Before the United States Copyright Office
Library of Congress
Washington, D.C.

In the Matter of	)	
	)	
Notice and Recordkeeping for	)	Docket No. RM 2002-1
Use of Sound Recordings under	)	
Statutory License	)	

Comments of the Digital Media Association

Pursuant to the Notice of Proposed Rulemaking published February 7, 2002, at 67 Fed. Reg. 5761, the Digital Media Association (DiMA) submits these comments upon the proposed regulations for notice and recordkeeping for services operating under the statutory sound recording digital performance license, 17 U.S.C. § 114, and multiple ephemeral recordings license, 17 U.S.C. § 112(e).

DiMA's comments can be summarized as follows:

1. the proposed rule – which is intended to ensure that copyright owners receive reasonable notice of the use of the sound recordings under the statutory licenses – is extraordinarily overbroad, frequently redundant, and unrealistically burdensome to webcasters in terms of time, labor and expense;

2. the imposition of more than the minimum required data obligations on webcasters will be, particularly after the recent CARP royalty recommendation, an unjustified tax further diminishing webcasters' opportunity for success, which is contrary to one of Congress' primary goals in enacting Section 114 – to facilitate the development of new transmission services; and,

3. the suggestion that requirements for royalty calculation and allocation can be expanded into a "proof of statutory license eligibility" requirement is not supported by either section 112 or 114, and runs contrary to the general policy whereby the burden of proof lies with those who would challenge statements made upon penalty of perjury.[1]

[1] DiMA associates itself with the Joint Comments of Radio Broadcasters in this regard, and with respect to the Broadcasters' reasoning concerning the flaws inherent in the process by which the rule has been proposed, wherein the burden to disprove is imposed on the webcasters, rather than imposing the burden of proof of need or entitlement upon the rule's proponents, the recording industry.

As an initial matter, DiMA notes the chasm between the limited sound recording identification requirements of the statutory license itself and the broad scope of the proposed regulations. Section 114(d)(2)(C)(2)(ix) requires the service to identify the sound recording by only three (3) data fields: "the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist...." By contrast, the proposed regulation requests 10 separate pieces of identification for each sound recording, and 23 separate fields of information overall.

This extraordinary difference between the statute and the proposed regulation is of a magnitude that, under traditional principles of administrative law, can only by justified by overwhelming evidence of its necessity, particularly in light of the burden the regulation would impose. Even the interim recordkeeping regulations for pre-existing subscription services require only 6 data fields concerning the sound recording, some of which are optional, and a total of 10 fields of data.

Mindful that the statute's goal is simply to ensure accurate distribution of royalties to copyright owners and performers, even 6 data fields may be excessive and unduly burdensome. It is unequivocally true, however, that 23 separate pieces of information are not required to ensure that sound recordings are accurately identified, and are absolutely unrelated to ensuring accurate distribution of royalties. Thus, we respectfully submit that those who seek this additional information bear a heavy burden to demonstrate why less information is not acceptable and, conversely, why additional information is absolutely necessary.

If for any reason the Copyright Office concludes that more than the barest minimum of data is necessary, then the Copyright Office must balance the additional costs and burdens imposed upon the services against the ability (and associated burden) of the designated agent to obtain the same additional information from other sources, and particularly from the copyright owners themselves. In allocating these obligations, DiMA submits that it would be most efficient and least burdensome for the designated agent to give the services access to its comprehensive database of sound recordings, rather than requiring each service to develop its own database. DiMA requests that the Copyright Office take notice of three important facts in this connection:

1. Complete and accurate information concerning sound recordings is available from the sound recording copyright owners. Information readily available to them and completely within their control would include at least the following: song title; featured artist name; album title; copyright owner (so-called "P-line"); ISRC where available (which code they would obtain from RIAA, as noted below); and UPC. It cannot be said to be burdensome, unprecedented or unfair to require copyright owners to provide information to the receiving and designated agents concerning the sound recordings that they publish and distribute, and for which they claim royalty payments.

2. The International Standard Recording Code ("ISRC") requested in the proposed regulations by the RIAA is information created, assigned and maintained by the RIAA itself. This code uniquely identifies each individual track on a sound recording.

Despite the potential value of the ISRC to streamlining this reporting process, the ISRC data are not readily available to the services. Therefore, to the extent that the Copyright Office accepts the RIAA's assertion that the services must provide this information (which assertion should not be accepted absent compelling support), the RIAA must be required to assist this process by providing the ISRC database to the receiving agents, the designated agents and the services in a usable form and in a timely manner.

3. The receiving agent, SoundExchange, already has amassed a database of information concerning sound recordings performed by statutorily licensed services. Undoubtedly, much of the information contained in this database came from information compiled and provided by services subject to the statutory licenses; and it is equally likely that, unless the Copyright Office requires sound recording copyright owner claimants to provide relevant information concerning their recordings to the receiving and designated agents, the services will continue to provide data that SoundExchange will use to populate its database. Making this database available to all statutorily licensed services would benefit both the services and SoundExchange. Licensees would be spared the expense and burden of creating individual databases, and they would be certain that their databases conformed to a format that complied with the needs of the receiving and designated agents and these regulations. SoundExchange (and, consequently, the copyright owners and performing artists) would be spared substantial future expense and burden of reconciling different information provided by the statutorily licensed services.[2]

DiMA respectfully submits that requiring sound recording copyright owners to provide accurate information to the designated agents, and requiring those agents to make their databases available to statutory licensees, would significantly enhance the efficient and cost-effective operation of the statutory license. Inasmuch as such data already is within the possession of the sound recording copyright owners and SoundExchange, requiring the disclosure of such information so as to improve the operation of the statutory license will not impose substantial costs on those entities, and will ultimately result in lower administration costs and higher royalty payments. We therefore urge the Copyright Office to seek further comments specifically as to how the reporting requirements could be implemented through provision of a common database, with the least expense and maximum benefit for all parties.

Furthermore, Congress when enacting the statutory webcast license stated its intention that the license be available so as to promote the development of new webcast services. Congress therefore could not have intended that services should be denied access to the statutory license because of onerous reporting and recordkeeping requirements. DiMA therefore believes that any recordkeeping regulations should

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[2] In this regard, we note that information that complied with the regulatory requirements still could create issues for reconciliation by a database operator. Computers generally interpret any differences in data entry as referring to different records. Databases treat as separate records data having such small distinctions such as "and" versus "&," punctuation placement, popular title versus actual title or reasonable abbreviations of titles (e.g., shortening the 90-word title of the most recent Fiona Apple CD to just "When the Pawn" or "When the Pawn..."). All such distinctions and reconciliation efforts would be avoided by providing a single common database to all users.

recognize and reflect several important goals from the perspective of the licensed services:

1. Statutory licensees should be required to provide information only to identify the sound recordings performed by the services and the number of performances made.

2. The corollary of the first goal is that licensees should be required to provide only such information as is necessary for such purposes. Several fields of information, taken together, are clearly sufficient for purposes of identifying the sound recordings and, if required, the copyright owner. For example, each of the following data sets by themselves would provide complete information necessary to the identification of the sound recording and copyright owner :

- Sound recording title, the featured recording artist, group, or orchestra, the retail album title, and the copyright owner information provided in the copyright notice on the retail album (e.g., following the circle 'P');
- Sound recording title, UPC Code and the copyright owner information provided in the copyright notice on the retail album (e.g., following the circle 'P');
- ISRC and the copyright owner information provided in the copyright notice on the retail album (e.g., following the circle 'P').

Thus, it should be sufficient for any licensee to provide these combinations of data by themselves, rather than to incur the burden and expense of entering all requested information for each individual track.[3]

3. Regulations should not impose requirements on the services that are impossible for the services to meet. Some of the proposed regulations are not feasible for any service. However, there are a number of instances where the regulations would impose on particular types of services requirements that cannot reasonably be fulfilled. DiMA therefore believes that regulations should not be stated as "one size fits all" rules applicable to all of the different types of covered services. Regulations properly tailored to each type of service would eliminate those instances where the current proposed regulations seek to force square pegs into round holes.

4. Regulations should not impose undue expense upon the services, lest they constitute an additional hidden tax on the services and further jeopardize their ability to survive. Where information already collected by the services in the normal course of business would suffice, the services should not be required to change their business processes solely to add superfluous data.

5. Regulations should seek to balance the costs and benefits of different means to achieve the regulatory goals, and should choose less expensive alternatives wherever possible.

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[3] Of course, it would not be necessary to so limit the number of fields were information to be made available from a database provided by the designated agents.

6. Regulations should recognize the difficulty in compliance for services that have engaged in webcasting prior to the issuance of the regulations (indeed, in some cases, prior to the enactment of the statutory licenses themselves). Allowances should be made both for grandfathering of existing services that cannot provide all requested information due to contractual limitations, industry practices and existing business operations, and for phased-in application of any requirements upon new services.

With these goals in mind, DiMA discusses below, first, several provisions that should be reflected in the regulations; and, second, DiMA's particular concerns with the proposed regulations.

I. Suggested Clarifications and Regulatory Provisions

A. The Receiving and Designated Agents Are Entitled Only to Information Concerning Statutorily Licensed Activities.

Statutorily licensed services may perform and otherwise utilize sound recordings that are not subject to the statutory license. As examples, services may perform sound recordings pursuant to a direct license from the copyright owner; sound recordings in the public domain; and certain sound recordings fixed and first published with the statutory copyright notice on or after February 15, 1972. Agents administering the statutory license do not need to receive information concerning performances of these sound recordings, and therefore are not entitled to it. Therefore, the Copyright Office should confirm in its determinations concerning the proposed regulations that services need only produce information concerning sound recordings utilized under the statutory webcast license.

Similarly, we note that the regulations seek information concerning the reception of performances of sound recordings outside of the United States. *See* Section 201.36(e)(3)(v), (vii). Even if it were reasonably feasible to provide information concerning the reception of performances outside the United States, such data are irrelevant to any regulatory purpose under the statutory license. Hence, such data should not be required to be produced under the proposed regulations.

B. Listener Logs are Irrelevant, Burdensome to Produce, and May Violate Listeners' Privacy; Playlist Information is Irrelevant, Burdensome to Produce, and Valuable Proprietary and Confidential Data Belonging to the Services.

DiMA endorses the views set forth in the Joint Comments of Radio Broadcasters to the effect that it is not appropriate for the regulations to impose burdens on services for the apparent purpose of better enabling RIAA to monitor compliance with the sound recording performance complement. *See* Section 20136(e)(2)(D)-(F) and Section 201.36(e)(3) ("Listener Log"). Putting aside the inappropriateness of this area of

proposed reporting requirements as a whole, the proposed regulations are far more onerous than necessary to achieve this illegitimate purpose.

For example, the "Listener's Log" regulations described at proposed Section 201.36(e)(3) would require the maintenance of seven (7) separate data fields concerning each listening session. For a reasonably popular service or channel that has 30-35,000 listener sessions per day – and we would note that some services have nearly that many simultaneous listeners in a given hour -- such a service would be required to produce more than 1 million records per month per channel, constituting terabytes of data. Larger multi-channel services would be required to produce well in excess of 100 million records per month. Even ignoring the massive processing job that would have to be performed by the receiving and designated agents to analyze this data, the daily collection and monthly maintenance and production of this information would impose severely onerous and burdensome work requirements upon the services. We respectfully submit that the enormous additional workload imposed by producing a Listener Log is simply not justified.

Listener Log information also implicates serious privacy issues for webcast services. Even if the services are not legally liable for extracting extensive listener data because it is required by regulation, many webcast listeners could be offended by this requirement, and would not be willing to listen to music over the Internet if they knew that services monitored their listening habits.

Playlist information requested in proposed Section 201.36(e)(2) also imposes similarly onerous requirements upon webcasting services. Even a modestly popular webcasting channel that has a substantial number of listeners per day would now have more than a million monthly records, including multiple lines of data representing each song performed in each individual listening sessions. Again, the result is that each service would be required to collect and maintain daily and produce monthly terabytes of data per channel.[4]

This burden of providing complete playlist information is certainly unjustified for those services that are entirely programmed by software and performed from individual song files on computer servers. Where a service performs songs from individual song files stored on servers, these servers count the number of times that the song file was requested to be performed during a particular time period. Thus, such a service can provide complete information necessary to the identification of sound recordings and the calculation of the performance royalty through a much smaller data set that identifies the sound recordings performed and the number of times that song file was "called" to be performed during a particular month.

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[4] The fact that pre-existing cable and satellite services supply intended playlist information does not justify the request being made here. Those services provide monthly playlist information for only some 30-120 channels. By contrast, the proposed regulations would require production of a playlist for every single listener to the service – a burden orders of magnitude greater than that imposed upon the pre-existing services. Thus, the balance of burden and efficacy clearly militates against the production of playlist information by the type of webcast services described in this section.

Moreover, the ordering of particular sound recordings in a computer-programmed playlist can reflects proprietary software algorithms and methods that give some services commercial advantages over others. DiMA members believe that it is inappropriate and potentially prejudicial to their business interests to turn over such proprietary information to entities that represent and are substantially controlled by their competitors.

Therefore, in light of the thorough adequacy of a smaller information set, and the modest requirements of the statute, DiMA respectfully requests that services should not be required to provide listener logs or playlists. Rather, services should be required to supply only information that identifies each sound recording and states the number of performances of that sound recording during that monthly period.

C. Service Practices under Pre-Existing Contracts should be Grandfathered.

A number of webcast services transmit programming provided by third parties. Section 114(d)(2)(C)(ix) recognizes that such services are entitled to avail themselves of the statutory license, but that they typically are not able to provide textual information identifying a particular sound recording. That section specifically states that this data-production obligation imposed on other services "shall not apply 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... ." Thus the statute relieves third party retransmitters of certain obligations where the ability to comply with such obligations is outside of their control.

Similarly, third party transmission services do not have and should not be required to produce information concerning the performed sound recordings for programming controlled by third parties. In these cases, the radio stations or webcast creators program the services, and do not provide such information to the third party retransmitter. Thus, third party retransmission services cannot provide the type of information concerning the identification of the performed sound recordings or the number of performances made. This is particularly true for those services that entered into contracts with radio stations and other programmers before the promulgation of there proposed reporting regulations; indeed, in many cases, prior to the enactment of the DMCA. Such services are bound by and are unable to renegotiate the terms of these existing contracts. Just as Congress recognized the need to exempt third party retransmission services from the song identification requirements, the Copyright Office should grant these services an exemption from the proposed reporting regulations.

II. Specific Comments on Proposed Regulations

Where appropriate, the number or text of the proposed regulation is cited below in bold.

Section 201.36(e)(ii)

The concept of an "Intended Playlist" arose from the business practices of the pre-existing cable and satellite subscription services. Those services intentionally

overscheduled their programs by approximately one song per hour, so as to ensure that there would be no "dead air" in case of timing errors or technical glitches. As a result, the services knew what they intended to play, rather than what actually was performed. That may not be the case with each of the varied types of Internet webcast services covered by the statutory license.

(A) The name of the Service or entity;

Although the name of the service could be identified in a separate writing rather than in a data field, it is inconsequential to provide this information in data fields as well.

(B) The channel or program; or in the case of an AM/FM Webcast, the station identifier used by the Service, including the band designation and the FCC facility identification number of the broadcast station that is transmitted; 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;

As noted above, webcast services that use scheduling software and perform songs from individual server files do not need to produce playlist information in order to provide the receiving and designated agents with information sufficient to identify and quantify sound recording performances. With respect to other services, we note that this subsection conflates together several different types of identifiers for different types of services. To the extent that it is appropriate to break out separate regulations for such services, different identifiers should be employed.

(C) The type of program: "A" (for an "archived program" as defined section 114(j)(2)), "L" (for "looped" if the program is a "continuous program" as defined in section 114(j)(4)), "V" (for "live" if the program is transmitted substantially at the time it is first performed in its entirety), or "PS" (for "prescheduled" if the program is an identifiable program transmitted at times that have been publicly announced in advance);

For the reasons noted above, we respectfully suggest that a separate category "C" be established for live services that use scheduling software and perform the songs from individual server files. In addition, this subsection also conflates together several different types of identifiers for different types of services. To the extent that it is appropriate to break out separate regulations for such services, different type identifiers also should be employed.

(D) For programs other than archived programs, the date of transmission;
(E) For programs other than archived programs; the time of transmission of the sound recording;
(F) The time zone of the place from which the transmission originated (as an offset from Greenwich Mean Time);

The data requirements of subsections (D) – (F) are unnecessary and inappropriate, particularly for those services that use scheduling software to create programs based upon defined sets of sound recordings recorded on servers as individual song files. In such cases, the identification of the sound recordings and the number of times each sound recording was performed is available without reference to dates and times of transmission. To the extent that this data is proposed to be collected solely for purposes of monitoring compliance with the complement, we agree with the Joint Comments of Radio Broadcasters that such purpose is beyond the scope of the statutory license recordkeeping requirements.

(G) For archived programs, the numeric designation of the place of the sound recording within the order of the program;

The relevance of this information is not apparent. Thus, before the Copyright Office approves it, the burden of proof should be on its proponents to justify the additional burden of tracking and providing this information.

(H) The duration of the transmission of the sound recording (to the nearest second);

Information concerning duration is not relevant to any factor under the statutory license. To the extent that the Copyright Office agrees with webcasters that transmissions of de minimis duration deserve no payment, such transmissions simply should not be included in the data provided to the receiving agent.[5]

(I) The sound recording title;

Where the ISRC has not been provided, DiMA agrees that this field is necessary and appropriate.

(J) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

ISRC is not available for all sound recordings. Where it has been assigned, however, it apparently identifies complete identifying information concerning each individual sound recording. Thus, services that may provide the ISRC and the name of the sound recording album on which the track is found, have supplied complete identifying information for that recording that should satisfy the regulatory requirements.

We again note that the ISRC is assigned to each sound recording by the RIAA. Were the RIAA to make available to the receiving and designated agents its database of ISRC information, the receiving and designated agents could provide the services with more accurate ways of identifying the performed sound recordings in their reports. As

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[5] SoundExchange apparently included this data field under the expectation that the RIAA might prevail on its request for a long song surcharge. Inasmuch as the arbitrators have denied their request, the information is clearly irrelevant; and, even if relevant, is unduly burdensome to collect.

noted above, we respectfully submit that this type of cooperation could significantly enhance the efficiency of the reporting, allocation and payment operations, to the substantial benefit of all parties.

(K) The release year identified in the copyright notice on the album and, in the case of compilation albums created for commercial purposes, the release year identified in the copyright notice for the individual track;

DiMA believes that this information is superfluous where information such as title, album title, featured artist and recording label already are produced, or where the ISRC or UPC is provided.

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

This information would be superfluous only where ISRC is provided.

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

This information would be superfluous only where the UPC is provided.

(N) The recording label;

This information seems superfluous, particularly inasmuch as copyright owner information is sought in subsection Q.

(O) The Universal Product Code of the retail album;

UPC should be optional; but where provided, it can substitute for information such as subsections K, M, N and P.

(P) The catalog number;

This information seems superfluous.

(Q) The copyright owner information provided in the copyright notice on the retail album (e.g., following the symbol 'P') or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual track;

This information should be provided.

(R) The musical genre of the channel or program, or in the case of AM/FM Webcast, the broadcast station format.

This information seems superfluous and, indeed, irrelevant for the purposes contemplated under the regulations. To the extent that this information adds value by allowing SoundExchange to track what types of radio stations are playing particular songs in a given month – information that recording companies currently may pay outside services to obtain -- we respectfully believe that they should not be entitled to obtain such information under these regulations.

Section 201.36(e)(3): The Listener's Log.

As noted above, DiMA objects to the proposed requirement to produce Listener Logs. Producing a Listener's Log would require the generation of extremely large volumes of data, adding substantial cost and burden to the operation of webcast services. As further noted, producing a Listener's Log is superfluous and unnecessary, in particular, for those webcast services that perform music from individual song files on servers, which servers can track accurately the number of times in which a performance has been requested. Apart from the above, DiMA believes that certain information requested in the proposed regulation is inappropriate, or impossible to provide, as set forth below.

(iii) The date and time that the user logged in (local time at user's location);
(iv) The date and time that the user logged out (local time at the user's location);
(v) The time zone of the place at which the user received transmissions (as an offset from Greenwich Mean Time);

The geographic location of a particular user is irrelevant to identifying sound recordings or assessing the number of performances made, and thus serves no regulatory purpose under the license. Moreover, the geographical dispersion of a service's listening audience is valuable information that should not be freely disclosed to third parties. It would be sufficient to provide date and time from the server's location for items (iii) - (v).

(vi) The unique user identifier assigned to a particular user or session;

DiMA notes that this request implicates significant privacy concerns. As noted above, many listeners will object to the collection of data concerning their listening habits and, so, will prefer not to listen to Internet webcast services in order to avoid such monitoring. In those cases in which users have voluntarily registered with a service, third parties should not be entitled to valuable customer information that links back to the particular user identifier number as registered for the service. Even where consumers have agreed to the collection of such information, that permission has been given to the service – not to SoundExchange or to any third party. In any event, DiMA further submits that services should not be required by regulation to relinquish customer data that is owned by the customer and the service.

(vii) The country in which the user received transmissions.

As previously noted, the country of reception is irrelevant regardless of whether a payment must be made upon the transmissions from servers located within the United States. DiMA respectfully submits that the Federal Government should not require services to provide SoundExchange or any private entity with information merely to enable that entity to get into the business of international royalty collection or distribution. Thus, this proposed subsection should be deleted.

Section 201.36(e)(4): Ephemeral Phonorecord Log

DiMA notes that the issue of whether any payment is required to be made for ephemeral recordings of statutorily licensed transmissions currently is on appeal from the report of the CARP. Notwithstanding the CARP report, DiMA believes that such ephemeral recordings are valueless and merit no payment. In this regard, DiMA agrees with the conclusion of the Copyright Office in its Section 104 Report that such ephemeral recordings have no independent economic value apart from the paid performances that they facilitate. *See* Report at 144 n. 434.[6]

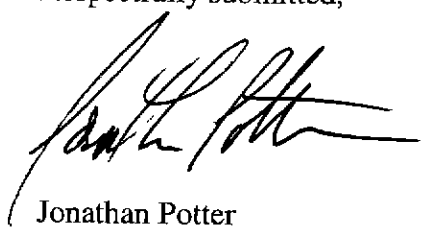
Perhaps more importantly, the information yielded from the creation of a proposed Ephemeral Phonorecord Log is wholly irrelevant to the allocation of fees to the copyright owners, as the CARP recommended a flat fee for ephemeral copies, so presumably the distribution of such excess royalty must also be tied to the distribution of the underlying performance royalty. In this context, the number of ephemeral copies and their location is unequivocally irrelevant, and any requirement to track them is beyond the scope of the authorizing statute.

[6] DiMA further notes that every service is entitled under 17 U.S.C. § 112(a) to an exempt ephemeral recording in order to facilitate the making of its transmissions. The regulations should make clear that no service should be required to provide information concerning the making or destruction of these exempt ephemeral recordings.

Section 201.36(e)(5): System failure

DiMA notes generally that here, as with the subscription services, system failures will not result in statistically significant differences in allocations or payments. Hence, the burden of requiring a service to create, maintain and produce "failure" logs outweighs any potential benefit to those entitled to payment. For systems controlled by computer software, reporting system failure is an irrelevant concept, inasmuch as such a failure results in no performances being made at all. Therefore, we respectfully submit that the proposed regulation concerning system failures should be deleted.

Respectfully submitted,



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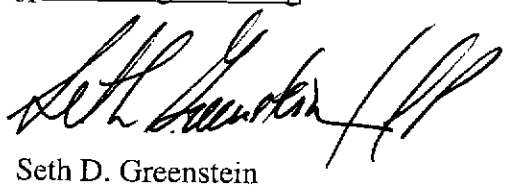

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