regulations:

> [R]adio technology was changing rapidly. In the mid-1990s, stations began buying software and hardware that allowed them to run their on-air programming with computers that contained entire catalogues of digital songs. Using such systems, DJs could also digitally record voice bits and drop them into a preformulated schedule of songs and commercials. Stations had long been able to prerecord some materials, using tape setups. But now a disc jockey could put together a perfect five-hour shift in less than an hour, using a computerized system that lets the DJ hear just the end of one song and the beginning of the next.
>
> Clear Channel and its predecessor companies began installing the technology in all its stations in the late 1990s, and linking them together into a giant high-speed digital network to move digital recordings around seamlessly.

Anna Wilde Mathews, *A Giant Radio Chain Is Perfecting the Art Of Seeming Local, DJs for Clear Channel Use High-Tech Gear to Sound Like They're Next Door*, Wall St. J., Feb. 25, 2002, at A1.

It strains credulity to believe that the sophisticated broadcast corporations that simulcast AM or FM signals over the Internet or the entrepreneurial companies that provide Internet-only or simulcast programming, or both, can develop proprietary algorithms and software to program innumerable stations and sell targeted advertising but are unable to provide the types of reporting logs required for operation under a statutory license or exemption. If companies streaming music on the Internet are sophisticated enough to digitize entire libraries of music to offer their listeners thousands of distinct sound recordings, develop technologies to strip out local commercials from over-the-air transmissions in order to replace them with Internet-only commercials for a worldwide audience, and create distinct streams for individual users, then they are capable of developing or purchasing automated systems that will enable them to provide the information that copyright owners need to distribute royalties to each and every copyright owner, artist and nonfeatured musician and vocalist entitled to receive such royalties and enforce their statutory rights.

E. The Information Requested In The Proposed Uniform Report Of Performances Is Readily Available To Services

The information requested for the uniform report of performances is readily available to the services. For commercially released compact discs, the information is available on the paper insert (referred to in the industry as the "label copy") of the compact disc. See Exhibit F (images of commercially released CD product inserts with notations identifying specific data elements). For promotional, pre-release product supplied by record label distributors, which does not represent the format eventually made available to consumers, some (but not necessarily all) of the requested information will be included in the product delivered to a service. See Exhibit G (images of pre-

release or promotional released CD product inserts with notations identifying specific data elements). The absence of some data on a promotional release may delay a service's ability to upload certain identifying information into a database at the time the database is populated with the promotional release or prevent the completion of all of the data fields in a uniform report of performances without reference to other sources. However, promotional releases of sound recordings will almost always include the artist name, the sound recording title, the label name, the release year of the sound recording and the duration of the sound recording. See Exhibit G. Promotional releases also may provide the title of the forthcoming album on which the sound recording will be released. See Exhibit G-3 (column (xiv)), G-4 (column (xiv)).

In the unlikely even that certain requested information is not available on a compact disc or the packaging for the compact disc, alternative sources for the missing information are readily available to a service. For example, if a statutory service receives a promotional, pre-release version of a sound recording on April 1, the commercial release of that same sound recording will generally be available within 6-8 weeks. Upon commercial release of the sound recording after the pre-release period, the service could research the sound recording on a variety of online and other reference sources in order to obtain the missing data elements requested in the uniform report of use. The service could also request catalog information from the record label providing the promotional release or visit the website of the label providing the promotional release for updated information. See Exhibit H (images of new release catalog information received from distribution entities); Exhibit I (list of publicly available websites that provide links to

record label websites, and through which a service in search of data elements for the proposed uniform report of performances could conduct free research).

If services fail to provide all of the data elements requested in a report of performances, the collecting entities will expend significant time and resources obtaining from other sources the very information that makes up the report of performances. It is the report of performances information that enables the collecting entities to identify and pay the appropriate copyright owners and featured artists. These expenditures increase the administration costs of royalty collection and distribution and decrease the royalties available for distribution to copyright owners and performers. Even if statutory services were adding a few hundred new sound recordings to their individual services during any one reporting period, it would still be more economical for each service to provide complete data on those releases it added to its own service than to shift the burden to a collecting entity that would have to research all sound recordings added by all statutory services during such reporting period.

To facilitate the accurate reporting of data on the uniform report of performances and in response to concerns expressed by certain services about the difficulty of locating the requested data elements, RIAA has set forth in Exhibits F, G and H images of CD product inserts and pages from new release catalogs from label distribution entities with notations identifying the specific data elements on pre-release and commercially released product. These examples are intended to assist services in the proper identification and reporting of the information requested in the proposed regulations.

A service should incorporate all of the data elements contained in promotional or commercially released product when they first load an ephemeral phonorecord of a sound

recording into a database from which transmissions are made. Certain services are already required to enter album, artist and song title information into a programming database in order to comply with the statutory requirement to display such information during the transmission of the sound recording. See 17 U.S.C. § 114(d)(2)(C)(ix). These services can reduce their costs of providing reports of use and the costs to collecting entities of royalty distribution by merely expanding their current business process established to enter the album, artist and song title information into a database to include a process for entering all of the other data elements needed for accurate reporting and distribution of statutory royalties, such as catalog number, release year, marketing label, duration of the sound recording, etc. Alternatively, a service can rely upon a vendor to provide a database of sound recordings that already includes all of the information requested in the uniform report of performances.

The obligation to research and provide complete information is also best borne by the services, as each service selects the sound recordings to be added to a playlist and transmitted to users, and so the services control the specific identifying information. Services are in the best position to determine which product a sound recording is taken from and to report all of the relevant information from such product so that the appropriate copyright owner and performers may be compensated for the use of their sound recordings.

F. Explanation Of Data Elements In RIAA's Proposed Uniform Report Of Performances

RIAA's proposed uniform report of performances can be divided into three principal parts: (1) information identifying the licensee as well as the type of service and programming offered by the licensee; (2) information regarding the digital audio

transmissions of sound recordings; and (3) information regarding the specific sound recordings transmitted to the public.[9] Each part of the uniform report of performances is explained below.[10] As noted in Section IV.B.1 *supra*, many of the data fields in RIAA's proposed uniform report of performances are already required under the Original Determination.

1. Information Identifying The Service And The Type Of Service And Programming Offered (RIAA Proposed 37 C.F.R. § 201.36(e)(1)(i) – (vi))

In providing collecting entities with reports of use, it is important that each service identify itself and the type of transmissions it is providing to users. The "Service Name" (proposed Section 201.36(e)(1)(i)) is required in order to identify and differentiate reports of use among all services. As a collecting entity may receive logs from hundreds if not thousands of services, where services may pay royalties based upon different royalty structures (e.g., percentage of revenues versus per performance) and at different rates (e.g., transmissions of Internet-only programming versus transmissions of AM or FM terrestrial programming), it is imperative for a service to identify itself for each line entry in a log so that there is no possibility of attributing the performances contained in one log to another service as royalties are distributed on a service-by-service basis. The requirement to have the Service Name appear on each line entry is a precaution in the event reports of use are delivered in or divided into segments, in which case the header containing the Service Name could be separated from the individual data entries. The

[9] The information on sound recordings can be further divided between information on the sound recording itself and information on the album or product that contains the sound recording.

[10] The lower-case, Roman numeral references in RIAA's proposed 37 C.F.R. § 201.36(e)(1)-(2) are also used in the column headings in Exhibits C and D.

Service Name is already required under the Original Determination. See Original Determination, 63 Fed. Reg. at 34,296.

The "Transmission Category" (proposed Section 201.36(e)(1)(ii)) is required to identify the correct royalty structure under which the service calculates its statutory liability. Preexisting subscription service transmissions and business establishment service royalty payments are currently based on a percentage of revenues. Eligible nonsubscription transmission service royalty payments are based on a per performance rate, but there are different rates for different types of eligible nonsubscription transmissions. Rates for other types of services have yet to be determined. Also, one service could offer multiple types of statutory transmissions and be required to pay different rates for each type of transmission. Without knowledge of the specific type of transmission being reported, a collecting entity could not verify royalty payments.

RIAA proposes the following Transmission Categories for transmissions:

Category Code	Description
WS	Simultaneous webcaster eligible nonsubscription transmissions of over-the-air AM or FM radio broadcasts
WI	All other Internet-only webcaster eligible nonsubscription transmissions
CBS	Simultaneous commercial broadcaster eligible nonsubscription transmissions of over-the-air AM or FM radio broadcasts
CBI	All other Internet-only commercial broadcaster eligible nonsubscription transmissions
NCBS	Simultaneous non-CPB, non-commercial broadcaster eligible nonsubscription transmissions by the same radio station
NCBI2	Other eligible nonsubscription transmissions by a non-CPB, non-commercial broadcaster, including up to 2 side channels of programming consistent with the mission of the station
NCBI	Other eligible nonsubscription transmissions by a non-CPB, non-commercial broadcaster

PES	Preexisting subscription service
SDARS	Preexisting satellite digital audio radio service
NES	New subscription service
BES	Business establishment service

The Category Codes for WS, WI, CBS, CBI, NCBS, NCBI2, NCBI and BES are necessitated by the rates recommended by the copyright arbitration royalty panel in the Webcaster CARP. See CARP Report, Appendix A, Summary of Royalty Rates for Section 114(f)(2) and 112(e) Statutory Licenses.

The "Channel or Program Name," (proposed Section 201.36(e)(1)(iii)), "Type of Program" (proposed Section 201.36(e)(1)(v)), and "Influence Indicator" (proposed Section 201.36(e)(1)(vi)) are characteristics of the service's transmissions and are necessary for enforcement of the statutory requirements. The Channel or Program Name field is needed for evaluating compliance with the sound recording performance complement because the evaluation is done for each channel of programming offered by the service. See 17 U.S.C. § 114(j)(13) ("The 'sound recording performance complement' is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than . . .") (emphasis added). In order to test compliance with the sound recording performance complement, the report of use must contain performance information in time-sequenced order by channel so that "any 3-hour period" can be measured on a rolling basis. See id.

As the Copyright Office has proposed in the NPRM, the Channel Name for an AM or FM radio station should be the Federal Communications Commission facility identification number of the broadcast station that is transmitted and the band designation (e.g., WABC-AM). NPRM, 67 Fed. Reg. 5761, 5766. The Channel Name for all other

transmissions should be the service's name for such channel (e.g., "80s Rock," "Celtic," "Folk"); "provided that if a program is generated as a random list of sound recordings from a predetermined list, the channel or program must be a unique identifier differentiating each user's randomized playlist from all other users' randomized playlists." Id. The Channel Name is already required under the Original Determination. See Original Determination, 63 Fed. Reg. at 34,296.

The Type of Program field is needed to ensure compliance with certain statutory provisions that establish duration requirements for particular programming. For example, an archived program must be at least 5 hours in duration and may not be made available for a period exceeding 2 weeks. See 17 U.S.C. § 114(d)(2)(C)(iii)(I)-(II). A continuous program may not be less than 3 hours in duration. See id. § 114(d)(2)(C)(iii)(III). If the uniform report of use did not identify the Type of Program, then a copyright owner could not ensure a service's compliance with this aspect of the statutory license.

RIAA proposes the following four categories for Type of Program:

Program Code	Description
A	for "Archived Programs" as defined in 17 U.S.C. § 114(j)(2)
L	for "Looped" if the program is a "Continuous Program" as defined in 17 U.S.C. § 114(j)(4)
PS	for "Prescheduled" if the program is an identifiable program transmitted at times that have been publicly announced in advance as defined in 17 U.S.C. § 114(d)(2)(C)(iii)(IV).
O[11]	for "All Other Programming" that is not Archived, Looped or Prescheduled.

[11] RIAA no longer recommends the use of "Live" as a Program Category. Such a definition may cause confusion among "live programming" (e.g., concert performances) and "live" transmissions (e.g., simulcasts of over-the-air AM or FM broadcasts or transmissions of programming created on the fly by an eligible nonsubscription transmission service).

NPRM, 67 Fed. Reg. at 5766.

The Influence Indicator field is needed because certain services provide the user with an ability to skip forward through a playlist at the user's sole discretion. Although RIAA believes that the use of a "skip" feature may render certain services interactive and, therefore, ineligible for the statutory license, a limited skip feature may eventually be determined to be eligible for the statutory license. If such services are determined to be eligible for the statutory license subject to certain conditions, then copyright owners will need to know which services offer a skip feature and whether those required conditions are satisfied.

RIAA proposes the following two categories for Influence Indicator:

Influence Indicator Code	**Description**
NUI	"Non-user influenced" if the program is a continuous stream of sound recordings on a particular channel that may not be influenced by the user in any way (e.g., through the use of a skip button)
UI	"User-influenced" if a specific user may determine the duration of the transmission of sound recordings on a particular channel (e.g., through the use of a skip button)

The "Genre" field (proposed Section 201.36(e)(1)(iv)) provides assistance in distinguishing among different sound recording copyright owners with the same name that own different repertoire. For example, "Spring Hill Music" is the name shared by at least two record labels. One Spring Hill Music is located in Tennessee and the other one is located in Colorado. Spring Hill Music (Tennessee) owns southern gospel repertoire while Spring Hill Music (Colorado) owns world, classical and new age repertoire. Receiving the Genre designation would be useful in situations where there is confusion as to whether one or the other similarly named record labels is entitled to royalty payment.

The Genre designation is not intended to be an objective designation attached to a particular sound recording. Rather, it is intended to be the designation that a service gives to the particular channel of music on which the sound recording is transmitted.

2. Information Regarding The Transmissions Of Sound Recordings (RIAA Proposed 37 C.F.R. § 201.36(e)(1)(vii)-(viii))

There are two data fields in the proposed uniform report of performances regarding the transmissions of sound recordings. These are the "Start Date and Time of the Sound Recording's Transmission" (proposed Section 201.36(e)(1)(vii)) and the "Total Number of Performances" (proposed Section 201.36(e)(1)(viii)).

The Start Date and Time of the Sound Recording's Transmission is essential to provide copyright owners with relevant information for ensuring compliance with the sound recording performance complement, as each 3-hour rolling period for a channel needs date and time reference points. The Start Date and Time of the Sound Recording's Transmission may also be used by collecting entities, subject to the consent of its members or clients, for distribution purposes when the audience size is not reported. The members may, for example, decide to weight performances based upon the time of day that the transmission is made, with performances during the day being weighted more heavily than overnight performances. Such a weighting could not be applied to the royalties due unknown or unaffiliated copyright owners, but the regulations adopted in the Webcaster CARP, for example, permit such weighting for distributions among members of a collecting entity. See CARP Report, Appendix B, § 3(f).

Providing such information does not create a material burden for services. For example, most radio stations and webcasters program channels using scheduling software. Some scheduling software will permit programs to be pre-programmed (e.g., a

service can select which 45 sound recordings it wants to transmit over a 3-hour period) while other software permits programming to be created on the fly from a finite universe of sound recordings (e.g., where a user initiates a stream on a channel and the approximately 15 songs delivered to the user during an hour are chosen from a universe of 200 songs). When programming is scheduled, the software determines the date and time sequence of the sound recordings, and such information can then be reported on the uniform report of performances. If the software does not record the pre-determined date and time of a transmission, an alternative is to use a service's computer server logs, which record the start date and time of transmissions. Computer server logs can also record the date and time of transmissions made on a pre-programmed service and will provide a back-up reporting system to the scheduling software. The Start Date and Time of the Sound Recording's Transmission is already required under the Original Determination, albeit in two separate fields. See Original Determination, 63 Fed. Reg. at 34,297.

The Total Number of Performances made by a service is necessary for ensuring that services properly account for their use of sound recordings under the rates and terms finally adopted by the Librarian (e.g., Webcaster CARP decision requiring eligible nonsubscription transmission services to pay a royalty for the transmission of all or any portion of a sound recording) and for distributing royalties according to usage. The Total Number of Performances should be identical to the number of performances reported on a statement of account, where royalties are calculated on a per performance basis.

The Total Number of Performances is captured in the service's server logs. Each time a user initiates a transmission from a service, it is logged on the server transmitting

the stream. See, e.g., *supra* note 8. The server log will also record the duration of the connection by the unique user as the song file is being transmitted. For purposes of the uniform report of performances, the service need only identify how many users were connected during the transmission of each sound recording, provided that a start date and time is provided for the initial transmission in instances where multiple users receive simultaneous transmissions of the same sound recording on the same channel. The total number of performances would be the cumulative number of separate connections made to end users, regardless of the duration of an end user's connection or the starting point of the transmission. Therefore, if 20 users were connected at the start of a sound recording and 10 new users connected midway through the transmission of that sound recording, then the total number of performances reported for that sound recording would be 30, even if some of the original 20 users terminated their transmission stream before the completion of the sound recording. Where there are no end user's receiving transmissions of a sound recording but the uniform report of performances contains entries for all sound recordings scheduled to be performed during a given time period (e.g., on a continuous program or on a simulcast of an over-the-air AM or FM broadcast), the Total Number of Performances would be reported as "zero" (0).

In the case where a service utilizes transmission technologies that are incapable of recording instances of user sessions (e.g., preexisting subscription services making broadcast-type transmissions that are available to all users without the user having to initiate a specific transmission) and such service is not required to pay a royalty for each transmission of any portion of a sound recording to a user, then only one (1) "performance" for each sound recording's transmission on a channel would be reported.

3. Information Necessary For Identifying Each Unique Sound Recording (RIAA Proposed Section 37 C.F.R. § 201.36(e)(1)(ix)-(xviii))

The remaining data fields in RIAA's proposed uniform report of performances, proposed Sections 201.36(e)(1)(ix)-(xviii), are needed to permit a collecting entity to identify and pay the copyright owners and performers who have earned the statutory royalties and permit a copyright owner or its agent to ensure a service's compliance with the sound recording performance complement.

The sound recording performance complement places limitations on the number of sound recordings by a particular artist or from a given album that may be transmitted on a particular channel during a 3-hour period. Statutory licensees as well as certain exempt services are required to comply with the programming limitations in the sound recording performance complement. 17 U.S.C. §§ 114(d)(1)(C)(iv), (d)(2)(C)(i). Therefore, in order to ensure compliance with the sound recording performance complement, copyright owners need to know the "Artist Name" (proposed Section 201.36(e)(1)(ix)), the "Sound Recording Title" (proposed Section 201.36(e)(1)(x)), and the "Album Title" (proposed Section 201.36(e)(1)(xiv)) for the sound recording transmitted to users. Providing this information cannot be presumed to place any extra burden on a service as it is already required under the statutory license to display in textual data, the artist name, album title and sound recording title during the transmission of the sound recording. See 17 U.S.C. § 114(d)(2)(C)(ix). This information is also already required under the Original Determination. See Original Determination, 63 Fed. Reg. at 34,297. As services will have recorded this information in some database to

permit the display of such information during transmission[12], such information is easily reportable to collecting entities.

The provision of only these three fields – Artist Name, Sound Recording Title and Album Title – are, however, insufficient by themselves for allocating royalties among copyright owners and performers. As such, RIAA has proposed additional data fields on the uniform report of performances that will permit a collecting entity to distinguish each sound recording as well as identify each copyright owner and performer entitled to receive royalties for the performance of a given sound recording. These fields include the "International Standard Recording Code" ("ISRC") (proposed Section 201.36(e)(1)(xi)), the "Track Label (P)-Line" (proposed Section 201.36(e)(1)(xii)), the "Duration of Sound Recording" (proposed Section 201.36(e)(1)(xiii)), the "Marketing Label" (proposed Section 201.36(e)(1)(xv)), the "Catalog Number" (proposed Section 201.36(e)(1)(xvi)), the "Universal Product Code" ("UPC") (proposed Section 201.36(e)(1)(xvii)) and the "Release Year" (proposed Section 201.36(e)(1)(xviii)). Each of these fields is described below.

The ISRC is the unique identifier for sound recordings, identifying each version of a sound recording. It functions much like a social security number does for a person. Various types of information for a particular sound recording can be obtained by using this unique identifier. Software currently exists to read the ISRC that is embedded in

[12] The obligation to display the title of the sound recording, the name of the featured artist and the title of the album is not required in the "case of a retransmission of a broadcast transmission by a transmitting entity *that does not have the right or ability to control the programming of the broadcast transmission.*" 17 U.S.C. § 114(d)(2)(C)(ix) (emphasis added). This limited exemption would not apply to terrestrial broadcast stations that simulcast their own signal over the Internet. In addition, for services offering retransmissions of terrestrial broadcast signals under contract, such services should require in a contract that the terrestrial broadcast station provide the service with the data needed for completion of the uniform report of use even if such data need not be displayed during the retransmission.

promotional and commercially released product. The ISRC can be plugged into a sound recording database, should such a database be made available commercially, to obtain the correct copyright owner and recording artist(s) entitled to receive distributions of statutory royalties. As the Copyright Office noted in the Original Determination, the ISRC, "when embedded in sound recordings, facilitates automatic identification and royalty administration worldwide." Original Determination, 63 Fed. Reg. at 34,289, 34,294.

The Track Label (P)-Line is the copyright owner information for an individual sound recording that can be found on the backside of the label packaging after the (P)-Line symbol (P). If the album is a compilation (e.g., a greatest hits release, a Broadway show album or a movie soundtrack), the Track Label (P)-Line information can be found inside the label package insert following the listing of each sound recording. See, e.g., column (xii) in Exhibits F-5b, -6b, -9b (examples of compilation albums containing different Track Label (P)-Line information for individual sound recordings). The copyright owner listed on the Track Label (P)-Line is generally the entity entitled to royalties for the public performance of the sound recording. The "recording label" is already required under the Original Determination. See Original Determination at 34,297.

The Duration of the Sound Recording is the total recorded time of that sound recording as identified on the label packaging and which pertains to the version being used by the service. This field is an objective number that should be constant regardless of the transmission time of all or any portion of the sound recording to a user. This

number helps distinguish among remixes of the same sound recording by the same artist (e.g., dance mixes). See, e.g., column (xiii) in Exhibits F-2, -8, -9b, -10, G-1, -2, -3, -4.

The Marketing Label is the name of the company that markets the album (e.g., a compact disc, audio cassette, LP, etc.) on which a particular sound recording may be found. See, e.g., column (xv) in Exhibits F-1, -2, -3, G-1, -2, -3, H-1b, -2b. In many cases, the Marketing Label name will be the same company shown on the Track Label (P)-Line. However, for compilation albums, the Track Label (P)-Line owner and the Marketing Label are often different. See, e.g., columns (xv) and (xii) in Exhibit F-6a, -6b, -9a, -9b. The "recording label" is already required under the Original Determination. See Original Determination at 34,297.

The Catalog Number is the unique number assigned by a particular record label to an album, as opposed to the particular sound recording on the album, for ordering and inventory management purposes. It can be found on the back or spine of the album label packaging. See, e.g., column (xvi) in Exhibits F-1, -2, -9a, -10, G-1, -7, -9, -10b, H-1b, -2b. Typically, the catalog number contains some portion of the UPC, described in the following paragraph. A record label may use the Catalog Number as an internal reference source (e.g., to track royalties, allocate revenues, etc.), whereas the UPC is a universal identifier. The Catalog Number is already required under the Original Determination. See Original Determination at 34,297.

The UPC is a 12-digit numeric identification code that is placed on product intended for retail sale and is read by automated scanning devices (i.e., the "bar code" number on a product). Unlike an ISRC, which is unique to a particular sound recording, a UPC is unique to a particular product (e.g., a CD, cassette, LP). For audio products, the

UPC contains detailed information such as the manufacturer number, the product selection number and the type of configuration. It can be found on the back of the album label packaging. See, e.g., column (xvii) in Exhibits F-1, -2, -3, -5a, -6a, G-2, -4, H-1b, -2b.

The Release Year is the year the album was first released commercially for public distribution as identified on the backside of the label packaging after the (P)-Line symbol. See, e.g., column (xviii) in Exhibits F-1, -2, -4, -6a, G-1, -2, -3, -4, -5, H-1b, -2b. If multiple release years are evident, the service should report the most current year.

The data elements requested by the RIAA are intended to permit a collecting entity to distinguish among the tens of thousands of sound recordings that have been released in the United States. When combined in a single entry, the proposed data fields will facilitate the efficient and prompt distribution of statutory royalties. For example, the Album Title, Release Year, ISRC and UPC together provide information that enables a collecting entity to distinguish among sound recordings by the same artist that may appear on different album releases. In such an instance, different copyright owners and nonfeatured performers may be entitled to the statutory royalties paid for the use of those sound recordings. See Exhibit J (printout from *All Music Guide* website of a number of albums containing the song "Does Anybody Really Know What Time It Is," including multiple performances by the featured artist *Chicago*.).

Receiving Release Year information assists in differentiating copyright ownership when the same sound recording by the same artist is released on a new album or appears on a reissue of an existing album. In these cases, ownership of sound recordings may have changed hands over the years and different copyright owners may be entitled to

statutory royalties depending upon the album from which the sound recording is taken. The Release Year also facilitates the differentiation among similarly titled albums. In addition, more and more artists – whose careers have spanned decades – are acquiring the copyright to their own recordings. Providing the Release Year, as well as the UPC and Catalog Number, provides invaluable information to discern current ownership and entitlement to statutory royalties. As noted above, this information is available on the physical product, is available to the service making the transmission and should be reported on RIAA's proposed uniform report of performances.

The Artist Name, Marketing Label and Track Label (P)-Line are used to ascertain the copyright owners and performers entitled to statutory royalties. As noted above, such information is particularly important for sound recordings that are taken from compilation albums, where each sound recording may have a different Track Label (P)-Line owner and the Marketing Label may be a separate entity entirely. See, e.g., columns (xv) and (xii) in Exhibit F-6a, -6b, -9a, -9b.

The independent administrator(s) appointed to allocate royalties to nonfeatured musicians and vocalists also require detailed information on each sound recording performed by a service in order to properly allocate royalties among nonfeatured performers. The current independent administrator is building a database to match featured performance information with information on background musicians and vocalists. Therefore, the independent administrator(s) will also be faced with the problems of distinguishing among the many similarly named sound recordings, the different releases of the same sound recordings and the different performances by the same artist of the same song. It is not uncommon for an artist to record a sound recording

with studio musicians but then to play concerts with different musicians. If a concert recording is made and then released, the performance of the same titled sound recording by the same artist may trigger different royalty payments to different nonfeatured performers. Similarly, a featured artist may record the same sound recording multiple times for different albums, with each performance containing different nonfeatured performers. Background performers are entitled to performance royalties. Therefore, services must report information that assists the independent administrator(s) in identifying the various background performers entitled to performance royalties. The information requested in the RIAA uniform report of performances will assist the independent administrator(s) in compensating the nonfeatured performers entitled to payment.

G. Ephemeral Phonorecord Logs

The ephemeral phonorecord log proposed by the Copyright Office, as modified by the RIAA in these proposed regulations (see Exhibit A), relies upon the same data elements set forth in RIAA's uniform report of performances. Cf. Exhibits C and D columns (ix)-(xviii). Separate data fields are included in order to track when an ephemeral phonorecord is first made, how many ephemeral phonorecords are made, when the first transmission from that ephemeral phonorecord occurs and when the ephemeral phonorecord is destroyed.

An ephemeral phonorecord log is needed for the allocation of royalties that are to be paid under the Section 112 license. As 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, they need the information on the number of reproductions created separate and apart from the number of performances. This is true

even though the payment for ephemeral reproductions may be tied to the payment for performances.

All of the information on the ephemeral phonorecord log is also needed to ensure that services comply with the statutory requirement to destroy ephemeral phonorecords "within 6 months from the date the sound recording was first transmitted to the public using the phonorecord." 17 U.S.C. § 112(e)(1)(C). Without detailed reporting logs on the creation and destruction of ephemeral phonorecords, copyright owners would be unable to ensure that a service has complied with a fundamental requirement of the statutory license. In fact, failure to require services to provide detailed ephemeral phonorecord logs will most likely ensure that no service will comply with the obligation to destroy ephemeral phonorecords within the 6-month period. And, if services believe that they can avoid having to destroy their ephemeral phonorecords, individual copyright owners will be deprived of their right to grant exclusive licenses that may waive the destruction requirement.

The layout of the proposed ephemeral phonorecord log is intended to be similar to the proposed uniform report of performances. For this reason, certain fields have been identified as "[Reserved]" so that sound recording and album information would be reported in the same fields on the ephemeral phonorecord log and the uniform report of performances.

H. Final Regulations Should Be Issued Expeditiously To Avoid Any Further Harm To Copyright Owners and Performers

The delay in adopting regulations for existing services may already have deprived copyright owners and performers of full compensation for the exploitation of their works. For example, the CARP Report recommends that certain eligible nonsubscription

transmission services be permitted to estimate the number of performances they made during the period October 28, 1998 through the thirty-day period following the Librarian's final order in the Webcaster CARP. See CARP Report (Interim Public Version) at 110. Where services have offered skip features or not included audio advertisements in their transmissions, the estimated number of performances used to calculate past royalty obligations will likely result in an underpayment of statutory royalties. Such underpayment would be directly attributable to a service's failure to retain and provide data of past transmission activity.[13] Copyright owners and performers should not be deprived of proper compensation for past or future performances because services neglected to retain historical data or worse yet, are permitted to report less than complete and accurate data that is critical to the proper allocation of statutory royalties.

The Copyright Office should adopt final regulations for all services as expeditiously as possible. Although services have had constructive notice since June 24, 1998, of the types of information they would have to report, concluding this recordkeeping proceeding in a timely manner will eliminate any doubt about a service's reporting obligations. Prompt adoption of final regulations will also ensure that collecting entities can develop royalty collection and distribution systems that will allow them to distribute expeditiously royalties to the copyright owners and performers entitled

[13] The CARP Report provides that "[f]or the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee may estimate its total number of performances if the actual number is not available." CARP Report (Interim Public Version) at 110 (emphasis added). The ability to estimate historical performances is conditioned upon a service not having actual performance data. The Copyright Office should make clear in its final regulations that where raw server logs are available to a statutory licensee – as they should have been in order for a service to qualify for the statutory license and following the Original Determination – the licensee should be required to mine those server logs to provide copyright owners with accurate notice of use of sound recordings.

to such royalties. Finally, the Copyright Office should not permit this rulemaking to delay the payment of royalties by eligible nonsubscription transmission services and the accurate calculation of royalty payments based upon the transmission of any portion of a sound recording to a recipient. See 17 U.S.C. § 114(f)(4)(C).

V. CONCLUSION

Services making ephemeral phonorecords or digital audio transmissions of sound recordings are benefiting from a statutory license (i.e., not having to negotiate license agreements with thousands of copyright owners) or a statutory exemption. In exchange for this substantial benefit, services must satisfy certain requirements. These requirements include, among others, the obligation to: (1) provide copyright owners with notice of use of their sound recordings; (2) comply with the sound recording performance complement; (3) comply with time limitations for certain archived and continuous programs; and (4) destroy ephemeral phonorecords within the 6-month period following the first transmission made from the ephemeral phonorecord. These requirements were enacted to ensure that copyright owners and performers are compensated for the use of their works and to minimize the devastating effect that these reproductions or performances, which copyright owners and performers have no control over, may have on their livelihood.

As noted above, there are two principal purposes for the notice and recordkeeping requirements. First, the reported information must provide sufficient detail so that royalties may be distributed to the copyright owners and performers who have earned such royalties. Second, a service must report information that permits a copyright owner to ensure that a service is complying with all statutory requirements. The regulations

proposed by the Copyright Office, as amended by the RIAA herein, would accomplish these dual purposes.

RIAA requests only the information it needs to distribute the royalties to the appropriate copyright owners and performers and determine if the other statutory requirements are being satisfied by a service. The requested information is almost always in the sole possession of the services, can be recorded by the services in the regular course of business, and will not create a material burden for the services. On the other hand, it is frequently impossible and always economically infeasible for copyright owners to monitor all channels of programming offered by all services in order to collect the information needed for the accurate distribution of statutory royalties, ensure compliance with the sound recording performance complement or monitor the destruction requirement for ephemeral phonorecords. To be refused the requested information would be tantamount to a denial of the royalties and the other statutory protections established by Congress for copyright owners and performers, such as the sound recording performance complement. If a collective has to expend most of the royalties it collects trying to identify who is entitled to the royalties, then the statutory intent is frustrated. Moreover, the sound recording performance complement requirement is vitiated if copyright owners are denied the very information they need to determine compliance.

As noted above, the process of distributing statutory royalties to copyright owners and performers is complex, time consuming and expensive. Yet 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. However,

SoundExchange cannot satisfy its obligation to serve as an agent for copyright owners without comprehensive data from services. Only with such data can a collective properly allocate royalties among the few thousand copyright owners and tens of thousands of featured artists and nonfeatured musicians and vocalists entitled to such royalties. Services cannot satisfy their statutory obligations by merely paying royalties and providing minimal information. Royalties that cannot be distributed have little value and statutory rights that cannot be enforced because of a lack of information result in no rights at all.

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For the reasons set forth above, RIAA respectfully requests that the Copyright Office adopt the regulations set forth in Exhibit A hereto.

Respectfully submitted,

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