Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal that is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 920

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 11, 2004.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

■ For the reasons set out in the preamble, 30 CFR part 920 is amended as set forth below:

PART 920—Maryland

■ 1. The authority citation for part 920 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 920.15 is amended in the table by adding a new entry in chronological order by ''Date of Final Publication'' to read as follows:

§ 920.15 Approval of Maryland regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	*
September 16, 2003	March 11, 2004	COMAR 26.20.03.07.A, B; 26.20.03.11; 26.20.05.01, A, B, C, and L; and 26.20.25.02.D.

[FR Doc. 04–5499 Filed 3–10–04; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201 and 270

[Docket No. RM 2002–1E]

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Interim regulations.

SUMMARY: The Copyright Office of the Library of Congress is announcing interim regulations specifying notice and recordkeeping requirements for use of sound recordings under two statutory licenses under the Copyright Act. Electronic data format and delivery requirements for records of use as well as regulations governing prior records of use shall be announced in future **Federal Register** documents.

EFFECTIVE DATE: The interim notice and recordkeeping regulations shall be effective beginning April 12, 2004. Updated notices of intent to use the statutory licenses under sections 112 and 114 are due July 1, 2004.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024–0977. Telephone: (202) 707–8380. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

I. Overview

Digital audio services provide copyrighted sound recordings of music for the listening enjoyment of the users of those services. In order to provide these sound recordings, however, a digital audio service must license the copyrights to each musical work, as well

as the sound recording of the musical work.[1] With respect to the copyright in the sound recording, the digital audio service may seek to obtain a licensing agreement directly with the copyright owner, or, if it is an eligible service,[2] may choose to license the sound recording through statutory licenses set forth in the Copyright Act, title 17 of the United States Code. There are two such licenses that enable an eligible digital audio service to transmit performances of copyrighted sound recordings to its listeners: section 114 and section 112 of the Copyright Act. Section 114 permits an eligible digital audio service to perform copyrighted sound recordings publicly by means of digital audio transmissions to its listeners, provided that the terms and conditions set forth in section 114 are met including the payment of a royalty fee. Section 112 permits an eligible digital audio service to make the digital copies of a sound recording that are necessary to transmit a performance of a sound recording to listeners,[3] provided again that the terms and conditions set forth in section 112 are met including the payment of a royalty fee.

The royalty fees collected under the two statutory licenses are paid to a central source known as a Receiving Agent.[4] *See* 37 CFR 261.2. Before the Receiving Agent, or any other agent designated to receive royalties from the Receiving Agent, can make a royalty payment to an individual copyright owner, they must know how many times the eligible digital audio service made use of the sound recording and how many listeners received it. To obtain this information, both section 112 and section 114 direct the Librarian of Congress to prescribe regulations that identify the use of copyrighted sound recordings (the ''recordkeeping'' provisions), as well as provide copyright owners with notice that a particular eligible digital audio service is making use of the section 112 and/or 114 license (the ''notice'' provisions). *See* 17 U.S.C. 112(e)(4) and 114(f)(4)(A). Today's interim regulations are the first step in complying with these requirements.

As discussed more fully *infra*, today's interim regulations set forth the requirements for an eligible digital audio service to file notification that it is using one or both of the statutory licenses, as well as the types and details of information that an eligible digital audio service must maintain in creating a record of use for each copyrighted sound recording it provides its listeners. There are two remaining issues. First, today's interim regulations only apply to the use of sound recordings from the effective date of the interim regulations and prospectively. There remains the issue of what types of information must be reported for uses of sound recordings prior to the effective date of this regulation and back to October 28, 1998. Second, there remains the issue of the character of the format in which records of use must be maintained, and what are the acceptable means of delivering the information contained in records of use to copyright owners of sound recordings.

II. Background

On February 7, 2002, the Copyright Office of the Library of Congress issued a Notice of Proposed Rulemaking (''NPRM'') on the requirements for giving copyright owners reasonable notice of the use of their sound recordings under the section 114 and 112 statutory licenses and for how records of such use shall be kept and made available to copyright owners. 67 FR 5761 (February 7, 2002). The proposed regulations set forth in the NPRM were taken, with some modifications, from the notice and recordkeeping regulations the Office had previously adopted for eligible preexisting subscription services making use of the section 114(f)(1)(A) statutory license. *See* 63 FR 34289 (June 24, 1998); 37 CFR 201.35–201.37.[5] The Office stated that although the existing regulations only applied to preexisting subscription services, it was the desire of the Office to adopt a single set of notice and recordkeeping regulations that would apply to any service claiming use of any of the statutory licenses set forth in section 114, as well as the section 112 statutory license for ephemeral recordings. 67 FR at 5762.

With respect to the notice provisions proposed in the NPRM, copyright owners and users voiced little disagreement. The details of the notice requirements being adopted by the Library are discussed below. With respect to what records of use of sound recordings should be kept, how they should be kept and in what manner they should be delivered to copyright owners, there was virtually no agreement between copyright owners and users. On May 10, 2002, the Office held a public meeting to facilitate discussion as to the required records of use, the frequency of the recordkeeping, and the manner and format for delivery to copyright owners. Persons representing copyright owners, users, and performers appeared and offered their opinions and criticisms of the NPRM and offered suggestions as to the amount of information necessary to distribute royalties collected under the section 112 and 114 licenses. The May 10 meeting revealed persistent differences as to the scope of the regulations, as well as the details for creating and delivering databases of records of use.

Subsequent to the May 10 meeting, the Office posted a notice on its website announcing the impending release of these interim regulations and describing in general the categories of information that will be required to be reported for performances of sound recordings governed by the section 112 and 114 licenses. These transitional requirements were memorialized in a September 23, 2002, **Federal Register** document. *See* 67 FR 59573 (September 23, 2002).

The need for announcing these transitional requirements was made evident during the course of discussions at the May 10 roundtable meeting. Although services making use of the statutory licenses in section 114 (other than the preexisting subscription service license) and section 112 have been doing so since the passage of the Digital Millennium Copyright Act in 1998, it became clear that many have not kept any records of the sound recordings which they have performed or the ephemeral copies they have made. This is unacceptable. The law requires a reporting of use of sound recordings sufficient to permit payment of royalties, and each day that passes results in the loss of records of performances that may never be accurately identified and reported. Furthermore, eligible nonsubscription digital transmission services have been required to make royalty payments

[1] Recorded music typically involves two separate copyrights. There is a copyright for the song itself—the music and the lyrics, if any—and there is a separate copyright for the sound recording of that music. The copyright to the musical work often belongs to the songwriter and/or his or her music publisher, and the copyright to the sound recording is generally owned by a record company that released the recording.

[2] These services are defined as preexisting subscription services, preexisting satellite digital audio radio services, business establishment services, nonsubscription services and new subscription services. These services are further discussed, *infra.*

[3] These copies are referred to as ''ephemeral copies,'' although they sometimes exist for a period of time that is far from the ordinary meaning of ''ephemeral.''

[4] Currently, the Receiving Agent is SoundExchange, Inc. *See* 37 CFR 261.4(c).

[5] These interim regulations place all notice and recordkeeping regulations pertaining to the statutory licenses under sections 112 and 114 into a new part 270. Accordingly, the notice and recordkeeping regulations currently located in §§ 201.35–201.37 have been moved to part 270.

under the section 112 and 114 licenses for eligible nonsubscription digital transmission services since October 20, 2002, meaning that a considerable amount of royalties (over five years' worth) should now be ready for distribution. Royalties cannot be allocated to owners, artists and performers until meaningful information regarding the instances of performances of specific sound recordings of musical works is provided by the services making use of the works. Publication of these interim regulations[6] will preserve the identification and reporting of as many performances under the section 112 and 114 licenses as possible.[7]

III. Prior Records of Use

The interim regulations announced today apply on a prospective basis, meaning that they apply to uses of sound recordings under the section 112 and 114 licenses occurring on and after the effective date announced above. There remains, however, the question of what records of use must be reported for uses of sound recordings from October 28, 1998, until the present. It was apparent from the discussions of the May 10, 2002, roundtable and subsequent filings that many services have maintained few or, in many instances, no records of prior uses. Incomplete and nonexistent records create serious difficulties for the fashioning of regulations that apply to prior uses of sound recordings. The Copyright Office has sought comment on the matter of prior records, *see* 68 FR 58054 (October 8, 2003), and will publish regulations in the future. In the meantime, both copyright owners of sound recordings and users of the section 112 and 114 licenses are strongly encouraged to resolve the matter in a way that will permit SoundExchange to distribute royalties for uses of sound recordings that took place prior to the effective date of these regulations. The Office would be pleased to consider any negotiated resolution as it determines the terms of the regulations to govern reporting on past uses of sound recordings.

IV. Format Requirements

Due to the highly technical nature of delivery of data in an electronic format and the widespread disagreement among SoundExchange and the users of the statutory licenses over formatting, the Copyright Office is unable to adopt data format and delivery regulations at this time. However, we will be publishing soon a Notice of Proposed Rulemaking in the **Federal Register** proposing electronic data format and delivery rules and will be seeking public comment. In the meantime, we strongly urge SoundExchange and services that will be making reports of use to negotiate acceptable means of data formatting and delivery. The negotiation process is better suited to targeting and resolving technical difficulties than an agency rulemaking process. Also, the more agreements that are reached, the greater the body of industry experience and practice that the Office can draw from in shaping final regulations.

V. The Small Webcaster Settlement Act of 2002

On December 4, 2002, the President signed into law the Small Webcaster Settlement Act of 2002, Public Law 107–321, 116 Stat. 2780, which permitted SoundExchange to enter into agreements on behalf of all copyright owners and performers to set rates, terms, and conditions for noncommercial and small commercial webcasters operating under the section 112 and 114 statutory licenses. The Act directs the Copyright Office to publish such agreements in the **Federal Register** and specifies that they may not be taken into account by the Office in formulating notice and recordkeeping provisions under the statutory licenses.

On December 24, 2002, the Copyright Office published the agreement for small commercial webcasters. 67 FR 78510 (December 24, 2002). That agreement specifies the types of data that must be reported by small commercial webcasters for the years 2003 and 2004. The agreement further provides, however, that

> [f]or calendar years 2003 and 2004, details of the means by which copyright owners may receive notice of the use of their sound recordings, and details of the requirements under which reports of use concerning the matters identified in Section 6(a)[8] shall be made available, shall be as provided in regulations issued by the Librarian of Congress under 17 U.S.C. 114(f)(4)(A).

Id. at 78512. Consequently, entities which are signatories to the agreement published on December 24, 2002, while not bound by the records of use provisions of these interim regulations, are bound by the interim notice regulations adopted herein.

On June 11, 2003, the Office published the agreement for noncommercial webcasters. 68 FR 35008 (June 11, 2003). That agreement provides that for 2003 and 2004, noncommercial webcasters are not required to provide any reports of use of sound recordings ''even if the Librarian of Congress issues regulations otherwise requiring such reports by Noncommercial Webcasters.'' *Id.* at 35011. Consequently, those entities that are signatories to the agreement published on June 11 are not bound by the records of use regulations announced in this notice for the years 2003–2004. These entities are still bound, however, by the notice provisions adopted today.

VI. Parties Affected

The Copyright Office announced in the NPRM that it intended to adopt a single set of notice and recordkeeping regulations for all four categories of services: Preexisting subscription services, preexisting satellite digital audio radio services, nonsubscription services, and new subscription services. 67 FR 5761, 5762 (February 7, 2002). The Office has been requested, however, to exclude preexisting subscription services and preexisting satellite digital audio radio services from this proceeding.

With respect to preexisting subscription services, the Recording Industry Association of America (''RIAA'') recommended in its petition that opened this rulemaking that preexisting subscription services be allowed to continue to operate under the rules set forth in former 37 CFR 201.36. RIAA petition at 1–2. Support for the proposal was echoed by the preexisting subscription services. Comments of Music Choice at 6 (submitted April 5, 2002); Comments of Music Choice at 1–2 (submitted September 30, 2002). Because copyright owners and preexisting subscription services appear content to operate under the existing recordkeeping provisions contained in former § 201.36 at this time,[9] the recordkeeping interim

[6] As discussed below, these interim regulations make some modifications to the requirements announced in the September 23, 2002, **Federal Register** document.

[7] The Office has also had discussions with copyright owners and users regarding the format in which records of use should be preserved, including a public meeting on October 8, 2002. See 67 FR 59547 (September 23, 2002). These discussions further underscored the difficulty of prescribing detailed electronic format and delivery requirements and have prevented including them in today's interim regulations. These requirements will be announced in a future **Federal Register** document.

[8] Section 6(a) of the agreement contains the details of the records of use that must be kept.

[9] On March 14, 2003, the Copyright Office received a joint petition from copyright owners and performers and preexisting subscription services to conduct an expedited rulemaking to modify the provisions of former § 201.36. The sought-after modifications, negotiated during the statutorily prescribed negotiation period for adjustment of rates and terms, would supercede the existing

Continued

regulations announced today will not apply to preexisting subscription services. Likewise, the notice provisions of § 270.1 (former § 201.35) announced today do not apply to preexisting subscription services.

On April 11, 2003, the Office received a petition from SoundExchange, XM Satellite Radio, Inc., Sirius Satellite Radio Inc., the American Federation of Radio and Television Artists, and the American Federation of Musicians stating that these entities had reached an agreement regarding notice and recordkeeping requirements for the period through December 31, 2006, and requesting that the Office defer adopting notice and recordkeeping regulations for preexisting satellite digital audio radio services at this time. The Office responded by letter dated May 8, 2003, denying the petition because ''it is the Library's responsibility, and the Library's responsibility alone, to promulgate rules establishing notice and record-keeping requirements.'' Copyright Office letter at 1 (May 8, 2003). We concluded that it is ''our duty to include provisions governing preexisting satellite digital audio radio services in the section 114 and section 112 notice and recordkeeping regulations that we are preparing for publication.'' *Id.* at 2. Although the parties to the agreement relating to preexisting satellite digital audio radio services could have requested that the Office adopt the notice and recordkeeping requirements they had negotiated, they did not do so. Indeed, the Office has no knowledge of the details of those negotiated requirements. Consequently, the interim regulations announced today apply to preexisting satellite digital audio radio services, as well as nonsubscription services, business establishment services and new subscription services. Presumably, however, no copyright owner who is a party to the negotiated agreement would be in a position to complain of the failure, by a service that is also a party to the agreement, to comply with the regulations announced today.

VII. Scope of the Reporting Requirements

In announcing today's required records of use on a prospective basis, it must be emphasized that they represent the minimum requirements. The Office recognizes that adopting detailed, comprehensive reporting requirements at this time could place a considerable burden on those services which have not yet developed methods for maintaining records of sound recording use. The prudent course therefore is to set forth minimum requirements for records that must be maintained, as well as the frequency with which they must be kept. It is highly likely that additional requirements will be set forth after the Office has determined the effectiveness of these interim rules.

VIII. The Proposals of the Commenters

A. Proposal of the Recording Industry Association of America

The Recording Industry Association of America (''RIAA'') [10] recommended that the Copyright Office require that services report to SoundExchange a comprehensive amount of data which it asserted was necessary for proper distribution of royalties under the section 112 and 114 statutory licenses. These requirements were set forth in the NPRM and are discussed there. See 67 FR 5761 (February 7, 2002). Subsequent to the NPRM, and due at least in part to concerns expressed by users of the statutory licenses regarding the privacy of user information in a listener log, RIAA revised its proposal and dropped its request that the requirements include a separate play list and listener log. Comments of RIAA at 33 (submitted April 5, 2002). RIAA submits that all the data elements it has requested for records of use are essential to the accurate and prompt identification of the ownership of each sound recording performed and to the efficient distribution of royalties. The more data that services using the statutory licenses submit, the more ''pieces to the puzzle'' there are for a correct royalty distribution. *Id.* at 39.

RIAA's proposed records of use are divided into three principal parts: (1) Information identifying the licensee as well as the type of service and programming offered by the licensee; (2) information regarding the digital audio transmissions of sound recordings; and (3) information regarding the specific sound recordings transmitted to the public.

1. *Data Identifying Service, Type of Service and Programming Offered.* RIAA proposes adoption of six different data fields for this category: (1) Service Name; (2) Transmission Category; (3) Channel or Program Name; (4) Type of Program; (5) Influence Indicator; and (6) Genre.

a. *Service Name.* The Service Name identifies the service reporting the use of a particular sound recording.

b. *Transmission Category.* The Transmission Category identifies the royalty structure for sections 112 and 114 that a service uses to calculate its royalty obligation. Because there are essentially many licenses within section 112 and section 114 (*e.g.,* a section 114 license for preexisting subscription services with one royalty rate, a section 114 license for nonsubscription services with different royalty rates), the Transmission Category is necessary to determine the royalty fee that is being paid for the particular use of a sound recording. RIAA offers ten category codes that identify each type of service using the section 112 and 114 licenses. *Id.* at 48–49.

c. *Channel or Program Name.* RIAA asserts that the Channel or Program Name is necessary to verify compliance with the sound recording performance complement set forth in 17 U.S.C. 114(j)(13). *Id.* at 49. SoundExchange also requests identification of the Channel or Program Name, but for purposes of royalty distribution. SoundExchange acknowledges that certain services lack the capacity to identify the number of performances (*i.e.,* the number of listeners) of a particular sound recording and recommends that those services report the number of Aggregate Tuning Hours (''ATH'') to a particular channel. However, in order for ATH to provide SoundExchange with meaningful distribution data, the service must report the Channel or Program Name to avoid under-valuing or over-valuing specific sound recordings. For example, if a service has two channels of programming that perform two different genres of music (one that has many listeners and one that does not), yet reports the same ATH for the two channels, the sound recordings on both channels will be valued equally even though the one channel received more listenership. However, if separate ATH are reported for each channel, the higher ATH for the more popular channel will be reflected and the sound recordings on that channel will receive a more accurate royalty distribution. Comments of SoundExchange at 17 n.6 (submitted September 30, 2002); Letter from SoundExchange to Copyright Office explaining footnote 6 (submitted October 28, 2002).

RIAA asserts that the Channel Name for an AM or FM radio station should be the Federal Communications Commission (''FCC'') facility identification number of the broadcast

recordkeeping provisions in former § 201.36. The petition will be addressed in a separate **Federal Register** document.

[10] RIAA's comments also include the views of SoundExchange which, at the time of submission of the initial comments, was an unincorporated division of RIAA. Comments of RIAA at 1 (submitted April 5, 2002).

station that is transmitted and the frequency band designation (ex. WABC–AM). The Channel Name for all other transmissions should be the service's name for such channel (ex. ''American Top 40,'' ''80's Rock'') ''provided that if a program is generated as a random list of sound recordings from a predetermined list, the channel or program must be a unique identifier differentiating each user's randomized playlist from all other users' randomized playlists.'' Comments of RIAA at 49–50 (submitted April 5, 2002) quoting the NPRM, 67 FR at 5766.

d. *Type of Program.* Identification of the Program Type ''is needed to ensure compliance with certain statutory provisions that establish duration requirements for particular programming.'' *Id.* at 50. RIAA proposes four categories for Type of Program: archived programs, looped programs, prescheduled programs and a category for all other programs. *Id.*

e. *Influence Indicator.* RIAA asserts that:

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

Id. at 51. RIAA proposes two categories for the Influence Indicator: non-user influenced and user influenced.

f. *Genre.* The Genre field provides assistance in distinguishing among sound recording copyright owners with the same name that own different repertoire. The Genre field would apply to the designation that a service gives to a particular channel (ex. Rock, Classical) not to a particular sound recording. *Id.* at 51–52.

2. *Data Regarding the Transmissions of Sound Recordings.* RIAA proposes two categories of information regarding the transmissions of sound recordings: (1) Start Date and Time of the Sound Recording's Transmission; and (2) Total Number of Performances.

a. *Start Date and Time of the Sound Recording's Transmission.* RIAA asserts that this information is necessary to assure that services are complying with the sound recording performance complement. It also asserts that the information is necessary because members of SoundExchange may ''decide to weight performances based upon the time of day that the transmission is made, with performances during the day being weighted more heavily than overnight performances.'' *Id.* at 52.

b. *Total Number of Performances.* RIAA asserts that Total Number of Performances is critical to distributing royalties collected under the section 114 license. Since the royalties paid by services under the license are on a per performance basis, see 67 FR 45240, 45272 (July 8, 2002), the services already have this information; and it is essential to the distribution mechanism mandated by the Librarian for non-SoundExchange members. *See* 37 CFR 261.4.

3. *Data for Identifying Each Sound Recording.* RIAA proposes ten categories of information for the identification of each sound recording: (1) Artist Name; (2) Sound Recording Title; (3) Album Title; (4) International Standard Recording Code (''ISRC''); (5) Track Label (P) Line; (6) Duration of Sound Recording; (7) Marketing Label; (8) Catalog Number; (9) Universal Product Code; and (10) Release Year.

a. *Artist Name* and b. *Sound Recording Title*

RIAA asserts that these two elements are the most basic information necessary to identify a sound recording and must be reported in all instances. Comments of RIAA at 55 (submitted April 5, 2002).

c. *Album Title.* RIAA asserts that Album Title is necessary to assist in differentiating a song by a particular artist that appears on more than one record album where the copyright owners of the album are different. For example, the Alice Cooper sound recording ''I'm 18'' appears on both the ''Classicks'' and ''Love it to Death'' record albums. Epic Records is the owner of the ''Classicks'' album, while Warner Bros. is the owner of the ''Love it to Death'' album. If the Designated Agents distributing royalties do not know from which album the service performed ''I'm 18,'' they cannot properly distribute royalties. Reply comments of RIAA at 57–58 (submitted April 26, 2002).

d. *International Standard Recording Code (''ISRC'').* The International Standard Recording Code (''ISRC'') is a unique code that is embedded in many sound recordings released in recent years and is capable of being read with the proper computer software. Because ISRC is unique to each sound recording that possesses it, it is extremely useful in specifically identifying a particular sound recording. Comments of RIAA at 56–57.

e. *Track Label (P) Line.* The Track Label (P) Line is the copyright owner information for an individual sound recording. According to RIAA, a Track Label (P) Line can be found on the backside of the label packaging after the (P) Line symbol. If the album is a compilation, the Track Label (P) Line information can be found inside the label package insert following the listing of each sound recording. *Id.* at 57. The copyright owner listed in the Track Label (P) Line is generally the entity entitled to royalties for the public performance of the sound recording, but is not the complete information necessary to distribute royalties under the section 112 and 114 licenses. *Id.*; Reply comments of RIAA at 63–64.

f. *Duration of Sound Recording.* Duration of the Sound Recording is the total recorded time of that sound recording as identified on the label packaging for that version of the musical work, regardless of the time that it takes the service to transmit the sound recording. RIAA asserts that this information is necessary to help distinguish among remixes of the same sound recording by the same artist. Comments of RIAA at 57–58 (submitted April 5, 2002).

g. *Marketing Label.* The Marketing Label is the name of the company that markets the album on which a particular sound recording may be found. RIAA states that often, but not always, the company name on the Track Label (P) Line will be the same as the Marketing Label; hence both data fields must be provided. *Id.* at 58.

h. *Catalog Number.* The Catalog Number is the unique number assigned by a particular record label to an album, as opposed to the particular sound recording on the album, for purposes of ordering and inventory management. RIAA asserts that services should provide this information because it is required in the Copyright Office regulations for preexisting subscription services. *See* 63 FR 34289, 34297 (June 24, 1998).

i. *Universal Product Code (''UPC'').* The Universal Product Code (''UPC'') is a 12-digit numeric identification code that is placed on products intended for retail sale and is read by automated scanning devices (*i.e.* the ''bar code'' number). Unlike an ISRC, which is unique to a sound recording, a UPC is unique to a particular product (*i.e.* CD, cassette, LP). RIAA asserts that the UPC is necessary to assist in correctly identifying the origin of a sound recording. Comments of RIAA at 58–59 (submitted April 5, 2002).

j. *Release Year.* The Release Year is the year the album was first released

commercially for public distribution as identified on the backside of the label packaging after the (P) Line symbol. Again, RIAA asserts that Release Year is necessary to correctly identify the origin of a sound recording. *Id.* at 59.

B. Proposal of the American Federation of Musicians and the American Federation of Televison and Radio Artists

The American Federation of Musicians (''AFM'') and the American Federation of Television and Radio Artists (''AFTRA'') endorse the proposal of RIAA for records of use data

> because those rules appear to require records of use that are adequate to fulfill the important Congressional objective of compensating each featured recording artist for use of his or her unique sound recordings, and * * * will further assist in fulfilling the equally important Congressional purpose of also compensating non-featured recording artists who have performed on sound recordings used by the services.

Joint comments of AFM/AFTRA at 2 (submitted April 5, 2002). However, AFM/AFTRA urge that the Copyright Office require an additional data field that requires services to enter the names of all non-featured singers and musicians on each sound recording when the services are in possession of that information. They assert that this information is essential to distribute the modest amount of royalties allocated to non-featured singers and musicians under the section 114 license. If the burden to obtain this information is placed upon the administrator of these royalties, the costs associated with obtaining it will exceed the royalties. *Id.* at 16–20.

C. The Services' Proposals

Not surprisingly, the services using the section 112 and 114 statutory licenses vehemently object to the amount and character of information sought by RIAA and SoundExchange. Some assert that much of the information sought is not generally available and that the cost of providing it will drive certain services out of business. There is no unanimity among the services as to what information can be provided, although they certainly all prefer to provide less rather than more.

1. *Proposals of Broadcasters.* Bonneville International Corporation, Clear Channel Communications, Cox Radio, Inc., National Association of Broadcasters, Susquehanna Radio Corporation, National Religious Broadcasters Music License Committee and Salem Communications Corporation (collectively ''Radio Broadcasters'') argue that RIAA and SoundExchange have the burden of proving why each element of requested data is necessary for the collection and distribution of royalties, a burden which they assert that RIAA and SoundExchange have failed to meet. Comments of Radio Broadcasters at 2 (submitted April 5, 2002). They also submit that the Copyright Office should only require information necessary to identify a sound recording for purposes of royalty distribution and should not require information that enables RIAA to monitor the sound recording complement requirements of section 114. *Id.* at 17–21. Smaller broadcasters charge that RIAA and SoundExchange are seeking data that they know smaller broadcasters cannot possibly supply. Comments of Collegiate Broadcasters at 2–3 (submitted April 5, 2002); Comments of National Federation of Community Broadcasters at 3 (submitted April 5, 2002); Comments of Harvard Radio Broadcasting Company at 8 (submitted April 5, 2002).

Indeed, smaller broadcasters—in particular noncommercial broadcasters—request that the Copyright Office exempt them from any record of use reporting requirements. Comments of College Broadcasters at 1–2 (submitted April 5, 2002); Comments of Collegiate Broadcasters at 3–4 (submitted April 5, 2002); Comments of Harvard Radio Broadcasting Company at 2 (submitted April 5, 2002); Comments of Intercollegiate Broadcasting System at 1 (submitted April 5, 2002); Comments of Mayflower Hill Broadcasting Company at 2 (submitted April 5, 2002); Comments of National Federation of Community Broadcasters at 3 (submitted April 5, 2002); Comments of WOBC at 2 (submitted April 5, 2002); Comments of Adventist Radio Broadcasters Association at 4 (submitted April 5, 2002). These commenters note that they possess neither the manpower nor the financial resources to assemble and enter the data requested by RIAA. Many of these stations depend upon volunteer help that cannot be required to undertake the task of preparing such detailed reports of use. Their general recommendation is that radio stations with ten or fewer paid employees be fully exempted from reporting records of use. See, e.g. Comments of National Federation of Community Broadcasters at 5 (submitted April 5, 2002); Reply Comments of Radio Broadcasters at 35 (submitted April 26, 2002); Comments of College Broadcasters at 22 (submitted April 5, 2002).

Radio Broadcasters submit that only five data fields should be required for records of use: (1) Name of the service; (2) sound recording title; (3) name of artist; (4) call sign of the station or channel; and (5) date of transmission. Comments of Radio Broadcasters at 41 (submitted April 5, 2002). They contend that while this information may not enable SoundExchange to identify every entity entitled to a distribution royalty every time, such perfection is not required because the law requires only ''reasonable'' notification of use. *Id.* Radio Broadcasters, as well as other services, contend that they cannot supply the additional fields of data requested by RIAA because, in many instances, they are not supplied with the information from the record label. This is particularly the case with new releases where the service receives a promotional sound recording which has yet to be placed on an album, receive an ISRC, UPC, catalog number, Track Label (P) Line, etc. Even if this information is received at a later date or can be later determined, it is unreasonably burdensome to require services to seek it out and report it. Comments of Radio Broadcasters at 44–54 (submitted April 5, 2002); Comments of beethoven.com at passim (submitted April 5, 2002).

Radio Broadcasters also indicate that there are special reporting difficulties associated with musical programming obtained from third-party syndicators. These syndicators provide little if any information regarding the sound recordings that they perform. Requiring the broadcaster of this programming to track down the information would be unduly burdensome. Comments of Radio Broadcasters at 31–33 (submitted April 5, 2002). A similar problem also exists for programming which is broadcast live or in a ''free flow'' fashion. Comments of Harvard Radio Broadcasting Company at 7 (submitted April 5, 2002).

2. *Proposals of Non-broadcaster Services.* Non-broadcaster services (*i.e.,* webcasters) are generally prepared to provide more data than broadcasters although certainly well short of RIAA's requests. For example, David Landis, founder of Ultimate 80's, states that he has ''spoken with many of my fellow webcasters'' and can provide the following data: (1) The name of the service; (2) the channel of the program; (3) the type of the program (archived, looped or live); (4) the date of the transmission; (5) the time of the transmission; (6) the time zone of the origination of the transmission; (7) the duration of the transmission (to the nearest second); (8) the sound recording title; (9) the featured recording artist; and (10) the musical genre of the channel or program (*i.e.* the station format). Comments of Ultimate 80's at 4 (submitted April 5, 2002).

Beethoven.com proposes the same requirements, with the exception of providing data on the duration of the transmission of a sound recording. Comments of Beethoven.com at 5 (submitted April 5, 2002).

Websound, Inc. recommends an even more extensive list of requirements. It states that it can supply: (1) The name of the service; (2) the channel or program, or in the case of transmission of an AM or FM signal, the station identifier including the band designation and the FCC facility identification number; (3) the type of program (archived, looped or live); (4) the date of transmission (except for archived programs); (5) the time of transmission (except for archived programs); (6) the time zone from which the transmission originated; (7) for archived programs, the numeric designation of the pace of the sound recording within the order of the program; (8) the duration of the transmission (to the nearest second); (9) the sound recording title; (10) the ISRC, where available; (11) the release year identified in the copyright notice on the album and, in the case of compilation albums created for commercial purposes, the release year identified in the copyright notice for the individual track; (12) the featured recording artist; (13) the album title or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the service for purchase of the sound recording; (14) the marketing label; (15) the UPC; (16) the catalog number; (17) the Track Label (P) Line; (18) the musical genre of the channel or program, or in the case of the transmission of an AM or FM station, the broadcast station format. Comments of Websound, Inc. at 1–2 (submitted April 5, 2002).

Yahoo, Inc. submits that the Copyright Office should adopt only minimal reporting requirements for webcasting and broadcast retransmissions that would include the call letters of the AM or FM station, the format of the station or program (music or talk), the genre of the station or program and the cumulative number of listening hours to each station during the reporting period. Reply comments of Yahoo at 4, 10 (submitted April 26, 2002).

The Digital Media Association (''DiMA'') argues that much of the information sought by RIAA and SoundExchange is redundant and should not be required. It suggests that services should be able to choose the data fields that they supply provided that the information is sufficient to identify the sound recording used. For example, DiMA asserts that any one of the following groups of information is, by itself, sufficient to identify a sound recording:

(1) Sound recording title, featured recording artist, group, or orchestra, the retail album title, and the Track Label (P) Line;
(2) Sound recording title, UPC and the Track Label (P) Line;
(3) ISRC and the Track Label (P) Line.

Comments of DiMA at 4 (submitted April 5, 2002).

Like Radio Broadcasters, DiMA argues that information sought by RIAA to monitor the sound recording complement of section 114 should be outside the scope of records of use requirements. *Id.* at 5; see, also Reply comments of Yahoo, Inc. at 2 (submitted April 26, 2002). And with regards to reporting requirements for programming provided by third parties, DiMA submits that existing third-party contracts should be grandfathered from reporting. *Id.* at 7.

IX. Required Records of Use

A. Consideration of the Comments

Deciding which data fields should be required for a record of use under the section 114 license presents a difficult challenge for the Copyright Office. There are many interests which must be considered and balanced. On the one hand, there must be sufficient information reported so as to accurately identify the sound recordings performed. This is necessary so that royalties may be paid to the proper parties and to avoid not compensating a large number of performances simply because there was insufficient information. On the other hand, the burdens associated with reporting information cannot be so high as to be unreasonable or to create a situation where many services cannot comply.

It has been asserted by some services throughout this docket that for some services any reporting of information regarding performances will be too great a burden. While this assertion, if true, might result in certain services ceasing operation under the statutory licenses, it is not a valid reason to eliminate reporting altogether. The law states that the Librarian of Congress must adopt regulations under the section 114 license to provide copyright owners of sound recordings with ''reasonable notice'' of the use of their sound recordings. 17 U.S.C. 114(f)(4)(A).[11] No provision is made for not adopting regulations in certain circumstances, or for exempting certain services from any reporting information. As discussed above, certain services—in particular noncommercial broadcasters—seek a complete exemption from reporting any data. Others are willing to report data for the sound recordings they perform themselves, but seek an exemption for sound recordings they receive from third-party syndicators. We find no authority in the statute to create such exemptions, nor do we find such exemptions as constituting ''reasonable notice'' of the performance of sound recordings.[12] In order to avail oneself of the statutory licenses, one must report some information. The question is how extensive that information should be.

In principle, one might imagine that recordkeeping for many webcasters could be a simple matter. Webcasting necessarily requires use of computers for storage and transmission of the performances of sound recordings. Thus, webcasters might be expected to have the requisite resources and sophistication to maintain and transmit detailed reports identifying each and every sound recording they transmit, as well as the number of performances transmitted.

If webcasters have the sophistication and equipment to facilitate the recordation and reporting of information, the webcasting statutory license could offer an opportunity to ensure that each copyright owner of each sound recording performed by webcasters will be compensated for exactly his or her share of the royalties generated by the statutory license. Because SoundExchange could, in theory, obtain perfect information about the number of performances of each sound recording, it could divide the total royalty pool by the total number of performances of all sound recordings, and then allocate to each sound recording the corresponding share based on the number of times it is performed.

However, many webcasters assert that the burden of keeping comprehensive

[11] A similar provision exists for use of the section 112 license. See 17 U.S.C. 112(e)(4).

[12] One could argue that reporting the use of sound recordings is not ''reasonable'' if a service cannot under any circumstances provide information about the sound recordings. Even if the Office were persuaded that some services cannot report any data—which we are not—the argument would be unpersuasive. Transmitting a sound recording to the public is not something that accidentally or unknowingly happens. It takes a significant amount of decision making and action to select and compile sound recordings, and a significant amount of technical expertise to make the transmissions. It is not unreasonable to require those engaged in such a sophisticated activity to collect and report a limited amount of data regarding others' property which they are using for their benefit. While making and reporting a record of use is undoubtedly an additional cost of transmitting sound recordings to the public, it is not an unreasonable one.

records would drive them out of business. *See, e.g.*, Reply Comments of a United Group of Webcasters at 3; Comments of Mayflower Hill Broadcasting Corp. at 1–2; Comments of Collegiate Broadcasters, Inc. at 2–3; Reply Comment of Harvard Radio Broadcasting Company at 6–7. We recognize that there will be some burden involved in reporting information on each sound recording performed, and as more information is required for each sound recording, the burden becomes greater. Although the ultimate goal is to require comprehensive reporting on each performance a webcaster makes, that goal is not achievable at this time. Therefore, the regulations announced today will not require year-round reporting, but only reporting for certain periods during the year, and the information that webcasters must provide will be less comprehensive than copyright owners desire.

In selecting the data fields described below, the Copyright Office was guided by several principles. First, we have not adopted any data fields proposed by RIAA which are not for the purpose of making royalty distributions under the section 112 and 114 licenses. RIAA has requested data for purposes of monitoring the sound recording performance complement in 17 U.S.C. 114(j)(13) (Start Date and Time of the Sound Recording's Transmission),[13] for monitoring requirements regarding the duration of programming 17 U.S.C. 114(d)(2)(C)(iii) (Type of Program), and to assist in determining whether a service is interactive (Influence Indicator). RIAA points to the Copyright Office's decision in the preexisting subscription service rulemaking to adopt reporting requirements designed to permit monitoring of the sound recording performance complement, 63 FR 34289 (June 24, 1998), and argues that the decision must be applied in this docket. Reply Comments of RIAA at 15 (submitted April 26, 2002). In that rulemaking proceeding we said:

> The Office considered arguments of DCR and other Services that the Act imposes no obligation to affirmatively report compliance with the complement, but reaffirms its earlier judgment. The Office notes that conforming to the performance complement is a condition of the statutory license, and a Service that complies with the regulatory notice requirements and pays the statutory royalties thereby avoids infringing the copyright owners' exclusive rights. 17 U.S.C. 114(d)(2), (f)(5). The Office determines, therefore, that it is within its rulemaking authority under section 114(f)(2) to require reporting of complement information. See *Cablevision Sys. Devel. Corp.* v. *Motion Picture Ass'n*, 836 F.2d 599 (D.C. Cir. 1988) (Copyright Office had authority to issue regulations interpreting statute). The Office believes that the presence and specificity of the performance complement indicates Congress' intent that records of use include data to test compliance. While section 114(j)(7) provides that transmissions from multiple phonorecords exceeding the performance complement's numerical limitations will nonetheless conform to the complement if the programming of multiple phonorecords was not ''willfully intended'' to avoid the numerical limitations, a pattern of conduct might provide evidence of the requisite intent.

63 FR at 34294.

The reasoning for requiring performance complement data in the preexisting subscription service rulemaking does not necessarily apply with the same force to these interim regulations. While there is evidence of legislative intent for services to report performance complement data, as well as other data related to compliance with the terms of the license, such data is not useful when it is limited to only two weeks per calendar quarter. See discussion of reporting periods, *infra.* Given that reporting of such limited data will not serve the purpose of monitoring statutory compliance and given the burden upon services for reporting the data, we are not requiring it at this time. The matter may be further addressed in the final regulations in this docket.

The second principle guiding our selection of data fields is a cost/benefit analysis. The Office has chosen to adopt interim regulations at this time to afford services an ample period of time to adjust to the process of reporting. It is evident from the statements made by certain services at the meetings held by the Office in this docket that in many cases up to now little or no gathering of data has taken place. Given this notable lack of activity, imposition of extensive and detailed reporting requirements at this time could increase the instances of noncompliance by services unprepared to report data and could substantially raise the reporting error rates for services that do fully comply. Consequently, the Office has chosen to require a minimal level of reporting at this time that will permit the distribution of royalties (albeit imperfectly). These baseline requirements will be revisited in the final regulations after the Copyright Office has had sufficient time to assess their effectiveness and consider ways in which data reporting may be improved.[14]

By applying these principles to the 18 data fields requested by RIAA and the fields requested by AFM and AFTRA, the Copyright Office has settled upon the fields which must be reported by services using the section 112 and 114 statutory licenses. With respect to RIAA's requests, we are not requiring Start Date and Time of the Sound Recording's Transmission, Type of Program and Influence Indicator because these data fields are for purposes of monitoring compliance with the limitations of the section 114 license. As discussed above, requiring these fields would be unnecessarily burdensome especially in light of the fact that the two-week-per-calendar-quarter reporting requirement renders the information collected from these fields of little or no value in enforcing the requirements of the section 114 license.

The Office also has not chosen to require reporting of the Track Label (P) Line, the Duration of the Sound Recording, the Catalog Number, the UPC and the Release Year, the reporting of which would be unduly burdensome at this time. As Radio Broadcasters stated in their comments, these pieces of information are frequently not provided to services until well after the initial transmissions of the sound recordings. While the information is discoverable at a later date, researching it and revising prior records of use would involve significant costs.

Finally, we are not adopting the proposal of AFM and AFTRA to report data regarding nonfeatured vocalists and musicians. Many sound recordings have numerous nonfeatured musicians and vocalists which would require large amounts of data entry into a report of use. Entering lists of names of performers into a report of use would be a prohibitively costly undertaking for services that would raise the likelihood of noncompliance and error rates in reporting. Furthermore, we are focused upon identifying and reporting the use of sound recordings, not performers associated with the sound recordings. AFM and AFTRA's proposal is not consistent with the goal of this interim

[13] RIAA also states that it may use data regarding the Start Date and Time of the Sound Recording's Transmission for distribution purposes when audience size is not reported. Comments of RIAA at 52 (submitted April 5, 2002). Reporting of the number of performances of a sound recording is discussed *infra*, and data regarding the Start Date and Time of the Sound Recording's Transmission is not necessary.

[14] While the data fields required by these interim regulations are the baseline requirements, there is no prohibition on services reporting additional data. As discussed above, webcaster services appear capable of providing more data than broadcaster services. Delivery of additional data is encouraged, and services wishing to do so should contact SoundExchange to make arrangements for providing the additional information.

regulation to establish merely baseline reporting requirements and cannot be adopted at this time.

B. The Record of Use Reporting Regime

In this section the Copyright Office sets forth the reporting regime for the use of sound recordings under the section 112 and 114 statutory licenses.[15] In the interest of regulatory flexibility and providing services with the opportunity to reduce their reporting burden, we are prescribing a reporting regime that, in two instances, permits the entry of a single amount of data in lieu of additional separate categories of data identifying the sound recording and its use. The reporting regime is as follows:

1. Name of Service
2. Transmission Category
3. Featured Artist
4. Sound Recording Title
5. Sound Recording Identification
   Album Title
   Marketing Label
   OR
   International Standard Recording Code (ISRC)
6. Total Performances
   Aggregate Tuning Hours
   Channel or Program Name
   Play Frequency
   OR
   Actual Total Performances

Under this reporting regime, a service may report as few as six items of data per sound recording or as many as eight depending upon the amount of reporting data available to each service. A service that has ISRC data and Actual Total Performances data for a sound recording need only report its Name, the Transmission Category, the Featured Artist, the Sound Recording Title, ISRC, and Actual Total Performances for the sound recording.[16] A service which has the ISRC but not the Actual Total Performances data, may report the ISRC and in addition must report its Name, Transmission Category, Featured Artist, Sound Recording Title, Aggregate Tuning Hours, Channel or Program Name, and Play Frequency. Likewise, a service which has Actual Total Performances data but not ISRC may report Actual Total Performances and then must report its Name, Transmission Category, Featured Artist, Sound Recording Title, Album Title, and Marketing Label. And a service which has neither ISRC nor Actual Total Performances data for a sound recording must report its Name, Transmission Category, the Featured Artist, Sound Recording Title, Album Title, Marketing Label, Aggregate Tuning Hours, Channel or Program Name, and Play Frequency.

C. Details of the Data Fields for a Record of Use

1. *Name of Service.* The Name of Service is a mandatory reporting category. The Name of Service is the full legal name of the service making the transmissions.

2. *Transmission Category.* The Transmission Category is a mandatory reporting category. Because the various statutory licenses contained in section 114 have differing royalty structures, and because many services frequently operate under more than one license, it is necessary to identify the category under which the performance of a sound recording is made. Services shall use the following category codes to identify each sound recording performed:

Category code	Description
A	Eligible nonsubscription transmission other than broadcast simulcasts and transmissions of non-music programming.
B	Eligible nonsubscription transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming.
C	Eligible nonsubscription transmission of non-music programming reasonably classified as news, talk, sports or business programming.
D	Eligible nonsubscription transmission by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by 37 CFR 261.3(a)(2)(i) and (ii).[17]
E	Eligible nonsubscription transmission by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by 37 CFR 261.3(a)(2)(iii).[18]
F	Eligible nonsubscription transmission by a small webcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act.
G	Eligible nonsubscription transmission by a noncommercial broadcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act.
H	Transmission other than broadcast simulcasts and transmissions of non-music programming made by an eligible new subscription service.
I	Transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service.
J	Transmission of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible new subscription service.
K	Eligible transmission by a business establishment service making ephemeral recordings.

3. *Featured Artist.* The Featured Artist category is a mandatory reporting category for each sound recording. Each service must provide the name of the featured artist for each sound recording it transmits during the relevant reporting period. If the featured artist is an individual or an entity such as a band, the full name must be reported. In those instances where the songwriter and the featured artist are different, care must be taken in reporting only the featured artist. For example, if the sound recording is a performance of the Boston Philharmonic Orchestra of a

[15] As discussed, *infra*, the required data fields for a record of use under the section 114 license are the same for a record of use under the section 112 license. Services using both licenses only need report the required data fields once for each sound recording.

[16] Simply because a service has the ISRC and/or Actual Total Performances for a sound recording does not mean the service must report this data in lieu of the alternative categories. The purpose of reporting ISRC and/or Actual Total Performances is to reduce the categories of data that a service must report for each sound recording. If, for example, a service possesses the ISRC for a sound recording but prefers instead to report the Sound Recording Title, Album Title and Marketing Label instead, it is free to do so.

[17] Transmissions covered by these provisions include simultaneous Internet retransmissions by non-Corporation for Public Broadcasting noncommercial broadcasters of over-the-air AM or FM broadcasts by the same radio station and other Internet transmissions of non-Corporation for Public Broadcasting noncommercial broadcasters, including up to two side channels of programming consistent with the mission of the station, and are subject to a section 114 royalty of 0.02 cents per performance.

[18] Transmissions covered by this provision include Internet transmissions on other side channels of programming by non-Corporation for Public Broadcasting noncommercial broadcasters and are subject to a section 114 royalty of 0.07 cents per performance.

work by Mozart, the featured artist should be reported as the Boston Philharmonic Orchestra, not Mozart. Likewise, where the sound recording performed is taken from an album that contains various featured artists (*i.e.*, a compilation), it is not acceptable to report the artist as ''Various.'' The featured artist of the particular sound recording track performed must be reported.

4. *Sound Recording Title.* As with the featured artist, care must be taken in accurately reporting the title of the sound recording (*i.e.*, the song title). It is not acceptable to report the name of the album from which the sound recording is taken.

5. *Sound Recording Identification:*

a. International Standard Recording Code (ISRC). The International Standard Recording Code (''ISRC'') is the unique identifier that identifies each version of a sound recording. It is imbedded in promotional and commercially released sound recordings and can be read by currently available software. A service may report the ISRC of a sound recording in lieu of the Sound Recording Title, Album Title and Marketing Label. However, identification of the Featured Artist is still required. The purpose of this requirement is to permit verification of the correct ISRC by allowing SoundExchange to identify and correct reports where the Featured Artist does not match the information associated with the ISRC.

b. For those services that do not report the ISRC for a sound recording, the Album Title and Marketing Label must be reported.

(i) Album Title. According to the comments and the May 10, 2002, public meeting, the title of an album on which a particular sound recording appears may not be determined at the time the sound recording is released to broadcasters and webcasters for performance; or the album title information may not be supplied by the recording label. Consequently, services need only report the album title for a particular sound recording when they have that information in their possession, or it has been supplied by the recording label, at or before the time of performance of the sound recording.

Those services which copy sound recordings into databases for subsequent transmission to their users and do not enter the album title into that database are nonetheless responsible for providing the album title if that information was in their possession, or been supplied to them, at or before the time the sound recording was performed.

(ii) Marketing Label. The Marketing Label is the name of the company that markets the album which contains the sound recording. As with album titles, it is sometimes the case that services do not possess, or are not supplied with, the name of the marketing label for the sound recording. Services need only report the marketing label if that information was in their possession, or was supplied to them by the marketing label, at or before the time the performance of the sound recording is made. Discarding marketing label information, or not including it in the database into which the sound recording is copied, does not relieve the service of the obligation to report the information.

6. *Total Performances.* Services must provide the total number of performances of each sound recording during the relevant reporting period. Section 261.2, 37 CFR, defines a ''performance'' as:

> [E]ach 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:
>
> (1) A performance of a sound recording that does not require a license (*e.g.* the sound recording is not copyrighted);
>
> (2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and
>
> (3) An incidental performance that both: (i) 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
>
> (ii) 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).

See, 69 FR 5693 (February 6, 2004).

Certain services argue that it is not possible, in many circumstances, to keep track of the number of performances of a sound recording. *See, e.g.* Comments of Harvard Broadcasting Radio Company at 2 (submitted September 30, 2002); Comments of NRBMLC and Salem Communications Corp. at 4 (submitted September 30, 2002); Comments of Collegiate Broadcasters, Inc. at 6–7 (submitted September 30, 2002). Obviously, repeated failures by multiple services to report the number of performances of a sound recording will subvert the purpose of the recordkeeping requirement in that many sound recordings will be under-compensated or not compensated at all from the section 114 and 112 royalties. The Copyright Office is therefore permitting services to identify the total number of performances of a sound recording during the reporting period in one of two ways: Actual Total Performances or Aggregate Tuning Hours, Channel or Program Name, and Play Frequency.

a. Actual Total Performances. For those services that possess the technological ability to identify accurately the number of times that a sound recording is performed (such as those that generate intended play lists), the number of performances must be reported in the performance data field. The data reported in this field may be for each time the sound recording is transmitted or ''played'' during the reporting period, or for all Actual Total Performances of the sound recording during the relevant reporting period.[19]

b. For those services that lack the technological ability to report the actual number of performances, or choose not to report such information, the Aggregate Tuning Hours, Channel or Program Name, and Play Frequency information must be reported for each sound recording.

(i) *Aggregate Tuning Hours.* Aggregate Tuning Hours (''ATH'') are a standard measure of listenership that can be used to estimate the Actual Total Performances of sound recordings. Aggregate Tuning Hours measure the total number of listener hours by all who have accessed the service during a given period of time. According to certain broadcasters, ATH for AM/FM radio stations are readily calculable by a service. See Joint Reply Comments of Radio Broadcasters at 26 (submitted April 26, 2002).

Aggregate Tuning Hours do not, by themselves, provide sufficient information on which to estimate the Total Performances of a sound recording. However, when combined with information regarding the Channel or Program Name on which the sound recording appeared and the Play Frequency, Aggregate Tuning Hours will permit SoundExchange to estimate the Total Performances for a sound recording during the reporting period.

[19] If a service chooses to enter the Actual Total Performance data for each time the sound recording is transmitted or ''played,'' it will be required to repeat the full data for the sound recording to account for all transmissions or ''playings'' of the sound recording during the relevant accounting period.

See Comments of SoundExchange, Inc. at 17 n.6 (submitted September 30, 2002). Services electing to report Aggregate Tuning Hours for a sound recording in lieu of the Actual Total Performances must report the Aggregate Tuning Hours for the two-week reporting period selected by the service for the channel or program on which the sound recording was performed. If the same sound recording was performed on more than one channel or program, a complete separate record of use must be reported for each channel or program. Under no circumstances may a service fail to report any data in the performance data field when submitting a record of use of a sound recording.

(ii) *Channel or Program Name.* The Channel Name for an AM or FM radio station should be the FCC facility identification number (*e.g.*, WABC–FM). For all other transmissions, the Channel or Program Name should be the name assigned by the service (*e.g.*, ''Oldies Hits,'' ''70's Rock''), ''provided that if a program is generated as a random list of sound recordings from a predetermined list, the channel or program must be a unique identifier differentiating each user's randomized playlist from all other users' randomized playlists.'' 67 FR 5761, 5766 (February 7, 2002).

(iii) Play Frequency. Aggregate Tuning Hours and Channel or Program Name are not sufficient, by themselves, to permit an equitable distribution of royalties collected under the section 112 and 114 licenses. A sound recording which is played 100 times during the two-week reporting period is of greater value and should receive a larger distribution of royalties than a sound recording played only once during that same period. Consequently, it is necessary for services that elect not to report Actual Total Performances to report the number of times each sound recording is played during the two week reporting period.

Play Frequency is different than performance data. According to the definition of ''performance'' in 37 CFR 262.2, a sound recording is performed each time a listener receives at least some portion of the sound recording. A sound recording that is received in some part by 10 listeners constitutes 10 performances of that sound recording. In contrast, ''played'' simply means the overall number of times a sound recording is offered, regardless of the number of listeners receiving the sound recording. If a particular sound recording is offered to listeners on a particular channel or program only once during the two-week reporting period, then it is only ''played'' once and the Play Frequency is one. Likewise, if the sound recording is offered 10 times during the two-week reporting period, then it is ''played'' ten times and the Play Frequency is 10.

D. Required Data Fields for a Record of Use Under the Section 112 License

Section 112 of the Copyright Act contains a statutory license that permits services making digital audio transmissions to make ephemeral copies of sound recordings necessary to the transmission process. Some services operate under both section 114 and section 112 in transmitting sound recordings, while some do not make use of the section 114 licenses because their performances of sound recordings are exempted by the Copyright Act. See 17 U.S.C. 114(1)(C)(iv). These business establishment services, however, make ephemeral copies under the section 112 statutory license.

Section 112(e)(4) requires the Copyright Office to establish requirements by which copyright owners receive notice and records of use of the ephemeral copies of their sound recordings. The RIAA and SoundExchange, Inc. have requested that the Office require detailed records of each ephemeral copy of a sound recording made during the transmission of the performance. Comments of RIAA at 61–62 (submitted April 5, 2002); Comments of SoundExchange at Tab A, p. 11 (submitted September 30, 2002). Broadcasters counter that detailed reporting of the number of ephemeral copies made is unnecessary because of the direct link between the royalty fees paid by nonsubscription services for the section 114 license and the section 112 license; the ephemeral royalty rate for nonsubscription services is a percentage of the section 114 fee for performances. The number of ephemeral copies made is irrelevant because the value of those copies is tied to the value of the performance of the sound recording. Joint comments of Radio Broadcasters at 57–58 (submitted April 5, 2002). Furthermore, broadcasters assert that tracking the number of ephemeral copies made of a sound recording to facilitate its performance is a virtually impossible task and will result in a high error rate if reporting is required. *Id.* at 58.

It is reasonable to conclude that the value of a license to make ephemeral copies of a sound recording for the purpose of facilitating a transmission that results in a performance will depend upon the value of the performances of that sound recording. The Copyright Office is persuaded that records of performances of sound recordings are a sound proxy for the value of ephemeral copies made under the section 112 license. Our decision is bolstered by two factors. First, in the recent nonsubscription service CARP proceeding, RIAA advocated that the royalty fee for section 112 be a percentage of the section 114 fee, apparently recognizing the difficulty of assessing the independent value of ephemeral copies. RIAA's Proposed Findings of Fact and Conclusions of Law at ¶244 (submitted December 3, 2001). Second, while RIAA submits that SoundExchange may choose to distribute section 112 royalties on the basis of the number of copies, it may not do so. *See* 37 CFR 261.4(a) and (h).

For services that make transmissions under one or more of the section 114 licenses, there is no need to keep separate records for ephemeral copies made under section 112. Those services are required to submit only the single data file for performances of sound recordings and need not submit a second data file for ephemeral copies. However, even though the service is not required to report a separate data file, it must identify to the receiving and designated agents during each reporting period that it has made use of the section 112 license and that the data file it is submitting applies to both licenses.

For business establishment services that do not make use of the section 114 license but do make use of the section 112 license, performance data shall serve as the records of use for section 112. All the requirements prescribed by this regulation for the section 114 license records of use (data fields, formatting, delivery, etc.) apply to submission of section 112 records of use. Such services must identify to the receiving and designated agents for each reporting period that the data they are submitting is for the use of the section 112 license and not the section 114 license.

E. Sound Recordings Not Licensed Under Section 112/114

Many services, particularly those performing older works, transmit sound recordings that are not under federal copyright protection or whose term has expired. Also, many services may perform works that are in the public domain, or for which no copyright is claimed, or may directly license certain sound recordings from their owners. Services performing these works may report records of their usage but are not required to do so. Services are cautioned, however, that failure to report a sound recording which is under copyright protection may preclude reliance upon the section 114 and section 112 statutory licenses for the

performance and/or making of ephemeral copies of the work.

X. The Reporting Periods

As discussed above, the reporting requirements announced today are adopted on an interim basis while the Copyright Office continues the rulemaking process to produce final regulations. The interim regulations apply to performances on a prospective basis. It is anticipated that the Office will address the status of performances made prior to the effective date of these interim regulations at a later time. In the meantime, services should preserve those records of performances in their possession dating back to the effective date of the section 112 and 114 statutory licenses.

For the same reasons that the Office considers it advisable to phase in the reporting process, we have determined that, at this stage, it is best to require periodic reporting of sound recording performances rather than year-round census reporting. Once 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.

For the period beginning with the effective date of this interim regulation until superseded by further regulations, services making use of the section 114 license (other than preexisting subscription services governed by 37 CFR 270.1, 270.2, and 270.4) and the section 112 license shall maintain records, as provided above, for each sound recording performed for a period of no less than two weeks (two periods of seven consecutive days) for each quarter of the calendar year.

The two weeks reported need not be consecutive, although a service may choose that option. Likewise, each week period need not begin on a Sunday, but may begin on any day of the week and then run for a total of seven consecutive days. The two weeks chosen for reporting should reflect as much as possible the programming typically offered by the service during the calendar quarter. Services that wish to report records of use for periods beyond the two weeks of each calendar quarter are encouraged to consult with SoundExchange on the feasibility of doing so and, if SoundExchange concurs, to report for longer periods of time.

The first reporting period shall begin on April 1, 2004,[20] which will mark the first period under these regulations that reports of use must be made. Reports of use thereafter will be due for each calendar quarter as described above until this interim regulation is superceded by final regulations.

A separate report of use is required for each calendar quarter for each statutory license used by the service.

XI. Notification of Use of the Statutory Licenses

The Copyright Office proposed in the NPRM certain amendments to the regulations contained in former 37 CFR 201.35 governing notice of use of statutory licenses. Unlike records of use, there is agreement on some of the proposed changes offered in the NPRM. Commenters agree that the Office should prescribe a single standard form for both the section 112 and 114 licenses and generally agree to the prototype form currently posted on the Copyright Office Web site at: *http://www.loc.gov/copyright/forms/form112-114nou.pdf. See, e.g.* Comments RIAA at 17–19 (submitted April 5, 2002); Joint Reply of Radio Broadcasters at 32–34 (submitted April 26, 2002). With respect to the form, RIAA requests that the services be identified in the exact manner in which they appear in the statute (*e.g.* ''Eligible non-subscription transmission service'' as opposed to ''Non-subscription transmission service''), whereas broadcasters request ''plain English'' descriptions of the various services identified in the form. Joint Reply of Radio Broadcasters at 33 (submitted April 26, 2002); Comments of Collegiate Broadcasters at 5–6 (submitted April 5, 2002). We are accepting RIAA's suggestion to conform the definitions. While broadcasters' suggestion for ''plain English'' sounds reasonable in theory, it is a considerable challenge to craft definitions that are sufficiently colloquial to satisfy the goal of ''plain English,'' yet remain technically accurate. Unfortunately, broadcasters did not provide any language for the Office to consider, and we therefore are not adopting their suggestion.

Commenters also agree that new notices of intent to use the licenses should be filed to update information from previously submitted notices and that notices should be maintained in a public file at the Copyright Office. Broadcasters, however, request that if new notices are required to be filed, the $20 filing fee be waived for those who have previously submitted notices and paid the fee. Joint Reply of Radio Broadcasters at 32 (submitted April 26, 2002); Comments of Collegiate Broadcasters at 7 (submitted April 5, 2002). The Copyright Office must recoup its costs for administering the section 112 and 114 statutory licenses; therefore it cannot waive the fee. Moreover, the $20 fee is not unreasonable or unduly burdensome. Part of the cost associated with the licenses is maintaining the public files for the notices and the Office shall continue that practice. Unfortunately, the Office is not prepared at this time to accept the submission of notices and fees electronically, and for the time being we will continue our practice of accepting only hard copies of notices and payment. It is anticipated that this may change in the future, and services using the section 112 and 114 licenses are encouraged to check the Office Web site for updates on this matter.

The Office stated in the NPRM that it was considering discontinuing its practice of posting copies of all notices on its Web site and requiring that notices be filed jointly with, or in the alternative only with, the collectives designated through the CARP process to receive and distribute royalties under the section 112 and 114 licenses. RIAA opposes elimination of the practice of posting notices on the Office Web site, arguing that the notices should be available to all copyright owners and not just those in the Washington, DC, area. Comments of RIAA at 20–21 (submitted April 5, 2002). The Office will post a list of names of those persons and entities that have filed a notice, but we will not continue to post the notices themselves. Scanning and posting the full notices is extremely costly and burdensome. When we institute our electronic filing system, we will revisit the issue. In the meantime, persons interested in viewing the notices must contact the Copyright Office.

None of the commenters favor submission of notices to the royalty collectives designated by the CARP process, either solely or jointly. See, *e.g.* Comments of the RIAA at 22–23 (submitted April 5, 2002); Joint Reply of Radio Broadcasters at 33 (submitted April 26, 2002). Consequently, the Office will not adopt such a requirement.

Updated notices, along with the $20 filing fee specified in § 201.3(e) of title 37 of the Code of Federal Regulations, shall be filed with the Licensing Division of the Copyright Office no later than July 1, 2004. The Office stated in the NPRM that it was considering requiring periodic updating of notices, perhaps on an annual basis. We are declining at this time to adopt a regular

[20] This does not mean that services will be required to keep records commencing April 1. Rather, April 1 is the beginning of the first three-month calendar quarter during which services must keep records for two weeks.

specified time period, preferring to gain experience in determining whether mandatory periodic updates by all services are necessary. The matter will be further addressed in the final regulations.

Notices of intent to use the section 112 and/or 114 licenses by new subscription services will still be required to be filed prior to the date of first transmission or the making of an ephemeral recording, and services will continue to be required to update the notice within 45 days of change in the information reported. Notices for new subscription services must be submitted to the Licensing Division of the Copyright Office accompanied by the filing fee specified in 37 CFR 201.3(e).

List of Subjects in 37 CFR Parts 201 and 270

Copyright, Sound recordings.

Interim Regulation

■ In consideration of the foregoing, the Copyright Office amends part 201 of 37 CFR and adds part 270 to 37 CFR to read as follows:

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

PART 201—GENERAL PROVISIONS

§§ 201.35 through 201.37 [Removed and Reserved]

■ 2. Remove and reserve §§ 201.35 through 201.37.

■ 3. Add part 270 to 37 CFR Chapter II, subchapter B, to read as follows:

PART 270—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

Sec.

270.1 Notice of use of sound recordings under statutory license.
270.2 Reports of use of sound recordings under statutory license for preexisting subscription services.
270.3 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.
270.4 Designated collection and distribution organizations for records of use of sound recordings under statutory license.

Authority: 17 U.S.C. 702.

§ 270.1 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) *Definitions.* (1) 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 section to be filed by a Service in the Copyright Office.

(2) 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. For purposes of this section, 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:

(i) A *preexisting subscription service* is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, and was in existence and making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(ii) A *preexisting satellite digital audio radio service* is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(iii) 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.

(iv) A *new subscription service* is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(v) 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.

(c) *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 website 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.

(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 website 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 (f) of this section.

(d) *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.

(e) *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 chapter. Notices shall be placed in the public records of the Licensing Division. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE, Washington, DC 20557–6400.

(1) A Service that, prior to April 12, 2004, has already commenced making digital transmissions 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, and that has already filed an Initial Notice of Digital Transmission of Sound Recordings Under Statutory License, and that intends to continue to make digital transmissions or ephemeral phonorecords following July 1, 2004, shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office no later than July 1, 2004.

(2) A Service that, on or after July 1, 2004, commences making digital transmissions and 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 igital transmission of the sound recording.

(3) A Service that, on or after July 1, 2004, commences making only ephemeral phonorecords of sound recordings, 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 a sound recording under the statutory license.

(f) *Amendment.* A Service shall file a new Notice of Use of Sound Recordings under Statutory License within 45 days after any of the information 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.

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

(a) *General.* This section prescribes rules under which preexisting subscription services shall serve copyright owners with notice of use of their sound recordings, what the content of that notice should be, and under which records of such use shall be kept and made available.

(b) *Definitions.* (1) A *Collective* is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) of title 17 of the United States Code and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(2) A *Report of Use of Sound Recordings under Statutory License* is a report required under this part to be provided by the preexisting subscription service transmitting sound recordings under statutory license.

(3) A *Preexisting Subscription Service* is an entity engaged in the digital transmission of sound recordings pursuant to section 114(f) of title 17 of the United States Code.

(c) *Service.* Reports of Use shall be served upon Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f). Reports of Use shall be served, by certified or registered mail, or by other means if agreed upon by the respective preexisting subscription service and Collective, on or before the twentieth day after the close of each month.

(d) *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 20th day after the close of each month, and make them available 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.

(e) *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.

(1) 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:

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

(ii) The channel;

(iii) The sound recording title;

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

(v) 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);

(vi) The recording label;

(vii) The catalog number;

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

(ix) The date of transmission; and

(x) The time of transmission.

(2) The Report of Use shall include a report of any system failure resulting in

a deviation from the Intended Playlists of scheduled sound recordings. Such report shall include the date, time and duration of any such system failure.

(f) *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.

(g) *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/YYYY;

(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.

(h) *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.

(i) *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. For reporting periods from February 1, 1996, through August 31, 1998, the preexisting subscription service shall serve upon all designated Collectives and retain for a period of three years from the date of transmission records of use indicating which sound recordings were performed and the number of times each recording was performed, but is not required to produce full Reports of Use or Intended Playlists for those periods.

§ 270.3 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 under which nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services shall maintain reports of use of their sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both.

(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 (c)(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 *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses, either by settlement agreement reached under section 112(e)(3), section 112(e)(6), section 114(f)(1)(A), section 114(f)(1)(C)(i), section 114(f)(2)(A), or section 114(f)(2)(C)(i) and adopted pursuant to § 251.63(b) of this chapter, or by a decision of a Copyright Arbitration Royalty Panel under section 112(e)(4), section 112(e)(6), section 114(f)(1)(B), section (f)(1)(C)(ii), section 114(f)(2)(B), or section 114(f)(2)(C)(ii) or by order of the Librarian of Congress pursuant to 17 U.S.C. 802(f).

(4) A *new subscription service* is defined in § 270.1(b)(2)(iv).

(5) A *nonsubscription transmission service* is defined in § 270.1(b)(2)(iii).

(6) A *preexisting satellite digital audio radio service* is defined in § 270.1(b)(2)(ii).

(7) A *business establishment service* is defined in § 270.1(b)(2)(v).

(8) 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).

(9) *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 two-week reporting period, then the play frequency is one. If the sound recording is transmitted 10 times during the two-week reporting period, then the play frequency is 10.

(10) A *Report of Use* is a report required under this section to be provided by a nonsubscription transmission service and new subscription 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.

(c) *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 (c)(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;

(ii) The category transmission code for the category of transmission operated by the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service:

(A) For eligible nonsubscription transmissions other than broadcast simulcasts and transmissions of non-music programming;

(B) For eligible nonsubscription transmissions of broadcast simulcast 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 eligible nonsubscription transmissions by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by §§ 261.3(a)(2)(i) and (ii) of this chapter;

(E) For eligible nonsubscription transmissions by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by § 261.3(a)(2)(iii) of this chapter;

(F) For eligible nonsubscription transmissions by a small webcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act;

(G) For eligible nonsubscription transmissions by a noncommercial broadcaster operating under an agreement published in the **Federal Register** pursuant to the Small Webcaster Settlement Act;

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

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

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

(K) For eligible transmissions by a business establishment service making ephemeral recordings;

(iii) The featured artist;

(iv) The sound recording title;

(v) The International Standard Recording Code (ISRC) or, alternatively to the ISRC, the

(A) Album title; and

(B) Marketing label;

(vi) 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 a two-week period (two periods of 7 consecutive days) for each calendar quarter of the year. The two weeks need not be consecutive, but both weeks must be completely within the calendar quarter.

(4) *Signature.* Reports of Use shall include 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.

(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.

§ 270.4 Designated collection and distribution organizations for records of use of sound recordings under statutory license.

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

(b) *Definitions.* (1) A *Collective* is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(2) A *Service* is an entity engaged in the digital transmission of sound recordings pursuant to section 114(f) of title 17 of the United States Code.

(c) *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 website 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.

(d) *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.

(e) *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 records of use, and such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(f) *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.

(g) *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 Copyright Office, 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.

Dated: February 26, 2004.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 04–5404 Filed 3–10–04; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900–AL40

Eligibility for an Appropriate Government Marker for a Grave Already Marked at Private Expense

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document affirms, without any changes, the provisions of the interim final rule that was published to reflect changes made by the Veterans Education and Benefits Expansion Act of 2001 (Pub. L. 107–103) and the Veterans Benefits Act of 2002 (Pub. L. 107–330).

This final rule establishes provisions pursuant to the Veterans Education and Benefits Expansion Act of 2001 to allow the Department of Veterans Affairs (VA) to furnish an appropriate Government marker for the grave of an eligible veteran buried in a private cemetery, regardless of whether the grave is already marked with a privately purchased marker. Pursuant to the Veterans Benefits Act of 2002, the provisions of this final rule will apply to requests to mark graves or memorialize eligible veterans whose deaths occurred on or after September 11, 2001.

DATES: *Effective Date:* This final rule is effective September 25, 2003.

Applicability Date: The provisions of 38 CFR 1.631 apply to deaths occurring on or after September 11, 2001.

FOR FURTHER INFORMATION CONTACT: David K. Schettler, Director of Memorial Programs Service (MPS), National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Telephone: (202) 501–3100 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On September 25, 2003, VA published an interim final rule in the **Federal Register** (68 FR 55317). The interim final rule amended VA's burial benefits provisions to allow VA to furnish an appropriate marker for the graves of eligible veterans buried in private cemeteries, regardless of whether the grave is already marked with a privately purchased marker.

We provided a 60-day comment period that ended November 24, 2003. We did not receive any comments. Based on the rationale set forth in the interim final rule and in this document, we adopt the provisions of the interim final rule as a final rule without any changes.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any given year. This rule would have no such effect on State, local, or tribal governments, or the private sector.

Paperwork Reduction Act

This document does not contain new provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521). The Office of Management and Budget has approved the existing information collection under control number 2900–0222.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Only individual VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program number for this document is 64.202.

List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Cemeteries, Veterans.

Approved: February 25, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

PART 1—[AMENDED]

■ Accordingly, the interim final rule amending 38 CFR part 1 that was