

LIBRARY OF CONGRESS**Copyright Office****37 CFR Part 270**

[Docket No. RM 2002-1G]

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License**AGENCY:** Copyright Office, Library of Congress.**ACTION:** Final rule.

SUMMARY: The Copyright Office of the Library of Congress is announcing a final regulation specifying notice and recordkeeping requirements governing the reporting of certain uses of sound recordings performed by means of digital audio transmissions pursuant to statutory license for the period October 28, 1998, through March 31, 2004.

EFFECTIVE DATE: November 1, 2004.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Gina Giuffreda, Attorney-Advisor, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380; Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:**Background**

The Copyright Act grants copyright owners of sound recordings the exclusive right to perform their works publicly by means of digital audio transmissions subject to certain limitations and exceptions. Among the limitations placed on the performance right for sound recordings are certain exemptions and a statutory license that permits certain eligible subscription, nonsubscription, and satellite digital audio radio to perform those sound recordings publicly by means of digital audio transmissions. 17 U.S.C. 114.

Similarly, copyright owners of sound recordings are granted the exclusive right to make copies of their works subject to certain limitations and exceptions. Among the limitations placed on the reproduction right for sound recordings is a statutory license that permits certain eligible subscription, nonsubscription, satellite digital audio, and business establishment services to make ephemeral copies of those sound recordings to facilitate their digital transmission. 17 U.S.C. 112(e).

Both the section 114 and 112 licenses require services to, among other things, report to copyright owners of sound recordings on the use of their works. Both licenses direct the Librarian of

Congress to establish regulations to give copyright owners reasonable notice of the use of their works and create and maintain records of use for delivery to copyright owners. 17 U.S.C. 114(f)(4)(A) and 17 U.S.C. 112(e)(4). The purpose of this notice and recordkeeping requirement is to ensure that the royalties collected under the statutory licenses are distributed to the correct recipients.

The Copyright Office announced interim regulations on March 11, 2004, specifying notice and recordkeeping requirements for use of sound recordings under the section 112 and 114 licenses.¹ See 69 FR 11515 (March 11, 2004). However, those interim regulations are prospective and do not address the notice and recordkeeping requirements for the period from October 28, 1998 (the date the statutory licenses other than the license for preexisting subscription services first became available) through March 31, 2004 (the "historic period").

Proposed Rulemaking

Previously, the Office had published a notice of inquiry seeking comment on what records of use are to be prescribed for uses of sound recordings during the historic period, a period during which many services had maintained few or, in many instances, no records of such use. 68 FR 58054 (October 8, 2003). The Office received a number of comments and, on July 13, 2004, the Office published a notice of proposed rulemaking proposing rules to address the historic period that were based upon the comments it had received in response to the notice of inquiry. 69 FR 42007 (July 13, 2004). Because few, if any, records of prior use had been maintained to date and those that do exist would be of little or no use in forming the basis for distribution of royalties for the historic period, the Office concluded that there was little likelihood of obtaining any useful and meaningful data by requiring services to report information from the historic period. Instead of requiring such retroactive reports, the Office followed the suggestion of several commenters and proposed to adopt rules providing that a proxy be used in lieu of reporting requirements for the historic period.

¹ Those regulations did not apply to preexisting subscription services, which are defined in section 114 as services that perform sound recordings by means of noninteractive audio-only subscription digital audio transmissions which were in existence and were making such transmissions to the public for a fee on or before July 31, 1998. 17 U.S.C. 114(j)(11). Requirements for preexisting subscription services were announced in 1998, see 64 FR 34289 (June 24, 1998), and will not be affected by the rules adopted today.

The proxy that emerged as the one most favored by the commenters was the data already provided by the preexisting subscription services to SoundExchange, Inc.² under the regulations announced in 1998 and now codified at 37 CFR 270.2 for transmissions made under section 114(f).

The Office proposed to adopt regulations specifying that the records of use submitted by the preexisting subscription services during the period between October 28, 1998, and March 31, 2004, shall be considered the records of use for all services operating under the section 112(e) and section 114 licenses and that no additional records need be filed by the nonsubscription services, the satellite digital audio services, business establishment services or new types of subscription services.

Comments

Three comments were submitted to the Office in response to the notice of proposed rulemaking. SoundExchange, Inc., a nonprofit organization jointly controlled by representatives of copyright owners and performers on whose behalf it receives and disburses section 114 statutory royalties, expressed its support for the proposed rule as "the best solution for a bad situation"—*i.e.*, a situation in which services using the statutory license had not been required to retain data on use of sound recordings. The National Association of Broadcasters, many of whose members operate under the statutory license, also expressed its support for the proposed rule.

RLI submitted a comment in which it took no position on the use of data from

² SoundExchange has been designated as the agent to receive royalty payments and statements of account from the preexisting subscription services. 37 CFR 260.3(f). SoundExchange was also designated as the "Receiving Agent" to receive royalty payments from eligible nonsubscription transmission services for the period from October 28, 1998, through December 31, 2002. SoundExchange and Royalty Logic, Inc. ("RLI") were designated for the same period as "designated agents" to distribute those royalty payments to copyright owners and performers. However, the regulations governing that time period provided that with respect to any royalty payment, RLI could act as designated agent only for copyright owners and performers who notified SoundExchange that they had elected to use RLI at least 30 days prior to SoundExchange's receipt of the royalty payment. 37 CFR 261.4(b). (c). Our July 13 notice of proposed rulemaking stated that it was the Office's understanding that no copyright owners or performers had elected RLI as their designated agent in accordance with §261.4(c), and that if that was the case, the proposed regulation would not need to require SoundExchange to provide to RLI any data from the preexisting subscription services. For the period after December 31, 2002, SoundExchange has been the sole designated agent. 37 CFR 262.4(b).

the preexisting subscription services as a proxy. However, RLI asserted that contrary to the Office's understanding, a number of copyright owners and performers had designated RLI as their designated agent to distribute statutory royalties. RLI therefore urged that the records of use submitted by the preexisting subscription services to SoundExchange be provided to RLI as well so that RLI could use those records in its distribution of royalties to copyright owners and performers who have designated it as their designated agent. RLI further requested that the regulations provide that RLI receive such records directly from the preexisting subscription services rather than from SoundExchange.

The Final Rule

In light of the support in the comments for adoption of the reports already submitted by the preexisting subscription services as a proxy for reports from nonsubscription services, the satellite digital radio audio services, business establishment services or new types of subscription services, the Office has decided to adopt the proposed rule as a final rule.

However, RLI's assertion that it is entitled to receive the preexisting subscription services' reports requires a modification of the proposed rule. Whether RLI has or has not properly been designated by any copyright owners or performers is not an issue that can be resolved in this rulemaking proceeding; nor is there any need to resolve that issue. It will suffice to provide in the regulation that if RLI has been properly designated by any copyright owners or performers,³ SoundExchange must provide copies of the preexisting subscription services' reports to that designated agent. The Office rejects as impractical RLI's request that the preexisting subscription services be required to send those reports directly to RLI. The reports in question, which cover the period from October 28, 1998, through March 31, 2004, have already been submitted to SoundExchange (or its predecessor, the Recording Industry Association of America) over a period of several years under the existing notice and recordkeeping regulations for preexisting subscription services. It would be an unfair burden on the preexisting subscription services to require them now to serve additional copies of those reports (copies of which they have not necessarily retained) on RLI, especially when all the reports are

now in the possession of SoundExchange, which necessarily will have retained those reports to assist in distribution of royalties.

List of Subjects in 37 CFR Part 270

Copyright, Sound recordings.

Final Regulation

■ In consideration of the foregoing, the Copyright Office amends part 270 of 37 CFR to read as follows:

■ 1. The authority citation for part 270 continues to read as follows:

Authority: 17 U.S.C. 702.

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■ 2. Part 270 is amended as follows:

■ a. By redesignating § 270.4 as § 270.5; and

■ b. By adding a new § 270.4 to read as follows:

§ 270.4 Reports of use of sound recordings under statutory license prior to April 1, 2004.

(a) *General.* This section prescribes the rules which govern reports of use of sound recordings by nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, for the period from October 28, 1998, through March 31, 2004.

(b) *Reports of use.* Reports of use filed by preexisting subscription services for transmissions made under 17 U.S.C. 114(f) pursuant to §270.2 for use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, for the period October 28, 1998, through March 31, 2004, shall serve as the reports of use for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services for their use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, for the period from October 28, 1998, through March 31, 2004.

(c) *Royalty Logic Inc.* If, in accordance with §261.4(c), any Copyright Owners or Performers have provided timely notice to SoundExchange of an election to receive royalties from Royalty Logic, Inc. as a Designated Agent for the period October 28, 1998, through December 31, 2002, or any portion thereof, SoundExchange shall provide to RLI copies of the Reports of Use described

in paragraph (b) of this section for that period or the applicable portion thereof.

Dated: September 21, 2004

Marybeth Peters,
Register of Copyrights.

Approved by:

James H. Billington,
The Librarian of Congress.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AZ 134-082; FRL-7820-1]

Interim Final Determination To Stay and/or Defer Sanctions, Maricopa County Environmental Services Department

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: EPA is making an interim final determination to stay and/or defer imposition of sanctions based on a proposed approval of revisions to the Maricopa County Environmental Services Department (MCESD) portion of the Arizona State Implementation Plan (SIP) published elsewhere in today's **Federal Register**. The revisions concern MCESD Rule 331.

DATES: This interim final determination is effective on September 30, 2004. However, comments will be accepted until November 1, 2004.

ADDRESSES: Send comments to Andy Steckel, Rulemaking Office Chief (AIR-4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105 or e-mail to steckel.andrew@epa.gov, or submit comments at <http://www.regulations.gov>.

You can inspect copies of the submitted rule revisions, EPA's technical support document (TSD), and public comments at our Region IX office during normal business hours by appointment. You may also see copies of the submitted rule revisions by appointment at the following locations:

Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Room B-102, 1301 Constitution Avenue, NW., (Mail Code 6102T), Washington, DC 20460.

Arizona Department of Environmental Quality, 1110 W. Washington Street, Phoenix, AZ 85007.

³ And RLI is the only other entity eligible to be so designated.