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Before the
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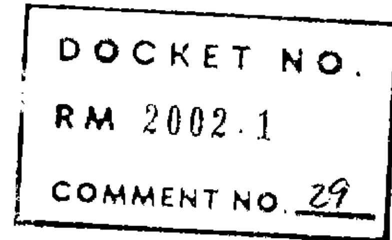
Washington, D.C.

In The Matter of:

Notice and Recordkeeping for
Use of Sound Recordings
Under Statutory License

Docket No. RM 2002



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

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INTRODUCTION

Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM"), the two "preexisting satellite digital audio radio services" described in 17 U.S.C. § 114(j) (collectively, the "Preexisting Satellite Services"), hereby provide their comments on the Copyright Office's proposed rule for giving copyright owners *reasonable* notice of the use of their sound recordings under the statutory licenses set forth in 17 U.S.C. §§ 112 and 114 and for how records of such use shall be kept and made available to copyright owners (the "Proposed Rule"). *See* Notice and Recordkeeping for Use of Sound Recordings Under Statutory License: Notice of Proposed Rulemaking, Docket No. RM 2002, 67 Fed. Reg. 5761 (Feb. 7, 2002) (the "NPRM").

In enacting Section 114, Congress made clear that its goal, in significant part, was to facilitate the development of new transmission services. When it amended Section 114 and adopted Section 112(e) in the Digital Millennium Copyright Act in 1998, Congress also emphasized its intent "to prevent disruption of the existing operations by" Preexisting Satellite and other services. H.R. Conf. Rep. 105-796, at 80-81 (Oct. 8, 1998). The Proposed Rule frustrates these congressional goals.

The Preexisting Satellite Services acknowledge that copyright owners are entitled to receive "reasonable notice of the use of their sound recordings" under the statutory license. In fact, the Preexisting Satellite Services have already designed and implemented reporting systems that will provide copyright owners with such reasonable notice. As demonstrated below, however, the information that would be required under the Proposed Rule for the intended playlist, listener log, and ephemeral phonorecord log dramatically exceeds the needs of the

copyright owners and any notion of "reasonableness." Indeed, some of the proposed requirements are impossible for the Preexisting Satellite Services to comply with, and others will add potentially millions of dollars of expenses that could not be justified by the usefulness of the information provided. Such requirements are inconsistent with Congress's intent to develop these services. As discussed below, copyright owners can receive "reasonable notice of the use of their sound recordings" through reports including a dramatically reduced number of elements and by employing sampling methods similar to those that other copyright owner collectives such as ASCAP and BMI already use to effectuate their licensing and distribution functions.

For the reasons discussed below, the Copyright Office should reject RIAA's proposed regulations with respect to the Preexisting Satellite Services and craft regulations that both provides copyright owners with the reasonable notice of use set forth by statute and minimizes the burden on the Preexisting Satellite Services.

I. THE PREEXISTING SATELLITE SERVICES

XM and Sirius were the winning bidders in the satellite digital audio radio service ("SDARS") auction held by the Federal Communications Commission in 1997, together committing nearly $170 million dollars to the U.S. Treasury. After receiving their respective licenses, the companies began developing their systems to deliver a new form of radio to consumers, a medium that has not seen significant changes since the commercial development of FM in the 1960s.

A. Sirius Satellite Radio Inc.

Sirius is a satellite radio system that transmits 100 channels of music and entertainment programming to motorists throughout the United States. Sirius transmits 60 channels of commercial-free music and 40 channels of news, sports and entertainment programming for a monthly subscription fee of $12.95. A substantial portion of Sirius's programming is provided by third parties, including ABC, A&E Television Networks, BBC, Bloomberg, CNN, FOX News, Hispanic Radio Network, National Public Radio, and Radio Disney, to name a few. The majority of the programming formats are generally unavailable on radio stations in any single market. Moreover, unlike conventional stations that have an average range of approximately 30 miles before reception fades, Sirius provides coast-to-coast coverage across the continental United States. On February 14, 2002, Sirius began the first phase of its national service rollout in four metropolitan markets: Denver, Houston, Phoenix and Jackson, Mississippi.

Sirius is based in New York, New York, where it maintains its studio complex, digital automation system, and transmission facilities. From there, Sirius creates its programming and beams it to its three high-powered orbiting satellites and ground repeaters, which send it to Sirius receivers in subscribers' cars, boats, or homes.

In order to maximize the line of sight between Sirius's satellites and antennas and thus achieve reception of the highest quality, Sirius has placed its three satellites in orbits that pass directly above the United States rather than in geostationary orbits over the equator. In major urban areas, where tall buildings may interrupt the line of sight, a network of ground repeaters augments Sirius's satellite signal. As a way to attract subscribers to Sirius's satellite digital

audio radio service, Sirius also webcasts its 60 music channels on a nonsubscription basis at www.sirius.com.

B. XM Satellite Radio

On November 18, 2001, XM Satellite Radio, Inc. became the first national digital radio service in the United States, providing 100 channels of digital-quality, continuous, audio programming to cars and homes across the country. XM's transmission system consists of an uplink facility, two high-power satellites, terrestrial repeaters, and subscribers' receivers. XM programming is beamed to its satellites from its earth stations located in Washington, DC. The satellites then transmit the programming directly to subscribers' receivers throughout the footprint of the satellites. XM's programming originates from the largest digital broadcast facility in the country and consists of its own original programming, as well as programming supplied by third parties such as ABC, BET, Radio One, Hispanic Broadcasting, Salem Communications, C-SPAN, CNN, Bloomberg, NASCAR, ESPN and Radio Disney, to name a few. XM's programming offers the widest diversity of radio programming available nationally, including familiar contemporary formats, Hispanic, Asian, African and Jamaican music, Christian programming, children and youth programs, educational programming, and even a channel for new artists not signed by a record label.

XM has a website located at www.xmradio.com, which is a marketing tool for XM's core SDARS offering. Since its launch in June 2000, the website has offered excerpts from a limited number of channels to entice listeners to subscribe to the satellite service.

XM's dynamic programming differs significantly from the programming of preexisting music services and Internet webcasters. Unlike the existing music services that are offered through cable and satellite television systems, whose programming relies almost exclusively on tracks from commercially available CDs, XM does not rely solely on music programming from its music library. Much of the music programming is outside of its control; for instance, an entire channel may be programmed by a third party or a third party may provide shorter programs on a number of channels. Moreover, XM provides talk, sports and other niche programming that all use sound recordings in various stages of programming.

II. THE COPYRIGHT OFFICE SHOULD ALLOW THE PREEXISTING SATELLITE SERVICES TO USE THEIR EXISTING REPORTING SYSTEMS, WHICH WERE DEVELOPED AT GREAT COST, TO PROVIDE REASONABLE NOTICE OF USE.

The Preexisting Satellite Services recognized that their performing rights licenses would contain some reporting requirements and have already developed their respective reporting systems based on existing models. Because their services are a hybrid, combining traits of both subscription services and traditional radio, the companies looked at a number of different data reporting models in developing their reporting systems, including the reporting requirement for the preexisting subscription services, terrestrial radio reporting requirements for musical composition performing rights licenses and the reporting requirements associated with the Section 118 compulsory license. The Preexisting Satellite Services believe that their existing reporting systems are more than adequate to provide copyright owners with the reasonable notice of use of their sound recordings required under the statute.

A. XM Satellite Radio

XM uses a digital asset management system designed especially for XM by Dalet Digital Media Systems. The Dalet system database includes nine fields for housing metadata from the sound recordings placed in the system:

(i) track title;

(ii) artist;

(iii) composer;

(iv) item code (a unique Dalet identifier for the recording);

(v) genre;

(vi) duration;

(vii) album title;

(viii) reference code (which XM has populated with the UPC); and

(ix) record label.

The ingestion of metadata into the Dalet database system is a labor-intensive data entry and research process that varies significantly depending on the source of the programming. The simplest scenario is the commercially available CD. During this process, metadata from those CDs is entered into Dalet by a music librarian clerk who takes the information from an album or CD cover. Once the ingestion process is complete, a program director or DJ selects the music he wants to play from the music available in the Dalet database, and the metadata, once entered, is associated with that recording. A report of music and associated metadata can then be generated. More difficult are promotional CDs or MP3 files received from the record companies that may

contain limited metadata such as track title, artist and label. The music librarian clerk enters the available data and leaves the other fields unpopulated.

The most significant difficulty lies in obtaining and entering the metadata from non-commercially produced compilations and discrete programs or entire channels provided to XM by third parties, which constitutes nearly 20% of XM's programming. Parties that program entire channels or provide discrete programs do not always use the Dalet system as a source of programming. In that instance, XM assigns a reference code to the third-party content; but because of limitations in the Dalet system, the metadata associated with this audio cannot be entered into that system. A separate proprietary performance rights management system ("PRMS") is required to record and track this metadata. Again, the metadata provided by the third party must be manually entered into the system if it is to be provided in electronic format to the rights holders. Manually entering metadata associated with sound recordings from entire channels is extremely burdensome and requires a significant expenditure for data entry personnel. Moreover, given the number of programs and channels that will require this data entry, XM must rely on those third parties for accuracy and completeness of the metadata associated with their programming.

In order to generate comprehensive play list information, XM must gather metadata from Dalet, Powergold (the scheduling software that XM uses), Encoda (the advertising scheduling software) and the PRMS that contains third-party information. This reporting function requires the development of specialized computer programs to extract and report the information.

XM estimates that costs attributable to developing the PRMS that maintains the metadata from third-party programs and the costs attributable to developing the reporting system to coordinate and report the information from Dalet, Powergold, Encoda and PRMS are approximately two million dollars. This estimate includes necessary hardware, software, and personnel required to create these systems. Significantly, this estimate does not include the costs for Dalet to create the entire digital asset management system that provides a number of functions for the company. The annual cost of maintaining these systems is just over a half million dollars.

B. Sirius Satellite Radio

Sirius uses a reporting system that is a feature of Selector, Sirius's music scheduling software. In assessing a possible scheduling and reporting system, Sirius recognized that Congress treated the Preexisting Satellite Services, in all material respects, like the preexisting subscription services in the DMCA amendments. Accordingly, Sirius acquired the version of Selector and its reporting feature that had been designed, with input from RIAA, for Music Choice (one of the preexisting subscription services). Sirius also hired former leaders of Music Choice's programming operations staff, who had helped design the reporting system, to run its programming operations. The information fields in these reports include:

(i) song title;

(ii) artist(s);

(iii) album title;

(iv) composer;

(v) publisher;

(vi) musical work performing rights licensor; and

(vii) label.

The reporting system also contains a unique item code used to communicate to Prophet, Sirius's automation playback software.

Entering the above information into Selector is a labor-intensive process, and the effort involved varies depending on the source from which the identifying information is obtained. The process is simplest where the source is a commercially available CD, which usually contains all of the aforementioned metadata. Much more problematic, however, are (1) promotional CDs provided by the record labels, (2) Hit Discs obtained from TM Century, a Dallas-based company that creates, produces, and distributes music for broadcast media use, or (3) older recordings, as none of these sources contain all of the above information. If information is not available for certain fields, the format manager or programming coordinator leaves those fields empty.

The biggest difficulty in reporting sound recording use data lies in obtaining and entering data from third-party content providers. Parties that program entire channels or provide discrete programs do not schedule their programs through Sirius's Selector system. In this case, Sirius makes an effort to acquire independent documentation of the music contained in these types of programs. Unfortunately, documentation often is not provided. Further, when Sirius does receive documentation, not all of the fields proposed by the Copyright Office are included. Also, any information that is obtained would have to be manually entered into an as-yet unidentified system. This, in itself, would require a significant expenditure of manpower and possibly even additional staffing. Further, if Sirius is required to report this information, it would have to rely

on those third parties for the accuracy and completeness of the data associated with this programming.

C. The Preexisting Satellite Services Are Able To Provide Significant Information Pertaining to Their Use of Sound Recordings, Subject to Certain Limitations.

As evidenced by the creation of the systems described above, the Preexisting Satellite Services recognized that copyright owners need to receive certain information in order reasonably to identify the sound recordings transmitted pursuant to the Section 114 statutory license. The Preexisting Satellite Services are willing to provide that information to the extent that (a) it is necessary to identify the sound recordings, (b) it is not unreasonably burdensome for them to provide that information, and (c) they have that information.

There are, however, a number of significant limitations on the Preexisting Satellite Services' ability to provide this information that the Copyright Office should consider in issuing final notice and recordkeeping regulations. First, while both XM and Sirius maintain databases of information concerning the sound recordings that they transmit, those databases do not contain fields for many of the reporting elements currently proposed by the Copyright Office. XM and Sirius have invested enormous human and monetary resources in developing their databases of information concerning their sound recordings as well as the reporting systems described above. XM estimates that it would literally cost millions of dollars to reprogram these databases to reorder the existing fields, include additional fields, create new reporting programs and input all of the additional metadata. Sirius acquired the reporting software that had been specifically developed in consultation with RIAA. Sirius has not been able to obtain an estimate of the cost of modifying this software. Moreover, as with any integrated computer systems, a radical

change in one aspect could have untold impact on the entire system. The Preexisting Satellite Services should not be required to incur these costs or risk their operations.

It would be especially onerous to obligate the Preexisting Satellite Services retroactively to track down and populate additional fields of information for sound recordings already listed in their database. XM, for example, maintains a database of information for 1.6 million sound recordings. XM estimates that, if the task of back-filling the metadata was outsourced, the cost would be between $800,000 to $1,000,000. If the task is performed internally, XM estimates that it would take 28 people a full year to complete the job. Under no circumstances should the Copyright Office require the Preexisting Satellite Services to "back-fill" information for their extensive databases. Any additional recordkeeping obligation resulting from this rulemaking should apply prospectively, after the effective date of the final rule, only.

Second, even on a going-forward basis, much of the music that the Preexisting Satellite Services play is provided by the record labels or comes from music services and does not contain many of the proposed reporting fields. Sirius, for example, obtains approximately 60-70% of its sound recordings from record labels in the form of promotional singles and albums, or compilation copies obtained from TM Century. The promotional singles that the record labels provide contain varying amounts of information, often as little as the title of the sound recording and artist. Even when they contain more information, these promotional singles and albums rarely contain a UPC or the same catalog number as the retail album (if a catalog number is present at all). The compilations obtained from TM Century typically contain only the title of the sound recording, artist name and record label.

Thus, the record labels themselves largely control the information that the Preexisting Satellite Services receive concerning the sound recordings in a significant portion of their repertory. It would be perverse to require the Preexisting Satellite Services to provide information to the collection and distribution agent of the labels when those very labels do not provide that information to the Preexisting Satellite Services in the first instance.

Third, many of the channels that Sirius and XM transmit contain programming provided to them by third parties. For the most part, satellite transmissions are a new, ancillary, and potentially expendable part of the business of these third-party programmers. The Preexisting Satellite Services must rely on sound recording information provided by these third parties. XM and Sirius have discussed the Copyright Office's proposed recordkeeping requirements with many of their program providers. The Proposed Rule would require the establishment of entirely new systems and recordkeeping processes that are simply not needed by these third-party programmers in the ordinary course of their primary businesses. It would be unreasonable to expect them to create entirely new systems simply to comply with rules applicable to this ancillary performance medium. In fact, faced with reporting obligations, many would likely conclude that participation in the new satellite medium was not worth the trouble. Further, Sirius and XM have entered into long-term agreements with many of these program providers and are simply unable to compel them to provide additional information.

While XM and Sirius are certainly willing to exert a reasonable, good-faith effort to obtain information from these third-party programmers, they should not be penalized for not reporting this information where a third party simply refuses to provide it, or provides

incomplete or inaccurate information. XM and Sirius propose that for programming provided by third parties, Sirius and XM will make a good faith effort to request this information from those third parties and pass through what they are provided to the copyright owners, similar to the good faith effort required of PBS and NPR stations in their reporting to ASCAP and BMI under the terms of the Section 118 license. *See* 37 C.F.R. §253.3(e).

III. THE COPYRIGHT OFFICE SHOULD PROMULGATE THESE RULES THROUGH CAREFUL CONSIDERATION OF THE CONGRESSIONAL MANDATE AND BY WEIGHING THE EVIDENCE PRESENTED BY ALL THE PARTIES.

A. Congress Has Mandated "Reasonable" Reporting Requirements that Do Not Place an Undue Burden on Digital Transmission Services.

Congress has made clear that, in establishing the statutory licenses, it attempted "to strike a balance among all of the interests affected thereby." S. Rep. No. 104-128, at 15-16 (Aug. 4, 1995); *see also* H.R. Rep. No. 104-272, at 14-15 (asserting that "legislation reflects a careful balancing of interests, reflecting the statutory and regulatory requirements imposed on U.S. broadcasters, recording interests, composers, and publishers") (Oct. 11, 1995). As the Senate Judiciary Committee stated in its report accompanying the 1995 Digital Performance Rights in Sound Recordings Act ("DPRA"):

> It is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, *without hampering the arrival of new technologies.*

S. Rep. No. 104-128, at 15 (emphasis added).

When Congress enacted the Digital Millennium Copyright Act in 1998, it specifically kept the Preexisting Satellite Services in their pre-DMCA position. Thus, the additional

programming restrictions in Section 114(d)(2)(C) and new fee-setting standard of Section 114(f)(2)(B) were not applied to the Preexisting Satellite Services. Rather, Congress preserved the fee-setting objectives with respect to Preexisting Satellite Services listed in Section 801(b), which included "minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." 17 U.S.C. §§ 114(f)(1)(B), 801(b)(1)(D). Congress took these steps to ensure that the Preexisting Satellite Services were not prejudiced in their reliance on the law as it existed when they committed to the investment in their systems and began the extensive preparatory steps necessary to launch their services. *See* H.R. Conf. Rep. 105-796, at 80-81 (Oct. 8, 1998). The notice and recordkeeping rules should accurately reflect, not undermine, this congressional mandate.[1] This is particularly true where, as here, the Preexisting Satellite Services similarly relied on the systems and rules developed for the preexisting subscription services, with which they were most closely analogized in the DMCA.

The operative statutory provision grants the Office authority to "establish requirements by which copyright owners may receive *reasonable* notice of the use of their sound recordings under this section." 17 U.S.C. § 114(f)(4)(A) (emphasis added); *see also id.* § 112(e)(5). The Copyright Office's interpretation of the statutory term "reasonable" must itself be reasonable and consistent with the goals of the underlying statute described above. As the United States Court of Appeals for the D.C. Circuit has observed, an administrative rule must be "reasonable and consistent with the statutory purpose." *Troy Corp. v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997); *see also City of Cleveland v. U.S. Nuclear Regulatory Comm'n*, 68 F.3d 1361 (D.C. Cir.

[1] Further, it would not make sense, and would impose a wholly needless and signficant burden, to require adoption of a different reporting system for the ancillary Internet activities of these

1995) (an agency's interpretation must be "reasonable and consistent with the statutory scheme"). A court will not uphold a rule "that diverges from any realistic meaning of the statute." *Massachusetts v. Department of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996).

To accomplish the statutory purpose of fostering the development of new digital transmission services in a manner consistent with the express statutory requirement of "reasonable" notice, a notice and recordkeeping rule must strike the balance described above between being accurate and complete on one hand and not unduly burdensome to collect, provide, and maintain on the other. The Copyright Office expressly recognized the importance of balancing the interests of sound recording copyright owners and transmission services in its recordkeeping rulemaking for the preexisting subscription services, asking the commenting parties to focus on "both the adequacy of the notice to the copyright owners of the sound recordings *and the administrative burdens placed on the digital transmission services in providing notice and maintaining records of use.*" Notice and Recordkeeping for Subscription Digital Transmissions: Notice of Proposed Rulemaking, 61 Fed. Reg. 22004, 22004 (May 13, 1996) (emphasis added). In this instance, the Proposed Rule fails to meet this statutory requirement. At least as applied to the Preexisting Satellite Services, the Proposed Rule seeks to achieve perfect accuracy to the point of redundancy, and, in doing so, imposes an unreasonably (and, in many respects, impossibly) high compliance burden for the Preexisting Satellite Services.

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services.

B. The Process Adopted by the Copyright Office in this Rulemaking Is Skewed in Favor of RIAA.

RIAA's Petition was limited to "nonsubscription services" and "new subscription services" that transmit sound recordings pursuant to the Section 114(f) and Section 112(e) licenses and explicitly *excluded* the Preexisting Satellite Services. RIAA Petition 1-2. The Copyright Office largely adopted the substance of RIAA's proposed regulations but expanded their scope to include the Preexisting Satellite Services, assuming that the requested requirements "seem[] reasonabl[e]" and preliminarily appearing to agree with RIAA's assertions that the requirements are "easily provided, [] not burdensome, and in fact, [are] currently provided by a number of licensees who have obtained licenses through negotiations with the RIAA and Sound Exchange." 67 Fed. Reg. at 5763. The Copyright Office then placed the burden on copyright users who "may find the requirements too stringent and burdensome" to *disprove* the reasonableness of these requirements by identifying "any problems they perceive with the proposed regulations and explain with specificity the reasons why the regulations are unworkable or unduly burdensome, or exceed the needs of the copyright owners." *Id.* The Preexisting Satellite Services, having developed systems in a good faith effort to supply the reports then being provided by other preexisting subscription services, now find themselves in the untenable position of arguing against the application of proposed regulations that were never proposed for them, even by RIAA.

Moreover, in taking this approach, the Copyright Office has placed the Preexisting Satellite Services at a severe disadvantage. First, the Office has unfairly allocated a burden of persuasion to the services. Second, the Office has improperly adopted RIAA's request without

any substantive explanation or showing of why any of the data elements are necessary to give copyright owners reasonable notice of the use of their sound recordings under the statutory license. Third, the approach will prejudice the Preexisting Satellite Services, which likely will have no opportunity to respond to any showing that RIAA does make in response to these comments. Fourth, the Copyright Office erroneously assumed that the notice and recordkeeping requirements of the Sections 114 and 112 statutory licenses include a duty on licensees to demonstrate compliance with the conditions of the licenses – a duty nowhere found in the statute or its legislative history – without even giving the Preexisting Satellite Services the opportunity to establish that monitoring compliance, as opposed to receiving notice of use, was not an appropriate use of the reported data.

1. The Burden of Proof Should Rest Equally on All Parties to this Rulemaking.

The Copyright Office's requirement that services who oppose RIAA's wish list should be required to disprove the reasonableness of RIAA's proposal, when RIAA has offered no evidence of its need for, or the reasonableness of, that proposal, violates fundamental principles of administrative law. In notice-and-comment rulemakings, *neither* the proponent *nor* the opponent of a rule should bear the burden of proof; rather, that concept is simply inapplicable. *See* Jacob A. Stein et al., 3 *Administrative Law* § 13.02[2], at 13-25 (2001) (citing *American Trucking Ass'ns v. United States*, 344 U.S. 298, 318-20 (1953)). In proceeding with this rulemaking, the Copyright Office should reconsider its baseline and not simply presume that RIAA's wish list is appropriate. Rather, the Copyright Office should evaluate each of RIAA's proposals in light of the evidence in this rulemaking to determine objectively which requirements

are necessary for copyright owners to receive reasonable notice of the use of their sound recordings and which requirements can reasonably be provided by the Preexisting Satellite Services.

In placing the onus on the Preexisting Satellite Services to rebut the reasonableness of RIAA's proposal, the Copyright Office has unfairly created a process by which RIAA can simply "lay back" during the initial comment period while others challenge its request and wait to provide the full support for its proposal at the reply comment phase. As a result, the Preexisting Satellite Services will not have an opportunity to respond to RIAA's arguments and evidence. That is fundamentally unfair. The Preexisting Satellite Services should have an opportunity to respond fully to any argument by RIAA that its requests are both necessary for RIAA to perform its collection and distribution functions and not unreasonably burdensome for the Preexisting Satellite Services to fulfill.

2. RIAA Does Not Provide Any Substantive Support for its Proposed Reporting Requirements.

RIAA's Petition provides no support for its proposed reporting requirements and no basis for the Copyright Office to conclude that RIAA's proposal "seems reasonable." RIAA stated that it was proposing reporting requirements that allegedly "evolved" from its negotiating experience with the handful of statutory licensees under Sections 112 and 114, which it claims "achieved a level of consistency" over "two years" of negotiating these licenses. RIAA Petition at 6. However, RIAA did not identify the specific agreements, did not attach copies of those agreements, and presented no evidence related to the negotiation of those agreements or their specific terms. The Preexisting Satellite Services can only assume that RIAA is referring to the

same 26 agreements that it proffered, largely unsuccessfully, as evidence of a supposedly appropriate royalty in the recently concluded eligible nonsubcription services Copyright Arbitration Royalty Panel ("CARP") proceeding and are left to speculate about the content of those agreements. *See In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9, CARP DTRA 1 & 2, Report of the Copyright Arbitration Royalty Panel at 2 (Feb. 20, 2002) ("CARP Report"). For a number of reasons, the Copyright Office should reject RIAA's reliance on these agreements as evidence that RIAA's proposed recordkeeping requirements are reasonable.

First, the RIAA did not include with its Petition copies of these supposed "standard" licenses, or even a summary of their pertinent terms. The circumstances surrounding those license agreements are relevant to determining whether the reporting requirements are "reasonable." It is fundamentally unfair for RIAA to be permitted to characterize the agreements under circumstances where there is no way for the Preexisting Satellite Services to verify the accuracy of RIAA's assertions.

Second, the CARP specifically found that 25 of the 26 agreements it reviewed were "unreliable benchmarks." CARP Report at 60. The CARP reviewed extensive evidence not available in this rulemaking proceeding and concluded that the agreements were the result of RIAA's scheme to manipulate the evidence before the CARP by picking off the potential licensees most "willing to pay higher rates for [sound recordings] than most other buyers pay" and inducing them to enter into agreements at RIAA's supra-competitive rate, on terms favorable to RIAA. CARP Report at 48-50 & 49 n.27. For these same reasons that caused the CARP to

reject these licenses as evidence of a reasonable market rate upon which willing buyers and willing sellers would agree, the licenses cannot be considered as evidence that the fee reporting requirements contained therein are reasonable.

Third, the fact that a handful of Internet webcasters *may* have agreed to these detailed reporting requirements under these circumstances is completely irrelevant to the inquiry of the form that reasonable reporting requirements should take, especially with regard to the Preexisting Satellite Services. According to RIAA, fully 736 web sites and 1557 broadcasters have filed notices of intent to rely upon the Section 114 statutory license – a total of 2293, in all. *See In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9, CARP DTRA 1 & 2, Written Direct Testimony of Steven Marks at 4 & n.2 (Apr. 11, 2001). The 26 agreements that RIAA relies upon thus represent only a small fraction of the entities intending to transmit sound recordings pursuant to the statutory licenses. Moreover, RIAA itself admits that the data reporting requirements in even this tiny universe of 26 unreliable benchmarks are not uniform but "have varied somewhat over time and among agreements." RIAA Petition at 6.

Finally, RIAA has made no showing whether even these 26 licensees actually submitted use reports at all or, if they did, of the circumstances underlying their submission. For example, did each and every licensee file the reports on time for each and every reporting period set forth in the license? Did the reports include each of the required data elements, or were some elements missing from the reports? It would be particularly unfair to require the Preexisting Satellite Services to challenge the recordkeeping requirements allegedly set forth in these

phantom agreements where RIAA will not allow the Preexisting Satellite Services to confer with the licensees to determine first hand their experience in complying with the reporting terms.

3. The Reporting Requirements Should Not Be Based on the Demonstration of Compliance with Statutory License Conditions.

Another inequity of the Copyright Office's proposal is that it incorrectly assumes that copyright owners are entitled to receive not only "reasonable notice of use of their sound recordings" but also detailed records demonstrating users' compliance with the terms of the licenses – such as the sound recording performance complement – without first affording the Preexisting Satellite Services the opportunity to challenge this assumption. *See* NPRM, 67 Fed. Reg. at 5763 (observing that proposed recordkeeping requirements "seem[] reasonably based on the premise the copyright owners need certain specific information to monitor compliance and use by the Services").[2] Many of the more burdensome aspects of the Proposed Rule stem directly from this erroneous premise, which is not consistent with the Copyright Act.

The plain language of the operative statutory provisions suggests that Congress did *not* intend to impose affirmative reporting requirements demonstrating compliance with the sound recording performance complement or, for that matter, any of the other statutory license requirements. Rather, the provision merely entitles copyright owners to records "of the *use* of

[2] The Office also reached this result in promulgating the interim rules governing reporting by the preexisting subscription services, but offered no basis in Section 114 substantiating its determination. Rather, the Office simply stated that the DPRA "contemplates that digital subscription services keep and make available ... records of use to enable sound recording copyright owners to generally monitor Services' compliance with the sound recording performance complement" and "that establishing such a reporting requirement is within its rulemaking authority under 17 U.S.C. 114 (f)(2)." Interim Regulations on Notice and Recordkeeping for Digital Subscription Transmissions, Docket No. RM 96-3B, at 8 (July 1, 1998) (internal citations omitted).

their sound recordings" under statutory license – not records of *compliance* with the statutory conditions and not records of the use of *all* copyrighted sound recordings.[3] Indeed, most of the other license conditions imposed under the DMCA are not amenable to any evaluation from use reports. It is not possible, for example, for use reports to demonstrate whether a webcaster's site is providing an advance program schedule or is accompanying a performance with a misleading image. A report of use cannot disclose that a service is making advance oral announcements of programs or is inducing copying. Simply put, these are not within the ambit of "notice of use" of a sound recording. Moreover, just as it is impossible to evaluate compliance with the other statutory conditions from use reports, it is difficult, if not impossible, reliably to evaluate compliance with the complement using census reports of use. Different owners may own the rights in different tracks from the same CD. It is not uncommon for recording artists to switch labels during their career. If four tracks with different owners from the same CD were played within a three-hour period, no single owner would be entitled to information from which it could identify a violation of the complement, as owners are only entitled to notice of use of their own sound recordings. If five sound recordings by the same artist that were recorded while under contract to different labels were played within a three-hour period, no single owner would be entitled to information from which it could identify a violation of the complement.

The fact that copyright owners have agreed to employ a collection and distribution agent to process records of use does not grant them more rights to monitor compliance than those

[3] The Copyright Office has recognized the principle that an individual copyright owner is entitled to notice of use only of its own works. *See* Interim Regulations on Notice and Recordkeeping for Digital Subscription Transmissions, Docket No. RM 96-3B, at 8 (July 1, 1998) (observing that "section 114(f)(21) requires that copyright owners receive notice of use of *their* sound recordings" (emphasis in original)).

accorded to copyright owners individually. Use of such an agent serves to ease the administrative burden on both owners and users of submitting and reviewing such records – *not* to convert the agent into a "big brother" figure to monitor compliance with the license terms. The existence of an agent should not engender extensive additional recordkeeping and reporting burdens for the services that copyright owners would not otherwise possess if collection and distribution occurred on an owner-by-owner basis.

Indeed, the provision in the Copyright Act that specifically permits copyright owners to designate common agents to perform certain functions relating to the statutory license without running afoul of the antitrust laws supports the view that compliance monitoring is not part of the joint agent function (or the reporting requirements). That section expressly states that those agents may only "negotiate, agree to, pay, or receive payments" free from antitrust concerns. *See* 17 U.S.C. § 114(e)(1). Where a CARP has set the statutory rates and terms, the only permissible function of a common agent for copyright owners is to "receive payments." Nowhere does this provision permit common agents also to "monitor compliance with the statutory license conditions," a fundamentally different and independent activity from receiving and distributing payments. Indeed, in the House Judiciary Committee Report accompanying the DPRA, the Committee stated that this provision "is a very limited antitrust exemption" that "authorizes the copyright holders to take actions which are necessary to effectuate Congress's intent to enable the statutory goals to be met. It is important to emphasize that it encompasses only certain actions that are taken . . . ." H.R. Rep. No. 104-274, at 22 (Oct. 11, 1995). The report also makes clear that where there is no such antitrust exemption, copyright owners must act "on their own" rather than through common agents. *Id.* at 23.

Further, requiring reports of use to demonstrate license compliance leads to particularly absurd results in connection with ephemeral recordings. The ephemeral license metric proposed by the CARP in the nonsubscription services proceeding – the only ephemeral license rate established by a CARP to date – is a percentage of the performance fee that does not depend in any way upon the number of copies made or when those copies were made. There is no justification at all to establish a complete reporting system that is unrelated to fees paid. *See* Part IV.C *infra*. Many, if not all, of the proposed requirements with respect to the Section 112 license could be eliminated if the requirements were limited to those necessary to verify payments and distribute them to copyright owners.

In short, nothing in the Act entitles copyright owners to reports that provide an affirmative demonstration of compliance with each of the statutory license conditions.

IV. THE NUMEROUS REQUIREMENTS PROPOSED BY RIAA ARE BURDENSOME AND REDUNDANT; COPYRIGHT OWNERS CAN OBTAIN REASONABLE NOTICE OF THE USE OF THEIR SOUND RECORDINGS FROM A SCALED-DOWN LIST OF REPORTING ELEMENTS.

A. The Intended Playlist Reporting Elements Should Be Narrowed to a List of Necessary Elements That Excludes Information That Is Cumulative or Unreasonably Burdensome for the Preexisting Satellite Services To Provide.

1. Copyright Owners Can Accurately Calculate and Distribute Royalties By Utilizing a Limited Number of Elements.

The following information, all contained in the Preexisting Satellite Services' current systems, would allow RIAA to determine the Services' sound recording usage and accurately to distribute royalties:

(i) name of the Service or entity;

(ii) sound recording title;

(iii) artist; and

(iv) retail album title, where available.

As noted above, the Preexisting Satellite Services often, but not always, have album information. The Preexisting Satellite Services are willing to provide such information where it is provided to them or is readily available from the source of the sound recording that is being performed.[4] In the vast majority of cases, provision of title, artist, and album information will be sufficient to identify a sound recording. Indeed, Barrie Kessler, the Chief Operating Officer of Sound Exchange, RIAA's licensing and distribution arm, testified during the nonsubscription services proceeding that for all sound recordings (except possibly some included on compilations), title, artist, and album information was sufficient to identify the track. *See* Docket No. 2000-9, CARP DTRA 1 & 2, Tr. 11828-30 (Kessler).[5] Although not strictly required for purposes of fee calculation or distribution (regardless of whether the metric is based on revenue or performances), the Preexisting Satellite Services are also willing to report: (i) the date of transmission, (ii) the time of transmission, (iii) time zone (iv) channel and (v) record label, subject to the limitations discussed below.

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4 Further, to the extent that it is not available to the Preexisting Satellite Services, RIAA, as the representative of approximately 90% of the sound recordings legitimately distributed in the United States, is in a far better position accurately to ascertain this information than the Preexisting Satellite Services. In any event, there is reason to believe that artist and title alone suffice to identify a sound recording. Even when a particular song performed by a particular artist appears on more than one album – *i.e.*, on the artist's original release information and on compilation albums – only in the rarest cases would the copyright owner change based on the album on which the song appears

5 Before becoming Chief Operating Officer, Ms. Kessler was the Director of Data Administration for Sound Exchange.

No doubt, RIAA will argue that additional data elements will facilitate its identification of a particular sound recording. But the United States District Court for the Southern District of New York rejected a similar argument by ASCAP in *United States v. ASCAP (In re Application of Salem Media et al.)*, 981 F. Supp. 199 (S.D.N.Y. 1997). There, ASCAP had argued that radio stations operating on a per program license (whose fee depended on the identity of the musical works performed) should be required to report: "(1) title; (2) name of composer, author, and publisher; (3) name of performing artist; (4) name of record company; and (5) all other information as to composer, author and publisher in full as shown on the label." *Id.* at 221. There was evidence at trial, however, that ASCAP was actually able to identify songs based on title and artist information alone. *See id.* Despite ASCAP's argument that "the more information the station gives us, the easier it is to identify the work," the court found that "ASCAP's reporting requirements are excessive." *Id.* The court then scaled back ASCAP's proposed reporting requirement to include only (a) title and (b) performer, composer, *or* recording artist." *Id.* No further information should be required, and the Copyright Office should carefully scrutinize any request made to the contrary by RIAA.

Nor has RIAA offered any demonstration of the scope of the errors that failure to provide additional information would produce or the burden that addressing those errors would impose on RIAA. Even if additional information will enhance accuracy, that added accuracy comes at a cost to the Preexisting Satellite Services. RIAA should bear the burden of demonstrating that the benefit of that added accuracy somehow justifies the cost. The Preexisting Satellite Services submit that RIAA will be unable to sustain that burden, particularly where, as here, RIAA has no

basis to believe that added accuracy will significantly affect fees paid by the Preexisting Satellite Services to copyright owners or will have a significant impact on RIAA's distribution.

2. The Preexisting Satellite Services Should Not Be Required to Report Elements That Are Duplicative, Unreasonable, or Impossible To Provide.

The Preexisting Satellite Services oppose the inclusion in the regulation of the following reporting elements, which are unnecessarily duplicative, unduly burdensome, and, in some cases, simply impossible to provide. Because RIAA has provided no justification for any of the proposed data requirements, the Preexisting Satellite Services are left to speculate in many cases as to the reason they are included in the Proposed Rule. In these comments, the Preexisting Satellite Services offer a preliminary response based on their incomplete understanding of RIAA's goals.

a. Channel

The channel does not appear to be necessary to determine the Preexisting Satellite Services' sound recording usage. Rather, it appears to be related solely to the sound recording performance complement. The Preexisting Satellite Services would be willing to indicate the channel in some fashion, somewhere on their report to facilitate identification, if the data element can be added without reprogramming their reporting systems.

b. Type of Program: Archived, Looped, Continuous, or Live

RIAA does not need to know the type of program in which a performance was made in order to calculate royalty fees or to make distributions. Rather, this proposal appears aimed at monitoring compliance with certain statutory conditions governing archived and continuous

programs. *See* 17 U.S.C. § 114 (d)(2)(C)(iii). As discussed in Part III.B.3 *supra*, the Preexisting Satellite Services do not believe that copyright owners are entitled to such records. Further, providing this information would be unreasonably burdensome. Neither company's current systems have a data field for this item.

c. Time Zone Where Transmission Originated

With respect to the companies' satellite operations, this proposed requirement is wholly unnecessary to either royalty payments or distributions. As explained in Part IV.B *infra*, the Preexisting Satellite Services are unable to gather listener data; therefore, no per listener per performance fee metric can established for the satellite services. Even with respect to the Preexisting Satellite Services' Internet services, which are subject to a per listener per performance metric, there is no need for RIAA to achieve a perfect, one-to-one correspondence between each and every listener and each and every sound recording performance in order to achieve perfect, as opposed to reasonable, accuracy in its distributions. "100% accuracy" is a largely unattainable goal and will cause the reporting burden to exceed the value of the license if the Copyright Office insists upon such a draconian standard.

Given the technology that the Preexisting Satellite Services employ, the time zone would be constant. Even though the Preexisting Satellite Services do not believe the data element is necessary, they would be willing to indicate the time zone in some fashion, somewhere on their reports, if it can be added without reprogramming their reporting systems.

d. Numeric Designation of Place of the Sound Recording Within an Archived Program

The Preexisting Satellite Services can only assume that this proposed requirement is geared solely toward monitoring compliance with statutory conditions, which the Preexisting Satellite Services believe is an improper use of sound recording usage records. *See supra* Part. III.B.3. Identifying the numeric designation of the place of a sound recording within an archived program is unnecessary to gauge sound recording usage, as it does not even provide enough information to match listeners with sound recordings, assuming that all of the other information necessary to do so were otherwise available. Further, although XM includes archived programming on its website, it has programmed the site with a random start feature. As a result, it is not possible to identify for any given listener where the program begins or the order of songs heard by that listener. Moreover, neither Sirius nor XM has any field in their music databases to store this information.

e. Duration

Neither company tracks the duration of the actual performance; rather, each company enters the actual duration of the sound recording in its respective database. Given the complete irrelevance of duration information to the royalty calculation and distribution process, the Copyright Office should delete this data item from its recordkeeping requirements.

f. ISRC

RIAA's request to receive the International Standard Recording Code ("ISRC") is symptomatic of the over-reaching nature of its entire request. As the Copyright Office is no doubt aware, the ISRC constitutes a unique 12-character identifier for a recording, such that

providing this code would enable the recording industry to quickly identify each sound recording transmitted and would obviate the need to provide the other data elements in the intended playlist. But as Barrie Kessler, Sound Exchange's Chief Operating Officer, testified during the nonsubscription services proceeding: "there's no public place to go and get the ISRC number." *See* Docket No. 2000-9, CARP DTRA 1 & 2, Tr. 11836 (Kessler). Even RIAA itself, who owns and controls the database including ISRC information, does not have access to ISRC information for all sound recordings in its repertory. Rather, that information exists for "somewhere . . . in between" 10-80% of those recordings, and it widely varies among RIAA members and among individual labels within each member depending on their individual business practices. *See id.* at 11834-35, 11839 (Kessler). The older a sound recording is, the less likely that it will have an affiliated ISRC. *Id.* at 11836 (Kessler).

Nevertheless, Ms. Kessler insisted that this field should be a required element because RIAA "wanted to provide a format that we could use in the future as well as the present." *Id.* at 11837-38 (Kessler). Until ISRC information becomes broadly available to the general public (or at least available to Section 112 and 114 statutory licensees), the Copyright Office should not require this information to be reported at all, even if it might be "available and feasible" for a handful of sound recordings."

If the Office does require RIAA to provide access to its database to statutory licensees so that reporting ISRC information becomes more practicable, the Office should relieve the Preexisting Satellite Services who choose to report ISRC from reporting any of the other sound

recording identifying elements set forth in the Proposed Rule.[6] Ms. Kessler herself has termed ISRC information the "magic bullet" that will render reporting other elements unnecessary:

> CHAIRMAN VAN LOON: Then I understand your testimony directly that the monthly logs that you receive have a slot for IRSC and anyone that doesn't have it -- or you hope they're going to have it, it's only the ones that don't where you have to go back and do the hunt?
>
> THE WITNESS: Right. To me the ISRC one day will be the magic bullet in closing the data loop. It doesn't exist yet. There's no place to access it currently.

Id. at 11836-37 (Kessler). Forcing copyright users to report a much more burdensome and complicated set of identifying information while withholding the "magic bullet" that would enable those users to identify sound recordings quickly and accurately constitutes yet another example of the complete imbalance between establishing "reasonable" versus "accurate" reporting requirements reflected in the Proposed Rule.

In any event, the ISRC has only relatively recently begun to be embedded in sound recordings by major record labels and to a lesser extent by the independent labels. XM and Sirius use and will continue to use recordings that do not have the ISRC embedded in the recording.

g. Release Year

The release year information appears to be another data point in determining the copyright owner; however, the information that the Preexisting Satellite Services have agreed to provide should suffice. Neither company maintains this information in its digital automation

[6] These elements would include the subset of elements I, K, L, M, N, O, P, and Q that the Copyright Office ultimately adopts.

software. It would require tremendous effort for the Preexisting Satellite Services to go back and redesign their software to create a field for this information and then populate the field for each sound recording in their extensive music libraries. Moreover, the companies receive much of their music from the record labels, which often do not provide release year information with the promotional CDs that they send.

h. Recording Label

RIAA's request for record label information superficially appears to be reasonable, and both XM and Sirius have label fields in their existing systems. Unfortunately, however, the companies' experience to date has been that this field is very difficult to populate in a meaningful way for a number of reasons related to how the record companies identify themselves and how Sirius and XM obtain sound recordings. Moreover, SoundExchange will be unable to rely on this information, as reported, for a number of reasons.

The songs contained in the Preexisting Satellite Services' systems may be taken from any number of places such as recently released CDs, cassettes, or vinyl albums. The data associated with the particular recording will be entered from the cover of the album or CD containing the particular recording. A CD may contain a reference to both a marketing and distribution label. The data entry technician is most likely to enter the first reference that he encounters, and that may or may not be the appropriate information for this field. The situation is further complicated because the term "label" is used in a number of ways in the record industry. For example, each of the five major record companies are referred to as "labels." However, each of these companies have dozens of marketing trademarks, some of which operate as divisions or

subsidiaries. These are also called labels, and range from the well-known to the obscure. It is these, often obscure, marketing names that RIAA seeks.

To add to the confusion, the name of the record label taken from the album or CD may not reflect the current owner of the sound recording, especially if it is an older recording. The recording industry has seen substantial consolidation over the past 20 years, and the label that originally released the album may no longer exist or have an interest in the copyright. Moreover, sound recording catalogs may be sold. RIAA will therefore necessarily need to verify the proper ownership before distributing any royalties.

Proper ownership information could much more easily be determined through a cross-reference of data elements that remain constant over time such as the data elements that the Preexisting Satellite Services propose to provide. As RIAA will regularly need to verify and update ownership information, capturing and reporting potentially outdated record label information is unreasonable and unnecessary. Thus, this field should be required only to the extent reasonably available from the recordings used by the Preexisting Satellite Services.

i. UPC

The UPC is merely another way to identify an album title, which the Preexisting Satellite Services have already proposed to report. While XM's database contains the UPC for sound recordings originating from its system, Sirius's music reporting system does not have a field to store this information and Sirius has not maintained it for the music in its existing database. Also, Sirius obtains approximately 60-70% of its music either in the form of promotional copies from the labels or from the TM Century library, which typically do not contain any UPC

information. Even if UPC information were available, it would be extremely time-consuming and costly for Sirius to modify its databases to include this data element, and even more expensive to fill in this information for data records already entered into the databases.

j. Catalog Number

The catalog number is merely an alternative, more complicated, means of identifying the album. Often, the source material provided to Sirius and XM does not contain catalog numbers, or contains numbers that differ from the number on the retail album. Moreover, the catalog number is more difficult to capture than the album title. The album title will generally be emblazoned across the cover art of the album, CD or cassette, while the catalog number is a tiny entry on the spine. Data entry mistakes are more likely to occur when entering a catalog number than when entering an album title. XM's database does not contain this data element or a field to populate. Although Sirius's database currently includes a field for catalog number, it is only partially populated.

k. P-Line Information

This information – namely, the copyright owner information at the time of release – is merely another means of identifying the sound recording and, as such, is duplicative of the title, artist, and album and record label information that the Preexisting Satellite Services have proposed to provide. This information also risks being out of date, as copyright owners often change.

Even if the information were helpful for copyright owners to identify their sound recordings, reporting it would be unduly burdensome. Neither XM nor Sirius maintains a field

for this information in its database. As is the case with adding any of the other fields discussed above, the burdens imposed on the Preexisting Satellite Services to modify their database, track down this information, and populate this field would be huge and would certainly outweigh any marginal benefit that RIAA may argue it would achieve by receiving this information. Once the record labels' collective has identified a particular sound recording – which, in most cases, it will be able to do from the title, artist, and, where available, album information that the Preexisting Satellite Services have offered to provide – it is in a far better position to ascertain the copyright owner directly from the labels than the Preexisting Satellite Services are to report that information in the first instance.

I. Music Genre

Genre information has very little, if any, relevance to ascertaining sound recording usage or to identifying sound recordings that are used. Recordings typically fit into multiple genres and there are no standards. For example, is Stairway to Heaven an "oldie," "classic rock," "heavy metal," "rock," "hard rock," "album oriented rock?" The more likely explanation for RIAA's attempt to obtain genre information is to obtain useful marketing information (*i.e.*, to determine sound recordings with "cross-over" appeal), which the Copyright Office should not permit.

Sirius did not include a genre field in its reporting system. Thus, it would be forced either to report this information manually or create and populate such a field, which would require substantial investments of both money and labor to accomplish. It should not be required to undertake this burden. XM does assign genre information to the sound recordings in its

database; however, the characterization of the genre is determined by XM and is generally used for internal programming purposes. XM would be willing on a voluntary basis to provide the genre information as determined by XM.

3. The Preexisting Satellite Services Should Not Be Obligated To Provide Information That the Record Labels Themselves Do Not Consider Important Enough To Provide to the Services.

As previously discussed, much of the music that the Preexisting Satellite Services broadcast is provided to them by the record labels in order to obtain free airplay, and the labels themselves do not provide many of the data elements that their collective now seeks. As a matter of fundamental fairness, and to allocate the burden on the party best able to shoulder it, the Copyright Office should exempt the Preexisting Satellite Services from reporting information concerning a particular sound recording if the sound recording was obtained from a record label and that label did not supply that information to the Preexisting Satellite Services in the first instance.

B. The Listener Log Requirement of the Proposed Rule Is Impossible for Satellite Services and Unreasonable for Internet Services.

1. The Listener Log Is a Technical Impossibility for the Satellite Services.

The Preexisting Satellite Services' primary response to the listener log requirements of the proposed rule is simple: it is not possible for them to provide this information. The companies' satellite digital audio radio services are one-way, broadcast-like services similar to over-the-air television and radio. With such a service, XM and Sirius transmit programming directly to subscribers, but subscribers cannot use their receivers to relay information back to XM or Sirius or among other subscribers. Accordingly, the Preexisting Satellite Services do not,

and cannot, know how many listeners are listening at any given time, let alone to what channel. This requirement cannot, and should not, apply to the satellite services.

Even if it were possible to provide this information, Sirius and XM question the Copyright Office's authority to issue detailed listener log recordkeeping requirements. Sections 112 and 114 only authorize copyright owners to receive notice of *use* of their sound recordings, not notice of *listening*. Further, there is no reason to believe that the number of listeners will have any effect on the royalty fee due from the satellite services or on the distribution to be made with respect to their performances.

2. The Burden of Providing Listener-by-Listener Internet Logs Far Outweighs the Value of Such Logs.

Neither XM nor Sirius receives server records from their respective service providers on a listener-by-listener basis. At present, the companies track only generalized information regarding the daily number of hits and average length of a website visit.

Moreover, even if it were available, the potential volume of information in the listener log is enormous. For each session on the website, the service would need to provide seven fields of information about each listener, including the date and time that a user logs in and out, the time zone and country that the user receives the transmission.

Against this enormous burden is an extremely small potential benefit. The Preexisting Satellite Services are able to provide aggregate Internet listener data as discussed above. From those data, it is possible to determine the average number of listeners to a service. Such a report

would allow a very close to exact estimate of the total royalty fee due and a reasonable estimate of the number of listeners.

By analogy, ASCAP and BMI distribute millions of dollars to a diverse group of musical works copyright owners on the basis of statistical sampling of their licensees. In accordance with the terms of their respective blanket radio licenses, ASCAP and BMI can obtain detailed playlists from their licensees for a discrete period of time.[7] The comprehensive playlist information that the Preexisting Satellite Services propose to provide to SoundExchange far exceeds the playlist information to which ASCAP or BMI have access for the distribution of royalties. In the previous rulemaking, RIAA itself acknowledged that sampling would be an acceptable method of determining performances to permit RIAA to distribute the royalties it collects. RIAA Comments, Docket No. RM 96-3A, at 2 (Aug. 25, 1997).

Moreover, SoundExchange has no alternative other than to rely on statistical analysis for the preexisting subscription services because those services cannot provide any detailed listener information. SoundExchange will presumably use that same system for distribution of royalties stemming from the Preexisting Satellite Services, as they, too, cannot provide any detailed listener information.

Even beyond the foregoing, there are significant problems with specific aspects of RIAA's request. For example, the Proposed Rule requires reporting of various time data in the

[7] For ASCAP, the current radio blanket license provides that licensees will provide playlist information for one month each year if such playlist information is requested by ASCAP. *See* ASCAP, Local Station Blanket Radio License, ¶ 6. However, ASCAP relies primarily on its own "listeners" to provide ASCAP with the performance data necessary to distribute royalties. BMI requires reports of only one *week* per year. *See* BMI, Radio-92 Blanket License, ¶ 11.

local time or time zone where the user is located. However, it is not possible to determine any user's location from Internet server logs. Moreover, XM does not require listeners to log on. Although Sirius asks users to log on, the log-on information is not maintained in a way that would allow it to be matched to user session data. Further, even such a log-on would not necessarily provide accurate information. More to the point, there is no conceivable reason for RIAA to know where the user is located or to request time and date data based on the user's time zone.

The request for information about the country where a listener is located similarly serves no purpose. The statutory license applies only to performances within the United States and reports may only be required for performances covered by the statutory license. It is not clear whether RIAA is taking the position that performances streamed from the United States to users outside this country are covered or not. The law is not settled on this point, and this is not an appropriate time or place to dispute or to attempt to resolve the point, as regardless of outcome, there would be no reason to report this information. If such performances are covered by the license, the user's location is not relevant. If such performances are not covered, the Copyright Office has no authority to order reports about such performances. In light of the burden of providing user-by-user country information, this information should not be required.

Finally, any request for user-identifying information (*i.e.*, the "unique user identifier assigned to a particular user or session") raises grave privacy concerns. The Proposed Rule does not define the "unique user identifier assigned to a particular user or session." Those unique identifiers may be tied to personally identifiable information that a company gathers on its

subscribers or those interested in receiving information regarding the company's service. RIAA needs to provide a full explanation of its supposed reason for requesting such information, and the Preexisting Satellite Services should have the right to respond. Webcast listeners should not be made to worry about how information about their listening habits may be used.

C. The Ephemeral Fee Structure Eliminates Any Possible Need for a Detailed Ephemeral Log.

RIAA's Petition was drafted well before the decision in the non-subscription services CARP. However, the Panel's determination made clear that the number of ephemeral recordings made and destroyed, the songs recorded, and the creation and destruction dates of those recordings are wholly unrelated to the royalty payments to be made by the services. The ephemeral recording fee was merely a percentage of the *total* performance license fee for any and all ephemeral recordings. This makes the proposed ephemeral log unnecessary. Because the ephemeral fee is derived from the performance fee, logically, SoundExchange should pay its members on that basis. Any other basis would pay copyright owners of performed songs less than the revenue generated by those songs. Indeed, ASCAP has long professed to adhere to a "follow-the-dollar" approach – *i.e.*, distributing royalties to members whose works generated those fees – in determining its member distributions. *See, e.g.*, http://www.ascap.com/playback/1999/september/payment.html ("ASCAP is guided by a 'follow-the-dollar' principle in the design of its payment system. In other words, revenues collected from radio stations are paid out to those members whose works are performed on radio . . . ."). Nor can RIAA be heard to argue that using performance fees as a proxy for ephemeral recording royalties is not appropriate. That was precisely the model advocated by RIAA in the

nonsubscription services CARP. *See* RIAA's Proposed Findings of Fact and Conclusions of Law, Docket No. 2000-9, CARP DTRA 1 & 2, ¶ 244 (Dec. 3, 2001) (proposing ephemeral fee of 10% of performance royalty).

Moreover, neither XM nor Sirius have systems in place to track and report this information. It would be enormously burdensome for XM and Sirius to develop the systems necessary to provide the requested log. The sound recording identifying elements are unduly burdensome to report for the reasons discussed in Part IV.A.2 above. In contrast, the Copyright Office itself already has determined that such copies "have no economic value independent of the public performance that they enable." *See* U.S. Copyright Office, DMCA Section 104 Report at 144 (Aug. 2001). In addition, the sheer paperwork burden in maintaining these records would be enormous. Sirius transmits 100 channels, 60 of which are music, on a nationwide, 24/7 basis, and already currently webcasts those channels on its Internet site. If one only considers a single cache copy made for the satellite transmission of 60 music channels alone and assumes that 15 sound recordings per hour are transmitted, this results in the creation of nearly 8 million cache copies created and destroyed in a single year.[8] Moreover, the statutory license is not needed for a *single* ephemeral, so the reporting burden would be at least double this number. Across all Section 112 licensees, the volume of paperwork would be crushing – faced with so much paper, it is difficult to imagine what benefit RIAA perceives it will gain from obtaining these records of copies, which the Office has already deemed to be worthless.

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[8] 60 channels * 15 ephemeral recordings per channel per hour * 24 hours per day * 365 days per year = 7,884,000 ephemeral recordings.

V. NON-FEATURED PERFORMANCES OF SOUND RECORDINGS SHOULD BE EXPRESSLY EXCLUDED FROM ANY RECORDKEEPING REQUIREMENTS.

RIAA's Petition for Rulemaking expressly acknowledged that it was not requesting that the Copyright Office establish recordkeeping requirements for non-featured uses of music, such as incidental or background uses. *See* Petition for Rulemaking To Establish Notice and Recordkeeping Requirements for the Use of Sound Recordings in Certain Digital Audio Services (May 24, 2001) ("We also reserve the right to request information concerning non-featured uses of sound recordings, although *we have not done so at this time*." (emphasis added)).

The Copyright Office's proposed regulations, however, do not specify the types of sound recordings for which it proposes that records be kept. On their face, they could be read to require users to maintain records relating to non-featured uses of music in addition to featured uses. For a number of reasons, the Copyright Office should clarify in its final regulations that the recordkeeping requirements apply only to featured uses of sound recordings. First, no Section 112 or Section 114 license to date has imposed a separate license fee at all, much less a performance-based license fee, for incidental uses. In the nonsubscription services proceeding, the CARP proposed a feature fee but specifically excluded from the license fee "transmissions or retransmissions that make no more than incidental use of sound recordings, including but not limited to, certain performances of brief musical transitions, brief performances during news, talk and sports programming, commercial jingles, and certain background music." *See* CARP Report at 108.

Second, it is next to impossible for copyright users to track non-featured performances of music, particularly incidental uses. *Cf. United States v. ASCAP (In re Applications of Salem*

Media, et al.), 981 F. Supp. 199, 219 (S.D.N.Y. 1997) (acknowledging that a radio station cannot reasonably "monitor and report its incidental music use"). To require such reporting would create burdens that would render the statutory licenses wholly useless to the Preexisting Satellite Services.

VI. THE NOTICE AND RECORDKEEPING REQUIREMENTS SHOULD PROVIDE FOR A TRANSITIONAL COMPLIANCE PERIOD AND SHOULD ALLOW LEEWAY FOR GOOD-FAITH REPORTING ERRORS OR INADEQUACIES.

While it would be grossly unfair for the Copyright Office to impose reporting requirements beyond their current system capabilities, the Copyright Office may require the Preexisting Satellite Services to maintain and report records of use that they previously were not required to keep. In that case,, the Preexisting Satellite Services will need a transitional period to make appropriate adjustments to their software, databases, and record preservation practices. Accordingly, the Preexisting Satellite Services propose that the Copyright Office institute a one-year transition period during which Preexisting Satellite Services will exercise commercially reasonable efforts to provide the records to RIAA, but will suffer no adverse consequences from the provision of incomplete or incorrect information.

Even after the requirements go into full force, there will inevitably be reporting errors despite the Preexisting Satellite Services' effort to supply accurate information. Therefore, the Copyright Office's recordkeeping provisions should provide that good faith reporting errors or inadequacies will not deprive licensees of the statutory license nor subject the Preexisting Satellite Services to other penalties imposed by RIAA. Rather, the Copyright Office should

include provisions providing that the Services and RIAA will work together to resolve any good faith reporting errors identified by RIAA.

VII. THE OFFICE SHOULD ADOPT CONFIDENTIALITY PROVISIONS CONCERNING USE OF AND ACCESS TO RECORDS AT LEAST AS RESTRICTIVE AS THOSE CONTAINED IN THE TERMS PROPOSED BY THE CARP IN THE NONSUBSCRIPTION SERVICES PROCEEDING.

Regardless of the recordkeeping requirements adopted, it is absolutely essential that the Office impose strict confidentiality requirements over the use and disclosure of the reports. A detailed account of the music performed is a valuable asset that reflects the competitive character of a service and is particularly vulnerable to abuse by competitors. Moreover, performance information has great economic value to record companies. Indeed, in the radio world, record labels routinely pay companies such as BDS Spin and Mediabase 24/7 substantial sums of money to obtain precisely the information that RIAA now seeks to obtain for free in this rulemaking. The labels should not be allowed to obtain free use of this valuable information for purposes unrelated to the administration of the statutory license. The Copyright Office should ensure against this misuse of information by applying the use and access restrictions referred to below to all records required to be maintained as a result of this proceeding and, in the same manner as set forth in the interim regulation, should not allow the dissemination of service specific-information to individual copyright owners.

Although the Copyright Office has included a confidentiality provision in the Proposed Rule that prohibits use of the information "for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use," the proposed provision allows the record

labels themselves and other copyright owners access to this valuable marketing information. *See* NPRM, 67 Fed. Reg. at 5767. For a number of reasons, access to these records should be strictly limited to the collective agents.

First, despite the use restriction contained in the Copyright Office's proposal, the risk for mischief is simply too great in light of the substantial commercial value that such records embody. Second, copyright owners are entitled to access records of use only of *their own* sound recordings, not of *all* copyrighted works. *See* 17 U.S.C. §§ 112(e)(5), 114(f)(4)(A); Interim Regulations on Notice and Recordkeeping for Digital Subscription Transmissions, Docket No. RM 96-3B, at 8 (July 1, 1998). Because the Preexisting Satellite Services will be reporting music use on an aggregate basis, not separated out on a copyright owner-by-owner basis, only the agent should view these records. Third, the CARP in the nonsubscription services proceeding already has proposed confidentiality provisions governing statements of account and other related information that forbid access to records by "employees or officers of a Copyright Owner or Performer," as discussed further below.

For all of these reasons, the Preexisting Satellite Services propose that the Copyright Office adopt confidentiality provisions governing access to all records required to be submitted by this rulemaking that are at least as restrictive as the terms proposed by the CARP in the eligible nonsubscription services proceeding. *See* CARP Report App. B, at B-13 to B-19. The Preexisting Satellite Services also request that the Office narrow the currently proposed use restrictions to limit use of such records solely to collecting and distributing royalties, pursuant to the CARP's proposal. The Preexisting Satellite Services believe that the provisions adopted by the CARP, with the consent and support of RIAA, constitute an acceptable minimum baseline for

the type of access and use restrictions that the Office should issue to preserve the confidentiality of all records to be maintained pursuant to this rulemaking.

The CARP's proposal specifies that licensees may designate as confidential "statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account." CARP Report App. B, at B-13. The provisions restrict access to that confidential information to:

(1) "[t]he Receiving Agent or a Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records";

(2) independent auditors; and

(3) in connection with a *bona fides* fee dispute or with future CARP proceedings, outside counsel, consultants, and other authorized agents to the parties.

CARP Report App. B, at B-16. The provisions also mandate that "[I]n no event shall the Receiving Agent or Designated Agent(s) use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto." CARP Report App. B. at B-14.[9]

In short, the Copyright Office should ensure against this misuse of information by applying both the use *and* access restrictions described above to all records required to be maintained as a result of this proceeding.

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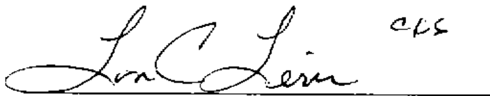
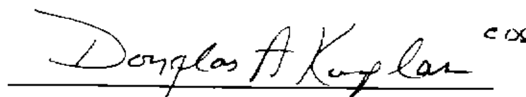
[9] The provisions do allow the Designated Agent(s) to report confidential information in aggregate form "so long as Confidential Information pertaining to any Licensee or group of Licensees cannot directly or indirectly be ascertained or reasonably approximated." CARP Report App. B, at B-14.

CONCLUSION

In considering any set of recordkeeping requirements, the Copyright Office must balance the adequacy of notice to the copyright owners against the burden on copyright users of providing that information. The Proposed Rule seeks to accomplish close to complete accuracy, but puts an impossibly high burden on the Preexisting Satellite Services. Complete accuracy is not obtainable, reasonable, or mandated by law. The Office should craft a non-burdensome set of regulations based on the services' existing systems developed at substantial cost. These systems provide information sufficient to give copyright owners the *reasonable* notice of use of their sound recordings set forth by statute, while at the same time minimizing any burdens on the copyright users in collecting and reporting that information.

Respectfully submitted,





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