

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

_____)	
In the Matter of)	
)	
NOTICE AND RECORDKEEPING FOR)	Docket No. RM 2008-7
USE OF SOUND RECORDINGS UNDER)	
STATUTORY LICENSE)	
_____)	

COMMENTS OF SOUNDEXCHANGE, INC.

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January 29, 2009

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I. INTRODUCTION

SoundExchange, Inc. (“SoundExchange”) respectfully submits these Comments in response to the Copyright Royalty Judges’ (“CRJs”) Notice of Proposed Rulemaking concerning Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2008-7, published in the Federal Register on December 30, 2008. 73 Fed. Reg. 79,727.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of sound recording copyright owners and performers. The CRJs have designated SoundExchange as the Collective to receive and distribute royalties under 17 U.S.C. §§ 112 and 114. SoundExchange submits these Comments on behalf of itself and the tens of thousands of copyright owners and performers on whose behalf it collects and distributes statutory royalties.

SoundExchange has long advocated census reporting,¹ and strongly supports the CRJs’ proposal to expand the reporting period to implement census reporting. Services’

¹ SoundExchange has advocated for census reporting on numerous occasions. *See, e.g.*, Written Direct Testimony of Barrie Kessler, Docket No. 2005-1 CRB DTRA, at 25 (Oct. 28, 2005); Written Direct

arguments against census reporting are old and well-rehearsed. Almost five years ago, the Copyright Office stated that “[o]nce final regulations are implemented, year-round census reporting is likely to be the standard measure rather than the periodic reporting that will now be permitted on an interim basis.” 69 Fed. Reg. 11,526 (March 11, 2004). Thus, it has been clear since at least 2004 that all webcasters should be preparing to provide census reporting on a per performance basis. SoundExchange agrees with the CRJs that “ample time has passed” since that announcement and believes that the time has come for year-round census reporting. Today, census reporting is technologically feasible and does not impose unreasonable costs. It also remains the best way to ensure that copyright owners and performers receive accurate payments for the use of their sound recordings and to ensure that all artists and labels – especially smaller labels and less established artists – receive any compensation at all.

SoundExchange recognizes that there may be rare situations in which a service cannot today provide census reporting. To the extent that anything less than census reporting is appropriate, it must only be in very limited circumstances and for a limited time where a service meets a heavy burden of showing that it would face significant hardship in providing census reporting in the short-term or that other special circumstances indisputably exist, and such services should work expeditiously to transition to census reporting. SoundExchange fully supports the transition to census reporting and believes that all webcasters should be reporting on a census basis in the

Testimony of Barrie Kessler, Docket No. 2006-1 CRB DSTR, at 17-18 (Oct. 27, 2006); Written Rebuttal Testimony of Barrie Kessler, Docket No. 2006-1 CRB DSTR, at 6-8 (July 23, 2007); Comments of SoundExchange, Docket No. RM 2002-1H, at 8-9 (May 27, 2005); Comments of SoundExchange, Docket No. RM 2005-2, at 8-12 (Aug. 26, 2005); Reply Comments of SoundExchange, Docket No. 2005-2, at 13-15 (Sept. 16, 2005);

near future so that SoundExchange can distribute funds on a fully accurate basis to all copyright owners and performers.²

In the Comments below, SoundExchange discusses the importance of census reporting, and responds to the CRJs' questions regarding census reporting, delivery of reports to a Web site and improvements that can be made to the reporting regulations. SoundExchange also proposes several revisions to the proposed regulations that will facilitate the efficient collection and distribution of royalties, including a request that the CRJs establish penalties for the late submission of reports of use and for the submission of reports of use that do not comply with the reporting regulations. SoundExchange has attached as Exhibit A hereto a redlined draft of the CRJs' proposed regulations that shows SoundExchange's proposed changes.

II. SOUNDEXCHANGE SUPPORTS THE CRJS' PROPOSAL TO ADOPT CENSUS REPORTING.

Year-round census reporting of all recordings used by a service is the best way to ensure that copyright owners and performers receive the notice of use of their recordings required by statute, *see* 17 U.S.C. §§ 112(e)(4) & 114(f)(4)(A), and a fair distribution of royalties to which they are entitled.

In the last webcasting proceeding, the CRJs concluded that a per performance usage fee structure for commercial webcasters was appropriate because it more accurately valued the usage of recordings than other metrics.³ At the same time, services were permitted under the regulations to report only a two-week sample per calendar

² SoundExchange does not believe the generally applicable regulations are an appropriate place to make exceptions to census reporting that require individualized showings of extraordinary burden and rapid transition toward census reporting. At the present time, the Webcaster Settlement Act provides a flexible mechanism for SoundExchange and particular webcasters to consider whether a special exception is warranted, and SoundExchange has discussed and is discussing very limited special exceptions for less robust reporting on a limited-time basis in that context.

³ Final Rule and Order, Docket No. 2005-1 CRB DTRA, 72 Fed. Reg. 24,084, 24,089-90 (May 1, 2007).

quarter of the sound recordings that they performed under the terms of the license. *See* 37 C.F.R. § 370.3(c)(3). Under this approach, webcasters had to track every performance in order to pay, but only had to report on a sample basis, with the two weeks of reporting serving as a proxy for the entire quarter. There is an obvious tension between requiring services to pay on the basis of every performance they make, but allowing them to report only a small amount of the available information about those performances.

As SoundExchange has previously shown, reporting based on sampling can result in underpayments or non-payments to copyright owners and performers whose recordings are used by licensees. In prior comments in a rulemaking proceeding, SoundExchange demonstrated through expert analysis that a one-week sample omitted nearly 30% of copyright owners and more than 31% of recording artists whose works were performed during a three-month period.⁴ Sampling also may overcompensate those artists and copyright owners whose sound recordings happened to be played during the sample period.

To further demonstrate the inadequacies of sampling, SoundExchange recently analyzed the reports of use provided by a large service that submits reports of use with year-round census reporting. SoundExchange first reviewed the actual census report of use that the service submitted for one quarter in 2008. SoundExchange then took a sample of two seven-day periods of data from the same service's same reports of use for the same quarter in 2008. SoundExchange compared the number of distinct recordings that were played and the number of artists that were entitled to payment under each reporting method. Based on that comparison, SoundExchange found that had this service

⁴ Comments of SoundExchange, Docket No. RM 2005-2, at 10 & Exhibit B (Declaration of Barry M. Massarsky) (Aug. 26, 2005).

provided for this quarter of 2008 only the sample reporting used in this analysis, approximately 30% of the artists entitled to royalties would have received no payment, and almost 50% of the recordings played would have been overlooked. Moreover, the analysis showed that sampling would have resulted in inaccurate royalty payments – many artists would have been under-compensated by hundreds or even thousands of dollars during that quarter had the service provided sample instead of census reporting. To be sure, some of the artists who would have been excluded or under-represented by sampling were entitled to relatively small royalty payments during that period, but even small payments can make a difference in an artist’s life.

The CRJs’ proposal to adopt year-round census reporting is appropriate because it will avoid the inaccurate reporting described above. Census reporting is most consistent with the objectives underlying the per performance rate structure adopted by the CRJs in the webcasting proceeding, and it will foster more accurate distribution to copyright owners and performers.

Achieving a more accurate distribution of statutory royalties through census reporting is technologically feasible and commercially reasonable. Perhaps the best evidence that census reporting is feasible is the fact that many services already provide SoundExchange with year-round census reporting. In 2008, webcasters that accounted for approximately 40% of the webcasting royalties paid to SoundExchange provided census reporting. The preexisting subscription services (“PES”) provide census reporting under the existing regulations. *See* 37 C.F.R. § 370.2(e). In addition, the SDARS and many webcasters have agreed to provide census reporting; and in a recently-concluded agreement between SoundExchange and the Corporation for Public Broadcasting

(“CPB”), CPB agreed to provide census reporting for certain public broadcasting stations that report the highest use in 2009 and 2010. SoundExchange estimates that over 75% of the royalties it receives from licensees are associated with reports of use that are made using year-round census reporting.

As evidence submitted in the last webcasting rate proceeding (Docket No. 2005-1 CRB DTRA) makes clear, services several years ago were already entering into marketplace agreements that required them to provide record companies with usage data. Since that testimony was submitted, and as discussed in greater detail below, the marketplace for reporting options has continued to expand and now offers even a wider array of reporting products and services than before.

Given that so many services are able to provide census reporting (including services of various sizes and even some noncommercial public radio stations), there is no valid reason that other services cannot do so as well within a reasonable time. Webcasters are required as a condition of the statutory license to transmit the recording title, album title and featured artist name in text data with every recording they transmit. *See* 17 U.S.C. § 114(d)(2)(C)(ix). If they fail to do so, they are operating outside the scope of the statutory license. Because the purpose of this proceeding is to determine notice and recordkeeping requirements for services that are operating *within* the scope of the statutory license, webcasters cannot be heard to argue that they do not know what recordings they are placing into rotation or that it is too burdensome to track their playlists. It must be assumed that every webcaster relying on the Section 114 statutory license has in the computer systems used for delivery of its service at the moment of

transmission at least those three data elements for every recording the service transmits during any week of the year.

The current reporting regulations also require webcasters to report additional data elements (including ISRC or marketing label). But there is no credible argument that it is unduly burdensome to provide such reporting. All services currently must report one of those data elements for the recordings in their repertoires to be able to provide reports of use for sample weeks. The fact that services report this information for sample weeks, and many services report it for every week of the year, demonstrates that it is practicable for services to report that information. Moreover, those data elements perform an important role in differentiating recordings so that the proper persons can be paid in situations where the song title, album title and featured recording artist name are insufficient to identify a recording uniquely. Indeed, given that there are thousands of labels, it can be difficult in some cases to identify the copyright owner unless a service reports the ISRC number or marketing label, even if a service identifies the artist, track, and album title.

More than ten years into the life of the webcasting statutory license, and five years after webcasters were told by the Copyright Office that they should expect to do census reporting, webcasters should make the small marginal effort necessary to prevent important information in their possession from going unreported when that omission has the potential to result in copyright owners and performers going unpaid because SoundExchange does not receive reports indicating that their works were used.

Although the large volume of data involved can make census reporting appear difficult, the type of data and the methodology for collecting and reporting it is exactly

the same as in the case of sample reporting. Every bit of this information is in the possession of the webcaster, and they need only retain it through use of commercially available software in order to provide it. It is simply a question of how often to report that data.

SoundExchange is committed to facilitating census reporting by services. SoundExchange has in the past and continues to provide information and assistance to services regarding the information they need to submit and the format in which it must be provided. SoundExchange also assists services with setting up their accounts, delivery issues, and any technological questions they may have. SoundExchange reaffirms its commitment to assisting services with their reporting and, to the extent that services claim they cannot currently provide census reporting, working with them to ensure that they are able to do so in short order.

As noted above, there may be very limited circumstances where it is appropriate to address differently the need to have a reliable basis for distributing royalties paid by services that for some reason have not yet implemented the capability to track all usage at the performance level. However, any such exception should be rare, narrowly targeted to address special circumstances that have indisputably been shown to exist, and limited in time so as to support the ultimate goal of moving the whole industry to census reporting. The CRJs should adopt a general requirement of census reporting, and permit any asserted special circumstances to be addressed through the Webcaster Settlement Act or other agreements.

III. RESPONSES TO THE CRJS' QUESTIONS

A. Commercial Solutions to Compile Reports of Use Are Available at Reasonable Prices.

SoundExchange appreciates the CRJs' efforts to stay abreast of technological developments that may assist services with submitting accurate reports of use. The CRJs have asked for comments addressing commercially available software that might be used by licensees for this purpose. Companies in the marketplace offer a range of technologies, including commercially available software and other third-party solutions, which services can use to provide the census reporting on a per performance basis that the CRJs now propose to implement. Furthermore, because the format required by the regulations is a simple .txt file containing the required information, many if not all of the reporting options discussed below should be able to produce reports of use that are fully compatible with SoundExchange's systems.

The marketplace has responded to the reporting requirements under Sections 112 and 114 by developing technological options that purport to offer large and small webcasters alike a wide range of reporting solutions. SoundExchange does not endorse or favor any particular company's software, nor can it vouch for the particular claims that particular companies make about the functionalities of their products and services. Nonetheless, it is apparent that there is a wide and growing range of companies that claim they can provide commercially available software that can be used to compile reports of use.

SoundExchange is aware that many services have developed their own reporting solutions to track playlists and usage, and to provide reporting to SoundExchange. In addition, many services already use content delivery networks that provide automated

reporting, such as StreamGuys, Akamai, LimeLight, Liquid Compass, and others. One of StreamGuys' products, for example, is a "Full Measurement Package" that will provide webcasters with data on audience measurement through the Webcast Metrics Ranker, which relies on "actual audience statistics gathered directly from the member stations' media servers" as opposed to "sample statistics."⁵ Similarly, Limelight Networks touts its "LimelightExchange" product, which can "[k]eep track of your users and their traffic patterns and measure the popularity of your content."⁶ Likewise, Liquid Compass offers a reporting tool that allows webcasters to generate reports of use that can be submitted to SoundExchange. The availability of these reporting solutions has helped accelerate the trend towards full census reporting, as discussed above.

In addition to content-delivery networks, SoundExchange understands that other third parties have developed software and other services that facilitate providing reports of use to SoundExchange. Companies have developed open-source applications, available for free, which can assist licensees with reporting obligations. For example, Salem Radio Labs' Rivendell application is designed to achieve this end, and, according to those familiar with its capabilities, webcasters have used it for this purpose since 2006.⁷ SoundExchange is also aware of a number of companies that offer reporting services, among other features, including Powergold, AndoMedia, RadioActivity, Backbone Networks, and LoudCity. Although the specific methodology and pricing varies by company, each has developed tools to assist with the collection and storage of the information needed for adequate reports of use – and several have previously noted

⁵ See <http://www.streamguys.com/statistics/webcastmetrics.html>. The cost of this particular product starts at \$125 per month, varying upwards depending on total streaming hours per month.

⁶ See <http://www.limelightnetworks.com/services.htm>.

⁷ See <http://www.linuxjournal.com/node/8821/print>.

that they seek to meet the need generated by the reporting requirements webcasters face. For example, one industry group has described LoudCity's programs as providing "[a]utomated music usage reporting. Reports are automatically filed with ASCAP, BMI, SESAC and SoundExchange."⁸

Indeed, companies in the marketplace now tout their ability to help with reporting to SoundExchange. For example, Powergold, which has offered music scheduling software since 1998, stated in 2007 that it had "[a]dded the SoundExchange report so users that must report to SoundExchange are able to do so."⁹ Similarly, the Chief Operating Officer of Liquid Compass indicated in a September 2007 press release: "We developed [a reporting product] to simplify the process and help our streaming clients deal with all the data collection, calculating and reporting that will be required to conform to the new monthly royalty fee structure."¹⁰ Liquid Compass's website now describes this product as "provid[ing] the necessary quarterly reports in . . . compliant spreadsheet format containing required data such as: Artist, Song Title, Album Name, etc."¹¹

While SoundExchange cannot vouch for the particular claims made by particular companies, the widespread availability of these products and services makes clear that the marketplace is responding to the need for commercially available software and related services to assist licensees with compiling compliant reports of use.

⁸ See <http://www.desktopworks.biz/licenses.htm>.

⁹ See <http://forum.powergold.com/RssFeed4-38-0-2.aspx>. One of Powergold's primary competitors is MusicMaster, which also provides Windows-based music scheduling software and also touts its product's ability to meet SoundExchange reporting requirements. See generally <http://www.mmwin.com/>. Similarly, Backbone has placed SoundExchange's logo atop its reporting page on its Web site. See <http://www.backbone.com/features/features-dmca-fields.html>.

¹⁰ See September 25, 2007 press release, available at <http://www.streamingmedia.com/press/view.asp?id=7559>.

¹¹ See <http://www.liquidcompass.net/reporting.php>.

The publicly available information about the prices for such software suggests that the costs of using it can be reasonable. For example, one company claims that its programs, available for as little as \$9.95 per month for smaller webcasters, “cover[] your obligations to ASCAP, BMI, and SoundExchange.”¹² RadioActivity, a web-based playlist tracking and reporting service, prices its services starting at \$30 per month while explaining its ability to “generate SoundExchange 'Reports of Use' formatted reports from your playlist data.”¹³ Similarly, LoudCity’s broadcasting services start at \$35 per month. Pricing is more difficult to determine when services (such as those provided by PowerGold and Liquid Compass) are predicated on the existence of a “membership” or client relationship and typically would involve services and functionality other than just reporting, because the submission of broadcaster specifics is required to obtain price quotes. The costs associated with such products and services may increase depending on the size of a webcasting service. Nonetheless, the existence of companies catering to smaller webcasters, indicates that reporting solutions are available.

B. The CRJs Should Not Require SoundExchange to Create and Maintain a Web Site for Receipt of Reports of Use.

The CRJs have asked several questions about delivery of records of use to a Web site. SoundExchange continues to oppose any proposal that would require SoundExchange to incur the costs, burdens, and risks associated with creating and maintaining a Web site for the delivery of reports of use. Instead, SoundExchange believes that the best way for services to deliver reports of use is via a File Transfer Protocol (“FTP”) site. FTP is the industry-standard means of transmitting large files over

¹² See <http://www.swcast.net/licensing/faq.html> .

¹³ See <http://www.radioactivity.fm/reporting/>; <http://www.radioactivity.fm/buy/>.

the Internet. Moreover, FTP sites are easy to use, more secure than a Web site, and can be accessed using software that is widely available for free online.

SoundExchange is and has always been flexible in its willingness to accept multiple methods for delivery of reports of use, including not only FTP, but also electronic mail attachment, CD-ROM and floppy diskette (though, as discussed below, SoundExchange believes that floppy diskette delivery has become obsolete and should be removed from the list of acceptable delivery methods). But requiring SoundExchange to develop an additional Web-based delivery mechanism would provide no benefit to licensees, and would impose significant burdens on SoundExchange. Web-based delivery is not appropriate at this time for several reasons.

First, SoundExchange is not aware of any recent requests by licensees to submit reports of use via a Web site as opposed to via an FTP site or one of the other means that SoundExchange supports. For this reason, SoundExchange believes there is not currently a demand for Web-based delivery of reports of use.

Second, SoundExchange already supports two different means of receiving reports of use via the Internet: FTP, which, as noted above, is the industry-standard for transferring large data files over the Internet; and email. Both of these delivery methods are free to anyone with access to the Internet, and licensees are familiar with them because they are widely used. SoundExchange regularly receives reports of use delivered via both of these delivery methods.

Third, using FTP is straightforward, and from a licensee's perspective it is ultimately no different than delivering a report of use to a Web site. In order to access an FTP site, a service simply needs to obtain FTP software, which is widely available for

free from a variety of Internet sources, such as download.com. For example, SoundExchange often suggests the use of WinSCP, an open source FTP client for Windows that enables the secure file transfer between a local and a remote computer. See <http://winscp.net/eng/index.php>. With the Internet protocol address of the FTP site, a user name, and a password – all of which SoundExchange provides to services free of charge – a service can use FTP software to easily upload files directly to SoundExchange. From a licensee’s perspective, this is no different than using a Web site, which requires Web browser software, a Uniform Resource Locator, an account and a password to upload files.

Fourth, Web-based delivery would be less stable than FTP. Unlike Web-based means of delivering files, FTP establishes a direct link between a licensee’s computer and SoundExchange’s computer, and that link is generally maintained until the file transfer is complete. Web sites, by contrast, are designed for the wide dissemination of information from servers to many different users, not for the transfer of large files from one computer to another. Thus, Web sites can experience problems maintaining a connection long enough to complete a transfer of data files (that is, there can be a problem with the connection “timing out” before the transfer is complete), potentially without a licensee’s even realizing the issue.

Fifth, FTP is much more secure than Web-based delivery systems. While a user identification number and a password are required for both Web-based delivery and FTP, a Web site has a more “public” face that may be easily discovered by anyone with a browser. The private nature of FTP sites provides a layer of protection in addition to the protection achieved through the use of accounts and passwords, because, in contrast to a

Web site, an FTP site is not automatically exposed to everyone on the Internet and cataloged by search engines. SoundExchange is not aware of any recent developments or data security methods that would make a Web-based delivery system as secure as FTP.

Finally, requiring SoundExchange to create and maintain a Web site to receive reports of use would impose substantial costs and burdens on SoundExchange that would necessarily decrease the amount of royalties that can be distributed to copyright owners and performers. SoundExchange would need to contract with Web developers to design a site that has the functionality to accept report of use files in a secure fashion, and the Web site would need to be able to track all log-ins and file transfers. These features would require the development of a more complex site than a typical site that provides information and links. SoundExchange would also need to set up a public-facing Web server to host the site, which would require the purchase of additional hardware, testing and maintenance. In addition, FTP creates an audit trail, by logging date and time of licensee access, as well as information on which files were uploaded, and where they were stored on the FTP server. This audit trail is important because it enables SoundExchange to verify a licensee file transfer or resolve a dispute, and it is a standard feature with FTP. In a Web-based system, an audit trail system would have to be developed. Furthermore, a Web site and Web server would require management and maintenance by SoundExchange, and would need to be updated periodically with software security and user-support features.

The CRJs have also asked whether technological or software developments since 2006 have reduced the costs of creating and maintaining a Web site for receipt of reports

of use. SoundExchange is not aware of any developments that have materially reduced those costs and concerns since 2006.

Because SoundExchange already maintains a functioning FTP site and accepts delivery via email and CD-ROM, there is no reason to require the development of duplicative and less appropriate systems and operational costs associated with a parallel Web site. SoundExchange has already expended considerable time and effort to accommodate various delivery methods, and there would be no additional benefit for licensees to the development of a Web site to receive reports of use. And, as noted above, a Web site would provide no additional functionality or ease beyond that of an FTP site.

The CRJs have also asked whether it would be “more efficient for the Collective to develop a system to report and deliver the records of use and make that system available to the Services.” It is not entirely clear to SoundExchange what kind of system this question contemplates. SoundExchange’s existing FTP site is such a system, as would be a Web site of the kind addressed above. But to the extent the question contemplates the creation by SoundExchange of a system that would monitor usage of recordings, compile records of use and electronically transmit those records, SoundExchange believes that it would be inappropriate for the CRJs to require SoundExchange to develop such a system at this time.

As discussed above, in today’s marketplace, there are companies that monitor the recordings played by music services and use that information to, among other things, compile reports of use that the services can then provide to SoundExchange. It would not be efficient to interfere with this developing market by shifting to SoundExchange the

very substantial effort and cost associated with monitoring all transmissions made by services.

First, the services, not SoundExchange, are in the best position to know and monitor what music they choose to play and when. Indeed, it is sometimes the case that services will play sound recordings that are not known to SoundExchange until they are reported to SoundExchange, because they are newly released, obscure, foreign, or for some other reason unknown to SoundExchange. Thus, unless and until a service reports the use of a particular recording to SoundExchange, SoundExchange may not have information about that recording in its system. The most efficient means of ensuring that the recordings that are used by services are reported to SoundExchange is for the services that use the recordings to identify them accurately.

Second, SoundExchange's systems are not configured to tap into every music service and monitor the recordings it is playing. Webcast transmissions are point-to-point transmissions from a service's server to a user. It would require a system integrated deeply into the unique networks of each and every webcaster for SoundExchange to identify, track and report every recording played by every music service. Even if SoundExchange did have a system that could monitor services' playlists and usage information, services would need to be willing to accept such surveillance of their networks and to perform the integration and testing necessary to make their networks and SoundExchange's system work together. In short, the development of such a system would require SoundExchange and services to expend substantial resources in connection with the networks of thousands of licensees.¹⁴ SoundExchange should not be required to

¹⁴ The architecture of the systems and networks used by services varies widely. There is no one place in every service's network infrastructure where a system developed by SoundExchange could look to find the

bear the costs of developing such a system, as any such costs would necessarily reduce the royalties that were paid to copyright owners and artists.

Given that market-based solutions have been and continue to be developed, there is no need at this time to require SoundExchange to develop such a system to report and deliver reports of use. Companies in the marketplace already offer such services, and it would be an inefficient allocation of resources and unfair to artists and copyright owners to require SoundExchange to incur the substantial resources necessary to develop such a system.

C. Improvements to the Reporting Regulations

The CRJs have also asked whether there are further improvements to the reporting regulations that can be made in light of recent technological developments, newly available software or reduced costs. In response, SoundExchange proposes the following improvements to the regulations. In general, each of the clarifications and improvements that SoundExchange seeks would impose little if any additional burden on services, but would reap benefits for copyright owners and performers by improving SoundExchange's ability to distribute royalties with a minimum of manual intervention.

As the number of services entering the marketplace and taking advantage of the statutory license continues to grow, SoundExchange receives an increasing number of reports of use. In 2008, SoundExchange estimates that it received approximately 600 reports of use each quarter, some of which contained usage data for multiple stations or channels (*e.g.*, a national simulcaster submitting a single log containing reports of use for all of its stations or an aggregator purporting to report on behalf of a large number of

recordings used, the number of performances rendered, and other usage information. Thus, SoundExchange would need to develop a monitoring system tailored to the specific configuration of each service's infrastructure.

services). These reports of use involve large volumes of data – in its most recent distribution, for example, SoundExchange processed logs containing approximately 12 million individual records.

Given the large volume of information that SoundExchange receives, it is critical that services submit the data in standard formats that permit SoundExchange to process the reports and distribute the royalties as efficiently as possible.¹⁵ As the large volume of data that SoundExchange receives each reporting period continues to grow – both as a result of more services taking advantage of the statutory license and of the larger volume of data associated with year-round census reporting – the need for standardized reporting data becomes even more critical. Clean data that is presented in standard formats enables SoundExchange to rely on its automated processing systems and efficiently receive reports of use and distribute royalties without human intervention.

To that end, SoundExchange has made major technological developments in recent years by continuing to improve its distribution platform, which enables SoundExchange to automate the process of receiving reports of use and distributing royalties. The modifications proposed below would facilitate SoundExchange’s ability to process reports of use and distribute royalties more efficiently – assuming, of course, that services comply with the existing and proposed standards.

Unfortunately, SoundExchange continues to receive defective and late reports of use that impede its ability to distribute royalties to copyright owners and performers. To

¹⁵ SoundExchange participates in industry-wide discussions concerning the development of international data standards. For example, there are ongoing discussions concerning the development of a standard method for the exchange of sound recording and other data among collection societies; an international standard code for uniquely identifying sound recordings; a system to identify releases of digital sound recordings for electronic distribution; and a file standard to report repertoire data from music labels. If adopted, these types of standards could in the future facilitate and make uniform the reporting of data to SoundExchange.

provide additional incentive for services to comply with the regulations governing reports of use, SoundExchange proposes the addition of a late fee for incomplete or late reports.

1. The Reporting Requirements Related to Notices of Use, Reports of Use and Statements of Account Should Be Harmonized.

In the interest of greater efficiency, SoundExchange makes the following proposals to harmonize requirements related to notices of use, reports of use and statements of account – principally to ensure that it is always clear which notices of use, reports of use, and statements of account are actually associated with one another.

First, the naming convention for reports of use should be clarified. SoundExchange sometimes receives a single report of use that covers multiple services and sometimes receives multiple reports of use that cover a single service. Moreover, reports of use are sometimes submitted using a service name that is different from the name listed in the corresponding notice of use and statement of account. This lack of consistency across notices of use, reports of use and statements of account requires manual handling by SoundExchange staff. Even after manual intervention, it is not always obvious which service a report of use pertains to, and SoundExchange can sometimes only resolve the ambiguity by contacting services for clarification. Given the large number of services relying on the statutory license, this sort of uncertainty increases the cost and can result in delays in matching reports of use with statements of account. Even slight variations in naming (e.g., abbreviating a name in one file, but not another) introduces the possibility of error and can require manual intervention and subjective assessment to ensure that reports are matched properly.

SoundExchange's proposed solution is straightforward. The CRJs' proposed regulations state that a report of use must contain the name of the service making transmissions, including the name of the entity filing the report of use, if different. *See* § 370.4(d)(2)(i). SoundExchange proposes that the name of the service provided pursuant to the CRJs' proposed § 370.4(d)(2)(i) should be *exactly the same* name that is used in the corresponding notice of use and statement of account for that service. In addition, as discussed below, if a simulcaster intends to submit a notice of use on behalf of more than one station, the service should list each of the stations in its notice of use so that there is no doubt as to which stations are associated with which service. Requiring the name of a service to be consistent across reports of use, notices of use and statements of account should be straightforward and imposes no burden on services.

It is easy for *licensees* to make it unambiguously clear which notices, reports of use, and statements of account go together. While imposing virtually no burden on services, this proposed requirement would provide significant benefit to SoundExchange as it would facilitate the automated processing of reports of use and avoid the costs and delays caused by inconsistent naming.

Second, the CRJs' proposed regulations require that "[e]ach data file contained in a report of use must be given a name by the service," *see* § 370.4(e)(5), but do not specify what the name should be. When SoundExchange receives data files with generic names, or names that do not match the name of a service, it can cause confusion and delay. SoundExchange proposes that each data file in a report of use should include the name of the service and that the name should be identical to the name in the notice of use and statement of account. Again, this would impose no burden on services, but would

significantly enhance SoundExchange's ability to take advantage of its automated processes.

Third, some broadcast simulcasters provide different logs for different stations providing the programming they transmit. In that instance, SoundExchange proposes that the file name required by the CRJ's proposed § 370.4(e)(5) should refer both to the name of the service and the name of the station. For example, if a service called "Webcaster" is reporting use by its station "WXYZ" for the first quarter of 2009, then the file name should be "Webcaster_WXYZ_20090101-20090331." (Services should *only* provide separate logs for separate services or stations if they also provide separate statements of account for those services or stations.)

Fourth, SoundExchange may assign a unique identifier (such as an account number) for each service. In that event, SoundExchange proposes that licensees should be required to use the unique identifier on all reports of use and statements of account submitted to SoundExchange. *See* SoundExchange's proposed § 370.4(e)(8).

Fifth, like statements of account, *see* § 380.4(c), reports of use should be due monthly. The proposed regulations appear to be inconsistent in this regard. Section 370.4(c) of the CRJs' proposed regulations provides that that reports of use "shall be delivered on or before the forty-fifth day after the close of each month," whereas § 370.4(d)(3) of the proposed regulations provides that a "Report of Use shall be prepared for each calendar quarter of the year." To avoid any confusion, SoundExchange proposes that these provisions should be made consistent and that reports of use should be due monthly, not quarterly. This will make submission of reports of use and statements of account due on the same time-table and further facilitate the matching of

reports of use and statements of account discussed above. Both submissions (the statement of account and the corresponding report of use) are essential for SoundExchange to distribute royalties.

Finally, it would be helpful if services would explicitly identify the report of use that corresponds to a statement of account by reference to the date of the statement of account. SoundExchange proposes that this be done on the certification discussed in Section III.C.5 below.

2. Collective Reports of Use by Simulcasters Should Provide Usage Information on a Station-by-Station Basis.

SoundExchange often receives a single report of use from a licensee on behalf of hundreds of individual stations owned or operated by the licensee. These reports occasionally fail to report separately for different stations. SoundExchange can accommodate such collective reports of use so long as the corresponding statements of account and payments are also submitted on the same collective basis. SoundExchange therefore proposes to add a new subsection § 370.4(d)(7) to the proposed regulations that provides with regard to simulcasters that any collective report of use should separate out usage on a station-by-station basis.

This clarification is necessary so that SoundExchange can allocate royalties accurately. Individual stations are often self-contained services in their own right, and they are often transferred from one station group to another. As a result, SoundExchange needs to have station-specific information to ensure that it is properly attributing royalties to the correct payees, that it correctly processes any credits or refunds that may be due in connection with royalties paid on behalf of specific stations, to determine minimum fee obligations, and otherwise to ensure that SoundExchange accurately tracks the particular

station's royalty obligations. Accordingly, SoundExchange proposes to amend § 370.2(b)(1) of the CRJs' proposed regulations so that it requires a service to list each station for which it intends to use the statutory license. In addition, whenever a station changes ownership, a new notice of use should be filed for that station. In practice, however, that does not always happen. Section 370.2(e) of the CRJs' proposed regulations requires services to file a new notice of use after any information contained in the notice of use has changed. SoundExchange proposes to amend that provision so that it expressly states that a change of ownership of a station requires the filing of a new notice of use.

3. Reports of Use Should Be Required to Include Headers.

The CRJs' proposed regulations allow services to submit data files either with or without headers. *See* §§ 370.4(e)(7) (with headers) & 370.4(e)(8) (without headers). In the past, SoundExchange has expressed its willingness to accept files with or without headers.¹⁶ Technological developments, however, have caused SoundExchange to change its position. Specifically, SoundExchange's modified distribution platform is designed to "read" the headers in such a way that reports of use can be ingested automatically based on the information in the headers – requiring no manual intervention so long as the information in the headers is accurate and the reports are otherwise in a proper format. To maximize the efficiency of distribution, SoundExchange proposes the elimination of the option to submit files without headers by eliminating proposed § 370.4(e)(8) and other references to the submission of files without headers. The requirement of including a header with a file imposes a trivial burden on services – many services already provide headers, and the information in the headers is information that

¹⁶ *See, e.g.*, Comments of SoundExchange, Docket No. RM 2002-1H, at 22-23 (May 27, 2005).

the services are already required to report to SoundExchange. In fact, SoundExchange originally created the option for services to provide reports of use with headers because several services requested it.¹⁷ At the same time, the inclusion of headers results in a significant benefit for SoundExchange, copyright owners and performers. The use of headers facilitates the efficient receipt of reports of use and distribution of royalties, minimizes the need for manual intervention which can slow down the distribution process, improves automated repertoire identification, automates the loading of files, and simplifies the allocation process.

4. The Option to Deliver Reports of Use Via Floppy Diskette Should Be Eliminated.

The proposed regulations maintain the option for services to deliver reports of use via floppy diskette. *See* §§ 370.4(e)(3) & 370.4(e)(3)(iv). The use of floppy diskettes has been rendered obsolete by recent technological developments. As technology has developed over the past several years and delivery methods such as FTP, CD-ROM and email have become commonplace, the use of floppy diskettes has become extremely rare. Today, SoundExchange rarely receives reports of use on floppy diskettes, and SoundExchange would prefer not to maintain the old disc drives and equipment needed to process reports of use delivered via floppy diskettes. This requirement has become obsolete, there is no need for it, and it should be eliminated.

5. The Certification Requirement Should Be Modified.

The proposed regulations require certification of each report of use, including a signature. *See* § 370.4(d)(4). However, the large data files necessitated by reporting do not lend themselves to meaningful certification and signature. SoundExchange proposes

¹⁷ *See* Reply Comments of SoundExchange, Docket No. RM 2005-2, at 19 (Sept. 16, 2005).

that the regulations should be clarified to provide that certification must be transmitted on a separate form provided by SoundExchange that accompanies the report of use. That same form would be used to identify the corresponding statement of account by date.

6. The Rate Categories Should Be Modified.

Section 370.4(d)(2)(ii) of the CRJs' proposed regulations includes a number of transmission categories and codes that services must include in their reports of use.

SoundExchange supports the use of transmission categories and codes, but believes that the list in proposed § 370.4(d)(2)(ii) does not accurately reflect current service categories. First, the list includes categories that have become obsolete because they reflect out of date rate structures. For example, there is no longer a need for a separate transmission category for simulcast transmissions (or for separate categories based on the type of content transmitted by simulcasters), because simulcast services no longer pay a different rate than other webcasters.

Second, the list does not include existing rate categories. For example, there is nothing in the CRJs' proposed § 370.4(d)(2)(ii) that reflects the distinction between commercial and noncommercial webcasters, which pay under different rate structures. Similarly, the proposed regulations do not distinguish between new subscription services subject to the rates provided in 37 C.F.R. Part 383 and webcasting new subscription services subject to Part 380, which pay under different rate structures.

SoundExchange proposes revisions to the rate categories in the CRJs' proposed § 370.4(d)(2)(ii) that correspond to the categories of service that are currently applicable under the CRJs' regulations. Those revisions are reflected in Exhibit A attached hereto.

In addition, there will likely be at least one and maybe more additional rates and

terms available after the conclusion of the upcoming rate-setting proceedings and/or the execution of agreements pursuant to the Webcaster Settlement Act that may result in new rate categories that should be subject to different transmission categories and codes. For this reason, SoundExchange further proposes that proposed § 370.4(d)(2)(ii) should be amended to allow SoundExchange to publish an updated list of rate categories from time to time and to require services to use the categories and codes set forth in any such updated list.

Furthermore, the CRJs have proposed in § 370.4(d)(2)(vii) (which SoundExchange proposes to re-number as § 370.4(d)(2)(viii)) that “a new subscription service” should report either actual total performances or aggregate tuning hours (“ATH”). A “new subscription service” is defined in the proposed regulations by reference to 17 U.S.C. § 114(j)(8). *See* § 370.1(d). SoundExchange believes that giving *all* new subscription services the option to report on an ATH basis is an error in the proposed regulations, and that the only “new subscription services” that should be authorized to report on an ATH basis are new subscription services subject to the rates provided in 37 C.F.R. Part 383. SoundExchange believes that webcasting new subscription services (new subscription services subject to the rates in Part 380), like other webcasting services, should be required to report on a per performance basis only, given that they are currently required to pay royalties on a per-performance basis. This correction is necessary to conform the CRJs’ proposed regulations to the CRJs’ ruling in the webcasting rate-setting proceeding.

7. The Use of the ASCII Format Should Be Maintained.

SoundExchange's systems currently support the receipt of reports of use in the ASCII format. The CRJs' proposed regulations provide that all report of use data files must be submitted in ASCII format. *See* § 370.4(e)(2). SoundExchange supports this proposal. SoundExchange understands that some services may prefer to submit reports of use in Unicode format. At this time, SoundExchange is unable to process reports of use in the Unicode format, and it would be expensive and time consuming to adjust SoundExchange's systems to support Unicode. Nonetheless, SoundExchange is aware of the interest in the Unicode format and is investigating the possibility of supporting Unicode. SoundExchange may be in the position to support that standard in the future. Until that time, SoundExchange supports the requirement that report of use data files must be delivered in the ASCII format.

8. All Types of Services Should Submit Copyright Owner Information Provided in the Copyright Notice on Retail Albums or Other Products.

In the CRJs' proposed regulations (and the current regulations), preexisting subscription services are required to include "the copyright owner information provided in the copyright notice on the retail album or other product (*e.g.*, following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording." § 370.3(d)(9). This information facilitates the distribution of royalties because it helps SoundExchange identify the copyright owner who is entitled to royalty payments for a particular recording. Accordingly, SoundExchange proposes that the same provision

should be added to the CRJs' proposed Section 370.4 as § 370.4(d)(2)(vi), so that the services governed by that section are required to report this information as well.

9. The Content of Reports of Use Should Conform to Information Provided in Commercially Released Products.

Section 370.4(d)(2) of the CRJs' proposed regulations sets forth the required content of reports of use submitted by certain services. When services submit reports of use, they sometimes submit some of the required information inconsistently. For example, one service may report a featured artist's name with the last name first (*e.g.*, "Springsteen, Bruce"), while another service may report the first name first (*e.g.*, "Bruce Springsteen"), and yet another service may list the name with more information (*e.g.*, "Springsteen, Bruce and the E Street Band"). Given the large volume of tracks reported to SoundExchange, inconsistencies in the way that track information is reported can cause problems with matching and interfere with the efficient processing of reports of use. To minimize inconsistent reporting, SoundExchange believes that the CRJs' proposed § 370.4(d)(2) should be amended to require services to provide track-specific information (artist, track title, album title, marketing label, and copyright owner information) in exactly the same form as it appears in the commercially released product (*i.e.*, the CD or download, etc.).¹⁸

10. The Format for Reporting Dates Should Be Uniform.

The CRJs' proposed regulations provide different formats for reporting dates. For the sake of consistency and to avoid confusion, SoundExchange proposes that all dates should be reported as YYYYMMDD. The standard for preexisting subscription services

¹⁸ In addition, in the CRJs' proposed § 370.4(d)(2)(iii), SoundExchange proposes to refer not only to the featured artist, but also to a featured "group or orchestra," which conforms this provision to the CRJs' proposed § 370.3(d)(4).

to report dates in a report of use in the CRJs' proposed § 370.3(f)(4) should be conformed to that standard, and proposed § 370.4(e)(5) should be clarified so that start and end dates of a reporting period should be in the format "year, month and day" (not "day, month and year"). This consistency would not impose a burden on any service, and it would harmonize the regulations, correct an apparent ambiguity in proposed § 370.4(e)(5), and facilitate SoundExchange's efficient collection and distribution of royalties.

11. The E-mail Address for Delivery of Reports of Use Should Be Changed.

In the CRJs' proposed § 370.4(e)(4), the correct address for emailing reports of use to SoundExchange should be listed as: reports@soundexchange.com.

12. Penalties for Defective and Late Reports of Use Should Be Adopted.

As noted above, SoundExchange receives a large volume of data in connection with reports of use. With more services entering the market and taking advantage of the statutory license, SoundExchange expects that the volume of data it receives each reporting period will continue to grow. In order to process this increasing volume of data efficiently, SoundExchange has continued to improve its internal systems for receiving reports of use and distributing royalties. When licensees submit reports of use in the standardized formats required by the regulations (and as proposed by SoundExchange herein), SoundExchange's processing of the data can be largely automated and royalties can therefore be distributed more efficiently.

Unfortunately, licensees too frequently fail to comply with the reporting regulations, either by submitting reports of use late or by submitting reports of use that are defective. For example, reports of use may fail to include the complete complement

of required information and thus contain unpopulated data fields, or invert artist names and dates. While these defects may seem minor on their face, they can interfere significantly with the efficient processing of data, especially when multiplied over numerous lines of data and across multiple reports of use. Given the volume of data involved, it is difficult to pinpoint the error rate precisely, but there is no question that the problems occur on a large scale. For example, based on a review of a sample of reports of use, SoundExchange estimates that approximately half of reports of use fail to follow the naming conventions required by the regulations; about one-third of reports of use are not submitted in ASCII format; less than one-quarter provide ISRC data; approximately one-third provide no album data; and approximately one-third provide no label data.

When SoundExchange receives reports of use that fail to comply with the reporting requirements set forth in Part 370, it must review and handle the defects manually. That can cause delays in processing reports of use and distributing royalties, to the detriment of the copyright owners and performers whose recordings have been used by the licensees. And when a service reports neither ISRC nor label information, it can significantly impede SoundExchange's efficient distribution of royalties, because SoundExchange generally relies on ISRC or label information to distribute a copyright owner's share of royalties.

To provide additional incentive for services to provide accurate reports of use on a timely basis, SoundExchange proposes that the CRJs apply the late fee applicable under the rate regulations to late reports of use. Specifically, SoundExchange proposes the adoption of a new § 370.5, under which services should be charged 1.5% of the service's royalty liability for the period covered by the report of use, per month. This late fee

would apply when a service fails to submit a report of use on a timely basis and when a service submits a report of use that fails to comply with the requirements set forth in proposed § 370.3 or § 370.4, as applicable.

This proposal is consistent with the existing late fee for statements of account. *See, e.g.*, § 380.4(e) (establishing late fees for statements of account). Reports of use and statements of account should be treated the same in this regard, as they both contain important information for the distribution of royalties; indeed, reports of use are key to distribution. SoundExchange proposes that in the case of late submission of reports of use, the penalties accrue from the due date until the report of use is received by SoundExchange; and in the case of defective reports of use, the penalties accrue from the due date until the defects are corrected by the licensee.

IV. CONCLUSION

SoundExchange appreciates the CRJs' attention to these matters, and looks forward to working with the CRJs and statutory licensees on the implementation of final regulations consistent with the proposals made herein.

Respectfully submitted,

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January 29, 2009

EXHIBIT A

SOUNDEXCHANGE'S PROPOSED REVISIONS TO THE CRJS' PROPOSED REGULATIONS

§ 370.1 General definitions.

For purposes of this part, the following definitions apply:

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

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

(c) A *Preexisting Subscription Service* is defined in 17 U.S.C. 114(j)(11).

(d) A *New Subscription Service* is defined in 17 U.S.C. 114(j)(8).

(e) A *Nonsubscription Transmission Service* is a service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under section 114(d)(1) of title 17 of the United States Code and are made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(f) A *Preexisting Satellite Digital Audio Radio Service* is defined in 17 U.S.C. 114(j)(10).

(g) A *Business Establishment Service* is a service that makes ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code and is exempt under section 114(d)(1)(C)(iv) of title 17 of the United States Code.

(h) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses by determination of the Copyright Royalty Judges.

(i) A *Report of Use* is a report required to be provided by a Service that is transmitting sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code, or both.

§ 370.2 Notice of use of sound recordings under statutory license.

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

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

(1) The full legal name of the Service that is either commencing digital transmissions of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both. In the case of a Service transmitting the programming of multiple AM or FM radio broadcast stations, the Notice of Use shall identify each station by call letters.

(2) The full address, including a specific number and street name or rural route, of the place of business of the Service. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(3) The telephone number and facsimile number of the Service.

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

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

(6) The date or expected date of the initial digital transmission of a sound recording to be made under the section 114 statutory license and/or the date or the expected date of the initial use of the section 112(e) license for the purpose of making ephemeral phonorecords of the sound recordings.

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

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

(d) *Filing notices; fees.* The original and three copies shall be filed with the Licensing Division of the Copyright Office and shall be accompanied by the filing fee set forth in § 201.3(c) of this title. Notices shall be placed in the public records of the Licensing Division. The Notice and filing fee shall be sent to the Licensing Division at either the address listed on the form obtained from the Copyright Office or to: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE, Washington, DC 20557-6400. A Service that, on or after July 1, 2004, shall make digital transmissions and/or ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of the sound recording and prior to the first digital transmission of the sound recording.

(e) *Amendment.* A Service shall file a new Notice of Use of Sound Recordings under Statutory License within 45 days after any of the information (including ownership of a station) contained in the Notice on file has changed, and shall indicate in the space provided by the Copyright Office that the Notice is an amended filing. The Licensing Division shall retain copies of all prior Notices filed by the Service.

§ 370.3 Reports of use of sound recordings under statutory license for preexisting subscription services.

(a) *General.* This section prescribes the rules for the maintenance and delivery of reports of use for sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by preexisting subscription services.

(b) *Delivery.* Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each month.

(c) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a preexisting subscription service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Preexisting subscription services shall post their Reports of Use online on or before the forty-fifth day after the close of each month, and continue to make them available thereafter to all sound recording copyright owners for a period of 90 days. Preexisting subscription services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. Preexisting subscription services may predicate provision of a password upon:

(1) Information relating to identity, location and status as a sound recording copyright owner; and

(2) A “click-wrap” agreement not to use information in the Report of Use for purposes other than royalty collection, royalty distribution, and determining compliance with statutory license requirements, without the express consent of the preexisting subscription service providing the Report of Use.

(d) *Content.* A “Report of Use of Sound Recordings under Statutory License” shall be identified as such by prominent caption or heading, and shall include a preexisting subscription service’s “Intended Playlists” for each channel and each day of the reported month. The “Intended Playlists” shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

(1) The name of the preexisting subscription service or entity;

(2) The channel;

(3) The sound recording title;

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

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

(6) The marketing label of the commercially available album or other product on which the sound recording is found;

(7) The catalog number;

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

(9) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (*e.g.*, following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(10) The date of transmission; and

(11) The time of transmission.

(e) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the preexisting subscription service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the preexisting subscription service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(f) *Format.* Reports of Use should be provided on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, and should conform as closely as possible to the following specifications:

(1) ASCII delimited format, using pipe characters as delimiter, with no headers or footers;

(2) Carats should surround strings;

(3) No carats should surround dates and numbers;

(4) Dates should be indicated by: MM/DD/YYYYYYMMDD;

(5) Times should be based on a 24-hour clock: HH:MM:SS;

(6) A carriage return should be at the end of each line; and

(7) All data for one record should be on a single line.

(g) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the preexisting subscription service providing the Report of Use.

(h) *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use.

§ 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

(a) *General.* This section prescribes rules for the maintenance and delivery of reports of use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services.

(b) *Definitions.*

(1) *Aggregate Tuning Hours* are the total hours of programming that a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or

stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment service transmissions, less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a nonsubscription transmission service transmitted one hour of programming to 10 simultaneous listeners, the nonsubscription transmission service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the nonsubscription transmission service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a nonsubscription transmission service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the nonsubscription transmission service's Aggregate Tuning Hours would equal 10.

(2) An *AM/FM Webcast* is a transmission made by an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2).

(3) A *performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (*e.g.*, the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (*e.g.*, the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(4) *Play frequency* is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the reporting period, then the play frequency is one. If the sound recording is transmitted 10 times during the reporting period, then the play frequency is 10.

(c) *Delivery*. Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each month.

(d) *Report of Use.*

(1) *Separate reports not required.* A nonsubscription transmission service, preexisting satellite digital audio radio service or a new subscription service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code and makes ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code need not maintain a separate Report of Use for each statutory license during the relevant reporting periods.

(2) *Content.* For a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (d)(3) of this section:

(i) The name of the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service making the transmissions, ~~including the name of the entity filing the Report of Use, if different~~exactly as it appears on the corresponding notice of use and statement of account for the service;

(ii) The ~~category~~ transmission ~~rate~~ code for the category of transmission ~~operated~~made by the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service, it being understood that a list of rate categories current as of January 1, 2009 is set forth below, but the Collective may from time to time publish an updated list of rate categories then applicable under the Webcaster Settlement Act or regulations, and Services shall identify the most specific category then applicable to them:

~~_____ (A) For eligible nonsubscription transmissions other than broadcast simulcasts and transmissions of nonmusic programming;~~

~~_____ (B) For eligible nonsubscription transmissions of broadcast simuleast programming not reasonably classified as news, talk, sports or business programming;~~

~~_____ (C) For eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming;~~

~~_____ (D) For transmissions other than broadcast simulcasts and transmissions of non-music programming made by an eligible new subscription service;~~

~~_____ (E) For transmissions of broadcast simuleast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service;~~

~~_____ (F) For transmissions of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible new subscription service; and~~

~~_____ (G) For eligible transmissions by a business establishment service making ephemeral recordings;~~

_____ (A) Eligible nonsubscription transmissions and transmissions as part of new subscription services, by commercial webcasters subject to Part 380, except transmissions described in subparagraph (ii)(B) below;

_____ (B) For late reporting of 2006-2007 usage only, eligible nonsubscription transmissions and transmissions as part of new subscription services, by

commercial webcasters subject to Part 380 paying on the basis of Aggregate Tuning Hours for –

(1) broadcast simulcast programming;

(2) non-music programming; and

(3) other programming;

(C) Eligible nonsubscription transmissions and transmissions as part of new subscription services, by noncommercial webcasters subject to Part 380, except transmissions described in subparagraph (ii)(D) below;

(D) For late reporting of 2006-2007 usage only, eligible nonsubscription transmissions and transmissions as part of new subscription services, by noncommercial webcasters subject to Part 380 paying on the basis of Aggregate Tuning Hours for –

(1) broadcast simulcast programming;

(2) non-music programming; and

(3) other programming;

(E) Transmissions by preexisting satellite digital audio radio services subject to Part 382(B);

(F) Transmissions by new subscription services subject to Part 383; and

(G) Eligible transmissions by a business establishment service making ephemeral recordings subject to Part 384;

(iii) The featured artist, group or orchestra, exactly as it appears on the commercially released product or download;

(iv) The sound recording title, exactly as it appears on the commercially released product or download;

(v) The International Standard Recording Code (ISRC) or, alternatively to the ISRC, the following in exactly the form it appears on the commercially released product or download:

(A) Album title; and

(B) Marketing label;

(vi) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording, in either case exactly as it appears on the commercially released product or download;

(vii) For a nonsubscription transmission service or a new subscription service subject to Part 380: the actual total performances of the sound recording during the reporting period; and

(viii) For a preexisting satellite digital audio radio service, a new subscription service subject to Part 383, or a business establishment service: the actual total performances of the sound recording during the reporting period or, alternatively, the:

(A) Aggregate Tuning Hours;

(B) Channel or program name; and

(C) Play frequency.

(3) *Reporting period.* A Report of Use shall be prepared for each ~~calendar quarter~~ month of the year.

(4) *Signature.* Reports of Use shall ~~include~~ **be accompanied by** a signed statement by the appropriate officer or representative of the service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Report, and by the date of the signature. **The foregoing shall be provided on a form to be made available by the Collective, which form shall provide for this statement; identification of the Service, reporting period, and the Report of Use and statement of account to which it relates; and contact details for a person the Collective may contact with questions about the Report of Use and statement of account.**

(5) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, without consent of the service providing the Report of Use.

(6) *Documentation.* A Service shall, for a period of at least three years from the date of service or posting of a Report of Use, keep and retain a copy of the Report of Use.

(7) Reports of Use Covering Multiple Stations. A Service transmitting AM/FM Webcasts of multiple AM or FM radio broadcast stations may choose to submit a single Report of Use that combines reports of use for more than one station. If it elects to do so, it must also separately identify the station in the “channel” field for each performance of a sound recording.

(e) *Format and delivery.*

(1) Electronic format only. Reports of use must be maintained and delivered in electronic format only, as prescribed in paragraphs (e)(2) through (8) of this section. A hard copy report of use is not permissible.

(2) *ASCII text file delivery; facilitation by provision of spreadsheet templates.* All report of use data files must be delivered in ASCII format. However, to facilitate such delivery, SoundExchange shall post and maintain on its Internet Web site a template for creating a report of use using Microsoft’s Excel spreadsheet and Corel’s Quattro Pro spreadsheet and instruction on how to convert such spreadsheets to ASCII text files that conform to the format specifications set forth below. Further, technical support and cost associated with the use of spreadsheets is the responsibility of the service submitting the report of use.

(3) *Delivery mechanism.* The data contained in a report of use may be delivered by File Transfer Protocol (FTP), e-mail, or CD-ROM, ~~or floppy diskette~~ according to the following specifications:

(i) A service delivering a report of use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall maintain on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.

(ii) A service delivering a report of use via e-mail shall append the report as an attachment to the e-mail. The main body of the e-mail shall identify:

- (A) The full name and address of the service;
- (B) The contact person’s name, telephone number and e-mail address;
- (C) The start and end date of the reporting period;

(D) The number of rows in the data file. ~~If the report of use is a file using headers, counting~~**Counting** of the rows should begin with row 15. ~~If the report of use is a file without headers, counting of the rows should begin with row 1;~~ and

(E) The name of the file attached.

(iii) A service delivering a report of use via CD-ROM must compress the reporting data to fit onto a single CD-ROM per reporting period. Each CD-ROM shall be submitted with a cover letter identifying:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. ~~If the report of use is a file using headers, counting~~**Counting** of the rows should begin with row 15. ~~If the report of use is a file without headers, counting of the rows should begin with row 1;~~ and

(E) The name of the file attached.

~~(iv) A service delivering a report of use via floppy diskette must compress the reporting data to fit onto a single floppy diskette per reporting period. Each floppy diskette must measure 3.5 inches in diameter and be formatted using MS/DOS. Each floppy diskette shall be submitted with a cover letter identifying:~~

~~(A) The full name and address of the service;~~

~~(B) The contact person's name, telephone number and e-mail address;~~

~~(C) The start and end date of the reporting period;~~

~~(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, the counting of the rows should begin with row 1; and~~

~~(E) The name of the file attached.~~

(4) *Delivery address.* Reports of use shall be delivered to SoundExchange at the following address: SoundExchange, Inc., 1121 14th Street, NW, Suite 700, Washington, DC 20005; (Phone) (202)640-5858; (Facsimile) (202) 640-5859; (E-mail) info@reports@soundexchange.com. SoundExchange shall forward electronic copies of these reports of use to all other collectives defined in this section.

(5) *File naming.* Each data file contained in a report of use must be given a name by the service followed by the start and end date of the reporting period. **The name must contain the name of the Service in a manner identical to the name of the Service used in the corresponding notice of use and statement of account. If a Service transmitting AM/FM Webcasts of multiple AM or FM radio broadcast stations provides separate Reports of Use for different stations, the file name must identify both the name of the reporting Service and the call letters of the station. (Example: if a Service called "Webcaster" reports use by its station "WXYZ" for the first quarter of 2009, then the file name should be "Webcaster_WXYZ_20090101-20090331.")** The start and end date must be separated by a dash and in the format of **dayyear**, month and **year****day** (YYYYMMDD). Each file name must end with the file type extension of ".txt". (Example: AcmeMusicCo20050101-20050331.txt).

(6) *File type and compression.*

(i) All data files must be in ASCII format.

(ii) A report of use must be compressed in one of the following zipped formats:

(A) .zip—generated using utilities such as WinZip and/or UNIX zip command;

- (B) .Z—generated using UNIX compress command; or
- (C) .gz—generated using UNIX gzip command.

(iii) Zipped files shall be named in the same fashion as described in paragraph (e)(5) of this section, except that such zipped files shall use the applicable file extension compression name described in this paragraph (e)(6).

(7) ~~Files with headers~~**Headers.**

(i) ~~If a service elects to submit files with headers, the~~**The** following elements, in order, must occupy the first 14 rows of a report of use:

- (A) Name of service;
- (B) Name of contact person;
- (C) Street address of the service;
- (D) City, state and zip code of the service;
- (E) Telephone number of the contact person;
- (F) E-mail address of the contact person;
- (G) Start of the reporting period (YYYYMMDD);
- (H) End of the reporting period (YYYYMMDD);
- (I) Report generation date (YYYYMMDD);
- (J) Number of rows in data file, beginning with 15th row;
- (K) Text indicator character;
- (L) Field delimiter character;
- (M) Blank line; and
- (N) Report headers (Featured Artist, Sound Recording Title, etc.).

(ii) Each of the rows described in paragraphs (e)(7)(i)(A) through (F) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (e)(7)(i)(G) through (I) of this section should not exceed eight alphanumeric characters.

(iii) Data text fields, as required by paragraph (d) of this section, begin on row 15 of a report of use with headers. A carriage return must be at the end of each row thereafter. Abbreviations within data fields are not permitted.

(iv) The text indicator character must be unique and must never be found in the report's data content.

(v) The field delimiter character must be unique and must never be found in the report's data content. Delimiters must be used even when certain elements are not being reported; in such case, the service must denote the blank data field with a delimiter in the order in which it would have appeared.

~~(8) Files without headers. If a service elects to submit files without headers, the following format requirements must be met:~~

~~(i) ASCII delimited format, using pipe (|) characters as delimiters, with no headers or footers;~~

~~(ii) Carats (^) should surround strings;~~

~~(iii) No carats (^) should surround dates and numbers;~~

~~(iv) A carriage return must be at the end of each line;~~

~~(v) All data for one record must be on a single line; and~~

~~(vi) Abbreviations within data fields are not permitted.~~

(8) Unique identifier. In the event that the Collective assigns a unique identifier or account number to a Service, station or channel, then the Service must submit that unique

identifier or account number with all Reports of Use and statements of account submitted to the Collective for that Service, station or channel.

§ 370.5 Failure to submit compliant Reports of Use on a timely basis.

A Service that fails to submit a compliant Report of Use by the applicable due date set forth in Section 370.3(b) and Section 370.4(d)(3), including a Service that submits a Report of Use that does not comply with the requirements set forth in Section 370.3 or Section 370.4, shall pay a late fee of 1.5% of the corresponding royalty liability per month, or the highest lawful rate, whichever is lower, for any Report of Use not received by the Collective in compliant form until after the due date. Late fees shall accrue from the due date until a compliant Report of Use is received by the Collective.

§ ~~370.5~~370.6 Designated collection and distribution organizations for reports of use of sound recordings under statutory license.

(a) *General.* This section prescribes rules under which reports of use shall be collected and distributed under section 114(f) of title 17 of the United States Code, and under which reports of such use shall be kept and made available.

(b) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a “Notice of Designation as Collective under Statutory License,” which shall be identified as such by prominent caption or heading, and shall contain the following information:

- (1) The Collective name, address, telephone number and facsimile number;
- (2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and
- (3) Information on how to gain access to the online Web site or home page of the Collective, where information may be posted under this part concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE, Washington, DC 20557–6400.

(c) *Annual Report.* The Collective will post and make available online, for the duration of one year, an Annual Report on how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses.

(d) *Inspection of Reports of Use by copyright owners.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner, and the copyright owner’s written agreement not to utilize 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 Collective shall render its best efforts to locate copyright owners in order to make available reports of use, and such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(e) *Confidentiality.* Copyright owners, their agents, and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

(f) *Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Licensing Division of the Copyright Office, the Copyright Royalty Board and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such Service with information identifying the copyright owners it has served.