

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:)
)
NOTICE AND RECORDKEEPING FOR)
USE OF SOUND RECORDINGS UNDER)
STATUTORY LICENSE)
)

Docket No. RM 2002-1A

REPLY COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Volume 1 of 4

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TABLE OF ABBREVIATIONS

ABBREVIATION	NAME
AFM	American Federation of Musicians of the United States and Canada
AFTRA	American Federation of Television and Radio Artists
ARBA	Adventist Radio Broadcasters Association
CARP	Copyright Arbitration Royalty Panel
CBI	Collegiate Broadcasters, Inc.
CD PROs	Compact Disc Promotional Releases
CD-R	Compact Disc-Recordable
College Broadcasters	College and University Radio Broadcasters Webcasting Under Statutory License
CPR	Christian Pirate Radio
DAS	Digital Automation Systems
DiMA	Digital Media Association
DMCA	Digital Millennium Copyright Act
EFF	Electronic Frontier Foundation, the Electronic Privacy Information Center, Fresno Free College Foundation, KFCF (88.1 FM) and KPFA Radio
FMC	Future of Music Coalition
Gladstone	Philip Gladstone
Harvard	Harvard Radio Broadcasting Company
IFPI	International Federation of the Phonographic Industry
ISRC	International Standard Recording Code
Librarian	Librarian of Congress
Mayflower	Mayflower Hill Broadcasting Corporation
NFCB	National Federation of Community Broadcasters
NPRM	Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (Feb. 7, 2002)
NRBMLC	National Religious Broadcasters Music License Committee
Original Determination	Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34, 289 (June 24, 1998)
PROs	Performing Rights Organizations
Radio Broadcasters	The Radio Broadcasters (Bonneville International Corporation, National Association of Broadcasters, Susquehanna Radio Corp., Clear Channel Communications, Inc., NRBMLC and Salem Communications Corp.)
RFA	Regulatory Flexibility Act
RIAA	Recording Industry Association of America
RLI	Royalty Logic, Inc.

SDARS	Joint Comments of Sirius Satellite Radio Inc. and XM Satellite Radio, Inc.
Sirius	Sirius Satellite Radio Inc.
Sony	Sony Music Entertainment, Inc.
Unions	AFM and AFTRA
UPC	Universal Product Code
Webcaster CARP	Copyright Arbitration Royalty Panel in the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2
Webcaster CARP Report	Report of the Copyright Arbitration Royalty Panel in the Matter of Rate Setting For Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002)
XM	XM Satellite Radio, Inc.

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**REPLY COMMENTS OF THE
RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.**

The Recording Industry Association of America, Inc. ("RIAA"), on behalf of itself and its member companies, which create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States and on behalf of SoundExchange,¹ currently an unincorporated division of the RIAA, which has a separate, overlapping roster of members that are large, medium and small recording companies, respectfully submits these reply comments in response to the Copyright Office's Notice of Proposed Rulemaking dated February 7, 2002. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (Feb. 7, 2002) (the "NPRM").

¹ SoundExchange licenses public performances and ephemeral recordings, and collects and distributes public performance and ephemeral recording revenue for such digital media as cable, satellite and the Internet. SoundExchange's board of directors is evenly divided between representatives of copyright owners and representatives of artists and nonfeatured musicians and vocalists. The board has decided to incorporate SoundExchange as a separate legal entity so that it is no longer a division of the RIAA.

I. INTRODUCTION

As the Copyright Office has explained, Congress has mandated that this proceeding must establish the “requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license and for how records of such use shall be kept and made available to copyright owners.” NPRM, 67 Fed. Reg. 5761.

Digital music services have enjoyed the benefits of the statutory licenses created by the DMCA for more than 3 years, but have not yet paid any royalties or filed any reports on their use of sound recordings. These services will soon begin to pay those royalties to which artists and copyright owners are entitled – as mandated by Congress. However, until the Copyright Office adopts the regulations that are the focus of this proceeding, it will be impossible to distribute these royalties to the entitled parties. Furthermore, unless these regulations require a sufficiently detailed and comprehensive level of usage reporting, truly accurate and equitable distributions to those entitled parties will also be impossible.

As RIAA explained in its initial comments, notice and recordkeeping regulations should meet three objectives: (1) permit copyright owners or their agents to collect the proper amount of statutory royalties; (2) permit collecting entities to distribute those royalties fairly and accurately; and (3) permit copyright owners to enforce the requirements of the statutory license. RIAA Comments at 5-16. It is the responsibility of the Copyright Office, with the aid of copyright owners and services, to establish regulations that meet these objectives. In its initial comments, RIAA explained in detail why its proposed regulations meet these objectives. Section II below expands on that reasoning by responding to specific issues raised in the initial round of comments.

Comments filed by services focus almost exclusively on the allegation that the proposed regulations would be unduly burdensome, attack RIAA's motives and attempt to shift much of the responsibility for usage reporting back to the copyright owners.² Indeed, in stark contrast to the RIAA, the services have failed entirely to propose any regulations that would provide for efficient and effective administration of the statutory license. Rather, the services complain that they are suffering under an unfair "burden of proof," and seem to labor under the misimpression that it is the copyright owners' and performers' burden to justify having any notice and recordkeeping regulations at all. Yet, it is the services that have a statutory obligation to provide information on their performances to the copyright owners. Remarkably, they have not so much as proposed any regulations, all the while building their businesses on the sound recordings owned by others for more than three years.³

As explained in Section III below, the services' claims of hardship are unfounded, as nearly all of them use automated systems that either already provide or can be easily modified to provide the data required under the proposed regulations. Moreover, all of the data necessary for the required reports is generally already in the possession of the services in one form or another. Section IV explains why the general suggestions made

² Many of the initial comments also address other irrelevant issues, such as the recent CARP proceeding and proposed amendments to the Copyright Act, that have no bearing on this proceeding.

³ RIAA agreed to an extension of time for filing comments in this proceeding because DiMA and others expressed an interest in meeting to resolve or narrow the issues in this proceeding. Unfortunately, those parties were unprepared to discuss anything of substance at the meeting, stating that they had not yet spoken with their member or client webcasters. Moreover, these parties failed entirely to follow up this meeting with a response to RIAA after promising to do so in a matter of days. RIAA can only assume that the meeting was a pretext to delay this proceeding and for lawyers to gather information from RIAA for their filings, both of which are consistent with the webcasters' utter failure to date to even propose a way to fulfill their statutory obligation.

by the services regarding notice and recordkeeping requirements are not sufficient for the purpose of royalty collection and distribution.⁴

In an effort to reach consensus on these issues, accelerate the process of adopting regulations and distribute these royalties to the entitled artists and copyright owners, RIAA proposes in Section V several accommodations to aid services in their reporting requirements and to address concerns raised in the initial comments. Importantly, these accommodations will allow services to postpone providing reports of use of sound recordings under statutory license for either three or six months following the Copyright Office's adoption of regulations. While this delay will negatively impact copyright owners and performers, who have been waiting for years to receive their share of statutory royalties, RIAA hopes that these accommodations will be received in the spirit of compromise in which they are offered. RIAA will then be able to move forward and collect and distribute the royalties to which Congress has determined artists and copyright owners are entitled.

II. RIAA HAS PROPOSED THAT SERVICES REPORT ONLY THAT DATA NECESSARY TO FULFILL THE PURPOSES OF THE STATUTORY LICENSE

Numerous commenting parties have stated that before the Copyright Office should adopt any regulations for notice and recordkeeping, the RIAA must demonstrate why it (or its members) needs information from services in order to collect and distribute

⁴ With respect to the specific questions raised by the Copyright Office in the NPRM, many commenting parties appear to take positions consistent with the RIAA's response laid out in its initial comments. Section VI explains the areas where agreement appears to be present.

statutory royalties.⁵ For example, the Radio Broadcasters (Bonneville International Corporation, National Association of Broadcasters, Susquehanna Radio Corp., Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee (“NRBMLC”) and Salem Communications Corp.) (hereinafter “Radio Broadcasters”) said that “RIAA should be required, in the first instance, to demonstrate why each element of data it seeks is necessary for the collection and distribution of statutory royalties” Radio Broadcasters’ Comments at 2.⁶

RIAA does not agree that copyright owners are responsible for justifying why each requested data element in a notice of use must be provided by a service operating under a statutory license. As the statutory licenses make clear, services must provide copyright owners with “reasonable notice of use of their sound recordings.” See 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A). For the word “reasonable” to have any meaning, it must include the reporting of sufficient data to permit an agent to distinguish with a high degree of confidence copyright ownership for the hundreds of thousands of sound recordings performed by the services so that, as required by statute, performance royalties may be allocated among copyright owners, featured performers and nonfeatured musicians and vocalists. See 17 U.S.C. § 114(g)(2)(A)-(C). It is the duty of the

⁵ Most commenting parties have stated that the “RIAA” should be forced to justify why certain data elements should be required under the notice and recordkeeping regulations. It would be more appropriate to ask why copyright owners or their agents need certain data for collecting and distributing royalties or enforcing the requirements of the statutory license, particularly where there are at least two “Designated Agents” that have been recognized by the Copyright Arbitration Royalty Panel (“CARP”) in the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (“Webcaster CARP”) to receive and distribute royalties on behalf of copyright owners and performers.

⁶ References to the filings of a service or individual that submitted comments in response to the NPRM will be referenced as follows: “Service or Individual Name (or Abbreviation)” [space] “Comments at ___.”

Copyright Office to adopt regulations meeting this standard. To assist the Copyright Office, copyright owners and users need to explain how the information they propose to have included in the reports of use will ensure the proper allocation of royalties among the entitled parties and permit copyright owners to test for a service's compliance with the statutory requirements.⁷ Copyright owners and performers, through SoundExchange, are already providing statutory services with a substantial benefit, by paying for the distribution of statutory royalties to each individual copyright owner and performer. Copyright owners have also justified with specificity why specific data elements are necessary on a report of use. To the extent that any service proposes to report minimal data (e.g., artist and song title and, where available, album title) or something less than what is proposed in the NPRM without explaining how such data will be sufficient for allocating royalties among copyright owners and performers or enforcing the statutory requirements, such service has failed to justify how such reporting is "reasonable."

A. RIAA Has Justified With Specificity Why Its Proposed Reporting Requirements Are Necessary For Royalty Collection, Distribution And Enforcement Of Statutory Requirements.

RIAA justified in its initial comments of April 5, 2002 the reasoning behind each data element in RIAA's proposed reports of use, which reports are substantially similar to the regulations proposed by the Copyright Office in the NPRM. See RIAA Comments at 8-11, 15-16. In addition, and contrary to the expectations of Radio Broadcasters (see Radio Broadcasters' Comments at 17), RIAA explained with great specificity how the

⁷ Cf. Music Choice Comments at 2 ("[T]he proponent of any recordkeeping requirements should initially meet a high burden to show that the requested data is necessary to effect compensation to copyright holders and not redundant in light of other data already being collected."). What Music Choice fails to acknowledge is that a similarly "high burden" must be placed upon any service that proposes alternative reporting requirements to demonstrate how those reporting requirements will provide copyright owners with reasonable notice of use of their sound recordings.

requested data elements were needed for (1) identifying the service and the type of programming offered by the service; (2) identifying the date, time and number of transmissions; and (3) identifying the specific sound recordings publicly performed by the services. See RIAA Comments at 46-62.

RIAA reiterates that its request for comprehensive data in reports of use is not, as many services hypothesized, an effort to obtain “valuable” or “confidential” marketing data from the services. See e.g., Digital Media Association (“DiMA”) Comments at 11; Radio Broadcasters’ Comments at 64; Joint Comments of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio, Inc. (“XM”) (hereinafter “SDARS”) Comments at 44-45. Rather, RIAA’s data requests are intended to accomplish three objectives: (1) permit copyright owners or their agents to collect the proper amount of statutory royalties; (2) permit collecting entities to distribute accurately statutory royalties to those copyright owners and performers entitled to receive such royalties; and (3) permit copyright owners to enforce the requirements of the statutory license. Many of the services that filed comments in this rulemaking have proposed reporting data that would not permit copyright owners to fulfill these identified objectives.

1. The Sound Recording Data Requested By RIAA Is Necessary For Ensuring The Proper Payment Of Royalties By Statutory Services.

RIAA’s proposed regulations are designed to permit copyright owners or their agents to ensure that statutory services pay the royalties that they are required to pay. See RIAA Comments at 9-10. This requires services to identify themselves for each line item of data that they report. See RIAA Comments at 47. Because different royalty rates apply to different types of statutory transmissions and even within the same category of

statutory transmissions,⁸ services must also report each type of transmission that they are making so that copyright owners can ensure that the proper royalty is paid for the specific types of transmissions made by a service. See RIAA Comments at 48-49. For example, Sirius offers both preexisting satellite digital audio radio service transmissions (60 channels of commercial-free music and 40 channels of news, sports and entertainment programming) and 60 channels of eligible nonsubscription transmissions. SDARS Comments at 3-4. While the Copyright Office has not established a rate for Sirius' preexisting satellite digital audio radio service transmissions, a rate has been established for eligible nonsubscription transmissions and so Sirius will have to pay for its 60 webcast channels at that rate.

Numerous broadcasters also offer different types of eligible nonsubscription transmission services, which may be subject to different rates depending upon whether the programming is a simultaneous Internet retransmission of an over-the-air AM or FM radio broadcast, Internet-only programming, or programming offered by a Non-CPB, Non-Commercial Broadcaster. See e.g., Comments of the Adventist Radio Broadcasters

⁸ See Report of the Copyright Arbitration Royalty Panel In the Matter of Rate Setting For Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2002) ("Webcaster CARP Report"), Appendix A. The Webcaster CARP adopted different per performance rates for simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts (for "Webcasters" and "Commercial Broadcasters"), all other internet transmissions (for "Webcasters" and "Commercial Broadcasters"), and three different per performance rates for "Non-CPB, Non-Commercial Broadcasters."

Association (“ARBA”);⁹ Radio Broadcasters’ Comments, Exhibit I, Statement of Jim Tinker;¹⁰ Exhibit K, Statement of Dusty Rhodes.¹¹

As some services will have to calculate their royalty liability on a per performance basis, it is also essential for services to report the total number of performances that they have transmitted under the statutory license.¹² Furthermore, the Webcaster CARP defined a “performance” as “each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener).” Webcaster CARP Report, Appendix B, Rates and Terms for Eligible Nonsubscription Transmissions and the Making of Ephemeral Reproductions at § 1(l) (hereinafter “Webcaster CARP Report, Appendix B”). Consequently, services must track each transmission to each listener in order to qualify for the statutory license for eligible

⁹ ARBA’s comments note that “[m]any ARBA members operate internet websites, some of which include the streaming of audio. In most cases, the audio streamed is the simultaneous transmission on the internet of the station’s over-the-air broadcast signal. At least one member also produces and transmits an audio stream that is separate and apart from its over-the-air broadcast signal.” ARBA Comments at 1-2.

¹⁰ According to Mr. Tinker, KKLA Communications Group offers both simulcast programming and Internet-only programming: “Today, all but one of our LA radio stations simulcast their broadcast over the Internet, and I oversee those streaming activities. In addition, I helped launch and continue to work with Christian Pirate Radio (CPR), an Internet-only service that operates seven separate channels of streamed content under the umbrella of www.ChristianPirateRadio.com and www.myCPR.com.” Radio Broadcasters’ Comments, Exhibit I, Statement of Jim Tinker, ¶ 2.

¹¹ The WAY-FM Media Group offers both simulcast programming and Internet-only programming: “To further our ministry, we stream the signals of our Nashville and West Palm Beach WAY-FM stations over the Internet through our website, www.wayfm.com. We also have an Internet-only ministry, The X Station, located at www.thexstation.com. The X Station is an edgier, male-oriented Christian modern rock ‘station.’” *Id.*, Exhibit K, Statement of Dusty Rhodes at 2.

¹² The Copyright Office should reject proposals to permit services to estimate prospectively the number of performances during an accounting period, particularly where a statutory royalty obligation is tied to actual and not estimated performances. *See, e.g.*, Radio Broadcasters’ Comments at 5 (“Broadcasters . . . should be allowed to report aggregate listener data, not detailed records of every single listener session.”). Permitting estimated performances prospectively (more than 30 days) would also be contrary to the recommendations of the Webcaster CARP. *See* Webcaster CARP Report at 109-10 (Interim Public Version).

nonsubscription transmission services.¹³ Consistent with the recommendation of the Webcaster CARP and for the reasons stated in its initial comments (including the need for performance data for royalty distribution), RIAA's proposed regulations require services to report the total number of transmissions of each sound recording. See RIAA Comments at 9-10, Exhibit A at Sec. 201.36(e)(1)(viii).

Because different services may be liable for different royalty payments under the various rate structures that may be adopted by the Librarian of Congress (the "Librarian"), the Copyright Office must require services to identify on a report of use the Name of Statutory Service, the types of transmissions made by the service (i.e., the "Transmission Category"), the Channel or Program Name of transmission, and the Total Number of Performances of each sound recording. This information is within the service's possession and it cannot be deemed burdensome to include in a report of use. If copyright owners or their agents are denied this information, they will have no method for confirming the royalty calculations of the services.

2. The Sound Recording Data Proposed By RIAA Is Necessary For Ensuring The Proper Distribution Of Statutory Royalties To Copyright Owners And Performers.

As explained in its initial comments, RIAA proposed requiring services to report detailed information on the usage of specific sound recordings in order to distribute

¹³ To the extent that services make transmissions using multicasting technologies rather than unicast technologies, see Philip Gladstone ("Gladstone") Comments at 2-3, such transmissions should only qualify for the statutory license if the service can maintain a control connection that permits the service to track each transmission so that the required statutory royalty is paid. RIAA believes that entities facilitating multicasting do and will have the capability to track the number of transmissions of all or any portion of a sound recording to a listener. Exhibit A attached hereto contains information on products readily available for the tracking of transmissions in a multicast environment; see also Exhibit M, Reliacast "Precise Audience Measurement of Audio & Video Streaming" Fact Sheet at 2 ("Reliacast's Audience Manager system is an easy-to-use, web-based application that can be seamlessly integrated into any organization employing unicast or multicast content delivery."). However, to the extent that a service uses a vendor or

Footnote continued on following page.

royalties to the copyright owners of and the performers on such sound recordings. See RIAA Comments at 10-11. A service operating under the Section 114 statutory license is permitted to transmit to the public any sound recording that has “been distributed to the public under the authority of the copyright owner.” 17 U.S.C. § 114(d)(2)(C)(vii). Consequently, an enormous number of distinct sound recordings potentially may be reported on a notice of use.

RIAA noted in its initial comments the depth and breadth of programming offered by webcasters. See RIAA Comments at 13-15. Many of the services submitting comments in this rulemaking also identified the depth and breadth of programming that they offer:

- “XM, for example, maintains a database of information for 1.6 million sound recordings.” SDARS Comments at 11.
- “Clear Channel’s centralized song database has information about approximately 43,000 titles although perhaps up to 20% of these entries may be duplicates.” Radio Broadcasters’ Comments, Exhibit B, Statement of Brian Parsons, ¶ 12.
- “Mayflower’s station is multi-formatted and the number of recordings played on the air is larger compared to those of tightly formatted commercial stations. The libraries accumulated over many years includes [sic] thousands of compact discs and albums that continue to receive airplay . . .” Mayflower Hill Broadcasting Corporation (“Mayflower”) Comments at 2.
- “The libraries accumulated over many years includes [sic] tens of thousands of compact discs and albums that continue to receive airplay . . .” Collegiate Broadcasters, Inc. (“CBI”) Comments at 2.
- “[T]hese stations are playing thousands of different songs from many different genres . . .” National Federation of Community Broadcasters, Inc. (“NFCB”) Comments at 3.

technology for multicasting and such vendor or technology is not capable of tracking the total number of performances, then such service should not be eligible for the statutory license.

- College Broadcaster KDVS' music library "consists of more than 150,000 compact discs and phonorecords" College and University Radio Broadcasters ("College Broadcasters") Comments at 18 n.17.
- "[Harvard Radio Broadcasting Co., Inc.] estimates it plays 70,000-90,000 unique sound recordings annually." Harvard Radio Broadcasting Company ("Harvard") Comments at 8.

Where the breadth of sound recordings programmed by services operating under the Section 114 statutory license is limited only by the imagination of a programming director, the parameters of scheduling software or computer algorithms, and by the service's library of sound recordings, there is a tremendous burden on collecting entities to identify the copyright owners and featured performers entitled to payment for each and every sound recording performed.¹⁴ The only way to ensure the distribution of statutory royalties in accordance with Congress' mandate to allocate royalties among copyright owners, featured performers and nonfeatured performers is to require services to identify with specificity each sound recording performed so that such sound recording can be distinguished from every other sound recording that has ever been publicly released. Contrary to the beliefs of many of the commenting parties, who naively assume that royalty distribution is a simple process that can be accomplished with hardly any data, the identification of copyright owners and performers, who are entitled to receive royalties – a responsibility that, absent compulsory licensing and the formation of SoundExchange would belong to the services – is difficult, time consuming and expensive. This is because sound recordings cannot be identified definitively on the basis of only a few data

¹⁴ The burden on the independent administrators for nonfeatured musicians and vocalists is even greater. See, e.g., American Federation of Musicians of the United States and Canada ("AFM") and the American Federation of Television and Radio Artists ("AFTRA") (collectively "Unions") Comments at 16-20.

points and, as noted by Royalty Logic, Inc. (“RLI”), “there is currently no standard publicly available and widely used electronic identification system (e.g., common numbering system, electronic watermark, digital fingerprint, etc.) and no commonly available reference database for additional identification, copyright ownership and other relevant business information.” RLI Comments at 3.

Collecting entities have no way of identifying the sound recordings performed by a service unless the service provides that information. Selection and performance of the sound recording is solely within the control of the service. See Exhibit B, Tab 2, Declaration of Gretchen Anderson, ¶ 10; Tab 3, Declaration of Suzanne Berg, ¶ 9; Tab 4, Declaration of John Dalton, ¶ 9; Tab 6, Declaration of Bruce Iglauer, ¶ 7; Tab 7, Declaration of Gerry Kuster, ¶ 9; Tab 8, Declaration of Heather McBee, ¶ 10; Tab 9, Declaration of Marina Scarlata, ¶ 10; Tab 10, Declaration of Rick Wietsma, ¶ 9; Tab 11, Declaration of Bill Macky, ¶ 9; Tab 12, Declaration of Leslie Jose Zigel, ¶ 9. Although one could theoretically monitor the performances on certain publicly available channels (e.g., monitor each and every terrestrial broadcast transmission that is simulcast on the Internet) if one had unlimited resources, there are hundreds of thousands of “channels” of programming that are available only to the recipient of that transmission and, therefore, are incapable of being monitored. See RIAA Comments at 7. But requiring collecting entities to engage in such monitoring improperly shifts the burden of reporting from the services – which voluntarily elect to engage in digital audio transmissions – to the copyright owners and performers, who are already providing a service to entities by saving them the time and expense of having to pay individual copyright owners and performers directly. Furthermore, the statutory mandate is for services to provide

copyright owners with reasonable notice of use of sound recordings, not for copyright owners to have to search or monitor for information on usage.

To satisfy the statutory mandate, the Copyright Office must adopt reporting requirements that permit collecting entities to identify the individual copyright owners and performers for each sound recording performed by a service. Only through such identification will those entitled to statutory royalties actually receive their share of the statutory royalties. The regulations proposed by the RIAA require the services to provide the information necessary to properly distribute statutory royalties. See RIAA Comments at 55-61.

3. The Copyright Office Has Already Properly Ruled That Reports Of Use Must Contain Information To Allow Verification That Statutory License Conditions Are Being Met.

Radio Broadcasters and XM/Sirius, in virtually the same words, reassert an argument made and rejected by the Copyright Office in the Notice and Recordkeeping for Digital Subscription Transmissions, Interim Regulations, 63 Fed. Reg. 34, 289 (June 24, 1998) (the "Original Determination"): that reports of use submitted by a service should not be used to determine that service's compliance with the statutory license conditions, principally the sound recording performance complement. See Radio Broadcasters' Comments at 17-21; SDARS Comments at 21-24. As the Original Determination reflects, it makes little sense to rule that "reports of use" of sound recordings under a statutory license should not provide information that confirms that such use meets one of the most important requirements of that statutory license. This is especially true where information as to compliance is solely within the possession of the service. See RIAA Comments at 7 and n.2 (describing services that create channels "on the fly" for each listener that cannot be evaluated through mere observation of the service).

The Copyright Office's reasoning on this issue in 1998 was sound and applies with equal force to the services in this proceeding:

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. Dev. 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 regular conduct might provide evidence of the requisite intent.

Original Determination at 34,294.

Radio Broadcasters and XM and Sirius spend little effort addressing or attempting to distinguish this conclusion. Rather, they provide a tortured interpretation of the "Authority for Negotiations" provision in Section 114(e)(1) and its legislative history to support their request to provide less than complete information about their use of sound recordings. This argument fails for several reasons. First, as the legislative history cited by the services makes clear, Section 114(e)(1) must be interpreted "to effectuate Congress's intent to enable the statutory goals to be met." H.R. Rep. 104-274 at 22. A primary goal of the DPRA "is to ensure that performing artists, record companies and others whose livelihood depends upon *effective* copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative

works are used.” *Id.* at 10 (emphasis added). That goal will be furthered if accurate and complete information as to compliance with the requirements of the statutory license is provided by the services.

The Radio Broadcasters also claim that the statute requires reports of use to each individual copyright owner of only those sound recordings owned by that copyright owner, so that where those recordings are intermingled with recordings owned by other record companies, they necessarily would be incomplete for purposes of determining compliance with the performance complement. They argue that this “rule” should be followed even if the service files a single report with a single collective that represents all of the relevant copyright owners and recordings that service used. See Radio Broadcasters’ Comments at 18-20. Of course, the Radio Broadcasters and XM and Sirius are not proposing that they actually provide separate reports to each individual copyright owner – they stand to benefit greatly from a single (or small number of) copyright owner collective organization(s). The efficiencies of having collectives handle collection and distribution should run both ways, and far outweigh the hyper-technical¹⁵ and hypothetical statutory interpretation offered in the Radio Broadcasters’ comments.¹⁶

¹⁵ That statutory interpretation relies on a single word – “their” – in Section 114(f)(4)(A). What the argument overlooks is that the subparagraph is phrased in terms of “copyright owners” plural – not a single copyright owner – meaning that Congress intended reports to be provided with information from multiple copyright owners rather than individual ones.

¹⁶ The initial comments raise the question of how to address reporting in the case of non-compensable performances. These would seem to fall into three categories: (1) performances of pre-1972 sound recordings; (2) performances directly licensed from the copyright owner; and (3) “incidental” performances under the decision of the Webcaster CARP. RIAA believes that the first two types of performances should be reported, because it is necessary to know about them to determine compliance with the sound recording performance complement in the case of compensable performances. For example, transmission of a whole album of greatest hits by one recording artist would violate the complement in the case of tracks where a service otherwise might rely upon the statutory license, even if a service had direct licenses for some tracks or some of the tracks were pre-1972 recordings. It might, therefore, be appropriate to include a field in the Footnote continued on following page.

4. The Data Requested By RIAA Is Necessary For Ensuring Compliance With The Statutory Requirements.

As explained in its initial comments, RIAA's proposed reporting regulations would permit copyright owners or their agents to enforce the requirements of the statutory license, including the limitations contained in the sound recording performance complement. See RIAA Comments at 15-16. And for the reasons set forth in Section II.A.3 *supra*, RIAA believes that it is appropriate and necessary for the Copyright Office to adopt reporting regulations that permit copyright owners to enforce the requirements of the statutory license, or those requirements would have no meaning. RIAA's proposed regulations would provide copyright owners with the minimum amount of information needed for compliance monitoring.

The specific categories of information that are needed for ensuring compliance with the statutory requirements are: (1) the Channel or Program Name; (2) the Start Date and Time of the Sound Recording's Transmission; (3) the Type of Program; and (4) identifying information for each sound recording. Copyright owners need the Channel or Program Name because the sound recording performance complement is enforced for each "particular channel" of programming offered by a service. See 17 U.S.C. § 114(j)(13). If all sound recordings were reported without regard to their transmission on a particular channel, including channels created on the fly for individual users, the sound recording performance complement could not be enforced unless copyright owners monitored each channel, which is impossible given the nature of certain transmissions.

reports of use for services to identify direct licensed or pre-1972 selections. The RIAA would not require that incidental performances, that qualify for compulsory licenses, to be reported.

To ensure compliance with the 3-hour limitation in the sound recording performance complement, copyright owners also need to receive detailed information on the start date and time for transmissions of sound recordings on each channel of programming. See 17 U.S.C. § 114(j)(13). Without date and time information, it would be impossible to determine whether, for example, more than four sound recordings by the same featured artist were performed on a particular channel during any 3-hour period. Of course, detailed information on each sound recording performed must be reported so that a copyright owner can determine whether more than 3 different selections of sound recordings from any one phonorecord or 4 different selections by the same featured recording artist have been performed. See 17 U.S.C. § 114(j)(13).

To ensure compliance with the limitations on archived, continuous and prescheduled programming, copyright owners need to receive reports of use identifying the Type of Program contained on a particular channel. See 17 U.S.C. § 114(d)(2)(C)(iii)(I)-(IV) and RIAA Comments at 50.

If services are permitted to omit from reports of use data that is necessary for ensuring compliance with the statutory requirements, then the statutory requirements will be meaningless. This could not have been what Congress intended when it adopted restrictions on the public performance of sound recordings via digital audio transmissions, particularly where the *quid pro quo* of the license is compliance with various statutory requirements. And where compliance with statutory requirements

cannot be reasonably determined absent self-reporting, then it is proper to place the burden of reporting compliance upon the services themselves.¹⁷

B. Royalty Logic, Inc., A Designated Agent That Has A Long And Close Relationship With Broadcasters And Other Copyright Users, Also Proposed Requiring Services To Provide Detailed Reports Of Use For Royalty Collection And Distribution.

RIAA was not alone in requesting detailed reports of use from services for royalty collection and distribution. Even RLI, an entity designated by the Webcaster CARP to receive and distribute royalties pursuant to the Section 112 and Section 114 statutory license and whose President and Chief Executive Officer testified on behalf of webcasters and broadcasters in the Webcaster CARP,¹⁸ proposed in its initial comments that services provide data on artist, song title, retail album title, recording label, catalog number, International Standard Recording Code (“ISRC”), the Universal Product Code (“UPC”) and the copyright owner information provided in the copyright notice of the retail

¹⁷ SoundExchange members are troubled by the lack of compliance with existing requirements of the statutory license, including the obligation to file an Initial Notice of Digital Transmission of Sound Recordings Under Statutory License. Several of the services that filed comments in this rulemaking appear not to have filed an Initial Notice with the Copyright Office (e.g., CPI Interactive’s VirtualRadio.com; Talley Broadcasting Corporation’s WSMI-FM, -AM; Mayflower Hill Broadcasting Corporation; Beethoven.com; WOBC 91.5 FM; 3WK). Compliance with other requirements of the statutory license cannot be determined by the provision of information at issue in this proceeding. Enforcement of these conditions, including the requirement to display artist name, album title and song title, see 17 U.S.C. § 114(d)(2)(C)(ix), requires copyright owners to expend time and money that would otherwise be available for distribution. Where copyright owners seek to enforce the requirements of the statutory license, all statutory licensees benefit because it prevents some services from obtaining an unfair advantage by not playing by the rules. For example, some of the parties filing comments in this rulemaking are not presently complying with the display requirements (e.g., Inetprogramming Incorporated; Andante Corp.; Ultimate-80s; Beethoven.com; Killer Oldies; Sirius Radio (webcasts)). Services that undertake the expense to comply with the display requirements may be at a competitive disadvantage vis-à-vis the services that do not incur those expenses.

¹⁸ When Mr. Gertz testified in the Webcaster CARP he also identified himself as an owner and executive of Music Reports, Inc., a sister corporation of RLI. MRI’s clients are nearly 100% copyright users rather than copyright owners. See Webcaster CARP Tr. at 10,993.

album.¹⁹ Although RLI did not explain its reasoning for supporting each of the specific data elements it proposed in its comments, it set forth a general rationale for why more data should be reported by the services: “Generally, the more data provided by the transmitting service (even though redundant and possibly inaccurate) the better – as the collectives could use additional data fields (absent a match on title, album and artist) to help in the identification process.” RLI Comments at 5 n.5. This sentiment expressed by RLI is consistent with the reasoning set forth in RIAA’s Comments. See RIAA Comments at 39 (“[R]eceiving more data from a service – even if in some cases some of the data is incomplete – permits a collecting entity to conduct a more comprehensive search for copyright owner and performer information (e.g., the additional data provides more pieces to the puzzle).”).

C. The Process By Which The Copyright Office Has Considered RIAA’s Proposed Reporting Requirements Has Been Fair To Services And Wholly Consistent With Applicable Principles Of Administrative Law

The Radio Broadcasters’ comments attempt to raise the specter of legal infirmity in the Copyright Office’s Notice of Proposed Rulemaking by arguing that the Copyright Office has established an unfair process and has failed to conform to the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-612. These assertions are meritless and appear to have been proffered simply to provide an opportunity to hurl insults and false accusations at RIAA. See Radio Broadcasters Comments at 16-17.

RIAA filed its petition in this proceeding nearly a year ago. At the time it did so, it provided courtesy copies to counsel for many of the most outspoken critics of the

¹⁹ RLI divided its data requests into a “core data set” that should be reported and a permissive data set that “should be required to be provided by the services where ‘applicable’ and/or where ‘available and feasible.’” RLI Comments at 4-5.

regulations proposed in the Notice of Proposed Rulemaking. Since the Copyright Office issued the Notice of Proposed Rulemaking, RIAA has provided the Office with 67 pages of detailed explanation of its proposed recordkeeping requirements. In its initial comments, RIAA modified its proposal to reflect concerns that had been raised, and RIAA does so again in these reply comments. The Copyright Office has indicated that it will hold a roundtable discussion among affected parties to further address outstanding issues and attempt to reach consensus. It would be hard to imagine a process more fair.²⁰ The process followed by the Copyright Office in this proceeding certainly comports with the minimum requirements of administrative law.

Turning to the specific legal arguments raised by the Radio Broadcasters, the Copyright Office has properly not placed any burden on any party to this proceeding. To be sure, the regulations proposed in the Notice of Proposed Rulemaking are similar to those originally proposed by RIAA (which are similar to the interim regulations adopted by the Copyright Office for preexisting subscription services). That is presumably because, in the nearly three years that notice and recordkeeping for eligible nonsubscription services has been pending,²¹ RIAA was the only party to propose specific regulations to the Copyright Office. Even during the nine months between the filing of RIAA's petition and publication of the Notice of Proposed Rulemaking, the

²⁰ The reality of this rulemaking directly contradicts the claims of the Radio Broadcasters and their unfounded accusation that "there is little reason to suppose that RIAA will provide much evidence in support of its proposal in its initial comments. RIAA can be expected to take advantage of the opportunity to 'sandbag' the services by saving its arguments and evidence for the reply comments." Radio Broadcasters' Comments at 17. Contrary to these expectations, RIAA identified with specificity in its initial comments the need for and justifications of the data elements it requested.

²¹ The Copyright Office first mentioned recordkeeping for eligible nonsubscription services on August 4, 1999, where it deferred consideration of those regulations in light of ongoing industry negotiations. See 64 Fed. Reg. 42316, 42317 (Aug. 4, 1999).

services did not provide the Copyright Office with any alternative regulations for consideration before the Notice was issued. After sitting on the sidelines for nearly a year, the services cannot suddenly complain when the Copyright Office properly submitted for public comment the only proposal pending before it. Certainly they should not be heard to propose further pointless procedural hurdles that will only delay adoption of regulations and compound what has already been nearly four years of delay in distributing royalties to artists and copyright owners.

In arguing that a burden of proof has unfairly been placed on them, the Radio Broadcasters suggest that the Copyright Office should defy administrative law and place a burden of proof on RIAA. As the very case cited by the Radio Broadcasters makes clear, in a notice and comment rulemaking such as this proceeding, there is no requirement that the proponent “assume and satisfy a ‘burden of proof.’” Am. Trucking Ass’n v. United States, 344 U.S. 298, 320 (1953). Indeed, even in CRT rate-setting proceedings courts have ruled that no burden of proof exists on either party under the Administrative Procedure Act. See NCTA v. CRT, 724 F.2d 176, 186 n.15 (D.C. Cir. 1983) & Amusement and Music Operators Ass’n v. CRT, 676 F.2d 1144, 1154 (7th Cir. 1982). This is not litigation. There is no burden of proof to be satisfied by any of the interested parties. The Copyright Office should reject the Radio Broadcasters’ suggestion to ignore this basic principle, as it need only “give interested persons an opportunity to participate in the rule making” and then, “[a]fter consideration of the relevant matter presented, ... incorporate in the rules adopted a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c).

Finally, the Radio Broadcasters argue that the Copyright Office has violated the RFA in its Notice because it failed to assess the impact of the proposed regulations on small business entities. This argument ignores the Copyright Office's consistent conclusion that "the Copyright Office, located in the Library of Congress which is part of the legislative branch, is not an 'agency' subject to the Regulatory Flexibility Act" See, e.g., 64 Fed. Reg. 42316, 42317 (Aug. 4, 1999).²² In any event, the Copyright Office has received numerous comments from smaller entities and invited them to a roundtable discussion to raise concerns about the impact regulations might have on their operations. See 67 Fed. Reg. 18148, (April 15, 2002) ("The Office is especially interested in the views of small businesses engaged in webcasting as well as individuals and small businesses who are copyright owners of sound recordings, and in details relating to the benefits, costs and burdens associated with the published notice and recordkeeping proposal and of alternatives to that proposal."). This approach is fully consistent with the policies behind the RFA.

III. RIAA'S PROPOSED REPORTING REQUIREMENTS ARE NOT UNDULY BURDENSOME

Many of the services filing comments in this rulemaking have complained that the information under consideration for inclusion in a report of use is unavailable to them and should, therefore, not be required by the Copyright Office. Anticipating these complaints, RIAA provided exhibits in its initial comments identifying where the requested data elements could be found on promotional product, commercially released

²² The RFA imposes obligations only on an "agency," see 5 U.S.C. § 603(a), which is defined "as each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include ... the Congress" 5 U.S.C. §§ 551(1)(A) & 601(1).

product and in promotional catalogues. See RIAA Comments Exhibits F-H. In this section, RIAA responds to the specific claims made by many of the services about the unavailability of identifying information for sound recordings.

A. Identifying Information Necessary For Royalty Distribution Is Generally Available On Promotional Product.

In reading the comments of many of the services in this rulemaking one would think that the promotional sound recordings that appear in the hands of program directors come in mysterious containers with little identifying information and, therefore, only minimal information should be required on a report of use. Some services allege that promotional releases may identify only the featured artist and the title of the sound recording, but very little else. Here are just a few of the statements made by various services in this rulemaking:

- “None of [the sound recordings given to radio stations] come with all or even most of the information RIAA would have radio stations report for each song they schedule.” Radio Broadcasters’ Comments at 26.
- “[S]ometimes all we get from the label is the artist name and title of the song . . .” Id., Exhibit A, Statement of Jaime Kartak, ¶ 5.
- “The compilation discs have even less of the requested information – generally only title, artist, and track length.” Id., Exhibit C, Statement of Michael Cary, ¶ 7.²³
- “The only information we can count on being sent to us with a CD provided by the label is the title and artist – sometimes, the labels don’t even provide the album name or a copyright notice indicating the date and owner of the sound recording copyright, much less UPC, ISRC, or catalog number.” Id., Exhibit K, Statement of Dusty Rhodes, ¶ 9.
- “The promotional singles that the record labels provide contain varying amounts of information, often as little as the title of the sound recording and artist.” SDARS Comments at 11.

²³ Cf. Exhibit B, Tab 13, Declaration of David Graupner, ¶ 5; see also Exhibit B, Tab 8, Declaration of Heather McBee, Attachments of CDX compilation materials and identifying information.

- “[M]uch of the music that the Preexisting Satellite Services broadcast is provided to them by the record labels in order to obtain free airplay, and the labels themselves do not provide many of the data elements that their collective now seeks.” Id. Comments at 36.

Such allegations are generally false, misleading and contradicted, not only by the information provided in RIAA’s comments, but also by other services filing comments in this proceeding. These allegations are also contradicted by the declarations from several label executives describing their respective company’s practices with regard to the distribution of promotional product. See Exhibit B hereto.

1. The Statements Of Many Commenting Parties In This Rulemaking Acknowledge That Promotional Product Contains Identifying Information.

Numerous parties acknowledge in their initial comments the receipt of promotional sound recordings from labels. This is to be expected as record labels frequently provide releases to terrestrial broadcasters (both commercial and non-commercial), and in varying degrees to preexisting subscription services, preexisting satellite digital audio radio services and eligible nonsubscription transmission services. But these commenting parties themselves acknowledge the availability on promotional product of nearly 70% of the identifying data elements that RIAA requested in its proposed uniform report of performance. RIAA proposed in its initial comments that the Copyright Office adopt regulations requiring services to report Artist Name, Sound Recording Title, ISRC, Track Label (P)-Line, Duration of the Sound Recording, Album Title, Marketing Label, Catalog Number, UPC and Release Year. See RIAA Comments at 55-61 and Exhibit C (columns ix)-(xviii)). The following quotes²⁴ indicate that

²⁴ The following quotes are from unsworn statements that are based to a large extent on hearsay. It is unclear from the statements what the person has personal knowledge of.

promotional product usually includes all of RIAA's requested data except Catalog

Number, ISRC and UPC:

- “The only information we readily receive about the songs we play is whatever is available via the liner or package notes or on the CD itself. That usually includes title, artist, record company, and sometimes album name and copyright information about both the musical work and the sound recording.” Radio Broadcasters’ Comments, Exhibit A, Statement of Jaime Kartak, ¶ 5.
- “Many of the promo singles we received are slickly packaged, with photos of the performer, color CD sleeve inserts, and basic identifying information about the name of the song, the length of the track, the name of the label, and often the copyright owner and date.” *Id.*, Exhibit E, Statement of Amy Van Hook, ¶ 11.
- “The Nikka Costa ‘Everybody Got Their Something Sampler,’ attached as Exhibit 3 to this Statement, is a typical example of such a compilation. The sampler appears to contain seven tracks from the artist’s forthcoming album, ‘Everybody Got Their Something.’ The packaging of the sampler lists the title of several songs, the name of the artist being promoted, and the title of her forthcoming album. In small type, it also lists the copyright owner and year. The listed catalog number does not appear to coincide with the catalog number of the retail album, and there is no indication whatsoever of any UPC or ISRC . . .” *Id.*, ¶ 13.²⁵
- “For the music that comes from major labels, we generally get the title, artist, record label name, and length of the track. The promo CDs also generally have the composer information, the names of the sound recording copyright owner and label, and the release year.” Radio Broadcasters’ Comments, Exhibit G, Statement of Mary Guthrie, ¶ 5.
- Promotional compilations “list the name of the artist, the name of the songs, and often the name of the distributing label. . . . Many of these

²⁵ RIAA has attached as Exhibit C hereto a copy of the Nikka Costa sampler CD cited by Ms. Van Hook. RIAA is unsure how Ms. Van Hook determined that the catalog number on the sampler does not coincide with the catalog number of the retail version of the album unless Entercom Communications Corp. was also provided with a copy of the full retail album. Nevertheless, as Ms. Van Hook’s admission indicates, the Nikka Costa sampler contains 90% of the information requested by RIAA: Artist Name, Sound Recording Title(s), Track Label (P)-Line, Duration of the Sound Recording(s), Album Title, Marketing Label, a distinct Catalog Number and Release Year. The only visible information missing on the sampler is the UPC number. The ISRC number, however, was capable of being read with the software product offered by Exact Audio Copy EAC. Exhibit C-3 indicates the ISRC numbers for the first six sound recordings on the Nikka Costa “Everybody Got Their Something” Sampler.

compilations bear sound recording copyright notices.” *Id.*, Statement of Jim Tinker, ¶ 6.

- Promotional releases “of course list the title of the song and the name of the artist. They frequently mention the name of the album the song is going to appear on, but not always – sometimes, the album title is not yet determined when the single is released to us. They also sometimes list composer information, the length of the track, the name of the label, and the year and copyright owner information contained in the copyright notice, or ‘P line.” *Id.*, Exhibit J, Statement of Dan Halyburton, ¶ 8.

While the above statements acknowledge the general availability of identifying information on promotional product, they do not always tell the full story. For example, Ms. Van Hook, one of the individuals providing a statement with the filing of the Radio Broadcasters, states that “promotional singles [like Aerosmith’s ‘Fly Away from Here’ single] are often sent to the radio stations in anticipation of a new album before the retail version is released, so retail information such as UPC code, catalog number, and sometimes even the album title, is not available to anyone. If the ISRC codes are on these promos, we cannot access them.” *Id.*, Exhibit E, Statement of Amy Van Hook, ¶ 11. Attached hereto as Exhibit D are images of the Aerosmith “Fly Away From Here” promotional CD and the accompanying label packaging for that promotional CD. Contrary to Ms. Van Hook’s statements, the forthcoming album title is noted on the packaging (“Just Push Play”) along with the catalog number for the album (62088), as well as nearly all of the identifying information requested by RIAA. The ISRC numbers for the two versions of the song on the CD can be read with the software products offered by Exact Audio Copy EAC (V.09 beta 3 from 6 March 2002) and the International Federation of the Phonographic Industry (“IFPI”) (ISRC lister Version 1.0). *See* Exhibit D at 3-4 (screen shots of software identifying ISRC numbers). For a discussion of ISRC readers, *see* Section III.A.4 *infra*.

Based upon the statements included in the Exhibits to the Radio Broadcasters' Comments, RIAA simply does not understand how the Broadcasters can claim that "none of [the promotional releases given to radio stations] come with all or even most of the information RIAA would have radio stations report for each song they schedule." Radio Broadcasters' Comments at 26 (emphasis added).

2. Identifying Information Is Available On Physical Promotional Product.

As noted in RIAA's initial comments, promotional product delivered in physical format generally provides most, if not all, of the information requested by the RIAA for royalty distribution purposes. See RIAA Comments, Exhibit G. Because services have questioned the availability of the requested information on promotional releases, RIAA has included declarations from executives at several labels describing their company's practices with regard to the availability of identifying data on promotional product ("CD PROs" and/or "CD-Rs").²⁶ See Exhibit B, Tabs 1-12. RIAA has also included examples of images of promotional releases with notations identifying the location of the information proposed for the uniform report of performances. Some of these examples are attached to the declarations in Exhibit B, and other examples are included in Exhibit E attached hereto. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, Attachments 1a-5b²⁷; Tab 2, Declaration of Gretchen Anderson, Attachments 1a-2c; Tab 4,

²⁶ Examples of CD PROs (CD Promotional) can be found at Exhibit G to RIAA's initial Comments and Exhibit E attached hereto. CD PROs are factory-prepared releases whereas CD-Rs (CD Recordable) are generally created by label personnel using a personal computer. See also Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 3.

²⁷ Attachments to declarations are identified as follows: "[Exhibit Letter]-[Tab Number] Attachment [sequential number of attachments] [and, where the attachment is a unit of more than one page, lower case, sequential lettering]. For example, the designation "B-1 Attachment 1a" refers to the first page of the first Attachment to the Declaration of Peter M. Mullen (Exhibit B, Tab 1).

Declaration of John Dalton, Attachments 1a-2d; Tab 6, Declaration of Bruce Iglauer, Attachments 1a-4b; Tab 7, Declaration of Gerry Kuster, Attachments 1a-6; Tab 9, Declaration of Marina Scarlata, Attachments 1a-1b; Tab 10, Declaration of Rick Wietsma, Attachments 1a-6e; Tab 12, Declaration of Leslie Jose Zigel, Attachments 1a-9c; see also Exhibit E attached hereto. These examples are from large and small labels, different genres and multiple releases of the same sound recording. As one can see from the declarations of the label executives and the images of promotional product attached to their declarations, the majority of the identifying data requested by the RIAA is available on physical, promotional product released by record labels, notwithstanding the claims of some of the services. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 3; Tab 2, Declaration of Gretchen Anderson, ¶ 4; Tab 3, Declaration of Suzanne Berg, ¶ 4; Tab 4, Declaration of John Dalton, ¶ 4; Tab 6, Declaration of Bruce Iglauer, ¶ 4; Tab 7, Declaration of Gerry Kuster, ¶ 4; Tab 10, Declaration of Rick Wietsma, ¶ 4; Tab 12, Declaration of Leslie Jose Zigel, ¶ 4.

Several parties have claimed that because they receive releases of sound recordings in CD-R format versus factory-pressed CD PROs, they should not have to provide identifying information to copyright owners or their collecting entities. See e.g., Radio Broadcasters' Comments at 4, 27; Exhibit B, Statement of Brian Parsons, ¶ 7; Exhibit H, Statement of Rick Killingsworth, ¶ 10; Exhibit J, Statement of Dan Halyburton, ¶ 8. The argument appears to be that in instances where a record label has rushed a new release of a sound recording to a radio station for its immediate use, the station should be released from any obligation to provide the basic information needed for the proper distribution of statutory royalties. This argument has no merit.

First, the use of CD-Rs is not widespread. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 8; Tab 2, Declaration of Gretchen Anderson, ¶ 4; Tab 3, Declaration of Suzanne Berg, ¶ 7; Tab 4, Declaration of John Dalton, ¶ 7; Tab 5, Declaration of Dan Hubbert, ¶ 7; Tab 6, Declaration of Bruce Iglauer, ¶¶ 3 & 9; Tab 7, Declaration of Gerry Kuster, ¶¶ 4 & 7; Tab 8, Declaration of Heather McBee, ¶ 8; Tab 9, Declaration of Marina Scarlata, ¶ 8; Tab 10, Declaration of Rick Wietsma, ¶ 7; Tab 11, Declaration of Bill Macky, ¶¶ 4 & 7; Tab 12, Declaration of Leslie Jose Zigel, ¶ 7. Most promotional releases of sound recordings are provided in – to use the words of Amy Van Hook – “slickly packaged [containers], with photos of the performer, [and] color CD sleeve inserts . . .” Radio Broadcasters’ Comments, Exhibit E, Statement of Amy Van Hook, ¶ 11.

Second, when CD-Rs are sent to radio stations, the stations will know the Artist Name, Sound Recording Title, Duration of the Sound Recording, Marketing Label, and, in most cases, the Release Year. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 3(a); Tab 4, Declaration of John Dalton, ¶ 7; Tab 6, Declaration of Bruce Iglauer, ¶ 9; Tab 11, Declaration of Bill Macky, ¶ 7; Tab 12, Declaration of Leslie Jose Zigel, ¶ 7. In many instances they are also likely to know the forthcoming Album Title for the sound recording and the Track Label (P)-Line will most likely be the same as the Marketing Label (i.e., the label providing the CD-R in the first place). See Exhibit B, Tab 4, Declaration of John Dalton, ¶ 7; see also B-7 Attachment 1a-b.

Third, CD-Rs are rarely the only product sent to a radio station. Record labels will generally send a radio station that received a CD-R containing a new release a follow-up CD PRO and/or a full-length promotional release of the album containing the

sound recording(s) included on the CD-R, so the station will eventually have all of the identifying information requested for the report of use. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 8; Tab 2, Declaration of Gretchen Anderson, ¶ 8; Tab 4, Declaration of John Dalton, ¶ 7; Tab 5, Declaration of Dan Hubbert, ¶ 7; Tab 6, Declaration of Bruce Iglauer, ¶ 5; Tab 7, Declaration of Gerry Kuster, ¶ 7; Tab 8, Declaration of Heather McBee, ¶ 8; Tab 12, Declaration of Leslie Jose Zigel, ¶ 7.

For example, Mr. Parsons of Clear Channel attached to his statement an image of a CD-R for the sound recording “Baby Got Back” by the band “The Grand Skeem.” Mr. Parsons claims that insufficient identifying information was provided on this CD-R. Radio Broadcasters’ Comments, Exhibit B, Statement of Brian Parsons, ¶ 7. But as the declarations attached at Exhibit B hereto indicate, most recipients of CD-R versions of sound recordings also receive CD PRO versions of the sound recording or the full-length retail album, on which more complete identifying information is provided. In Exhibit F attached hereto, RIAA has included images of the CD PRO and label packaging for the sound recording “Baby Got Back” by The Grand Skeem. As these images indicate, Artist Name, Sound Recording Title, Track Label (P)-Line, Duration of the Sound Recording, Marketing Label, Catalog Number and Release Year are included on the promotional product distributed by the record label.

Mr. Parsons also complained about the lack of information on promotional singles, including Jade Anderson’s promotional single “Sugarhigh.” The image of “Sugarhigh” included with Mr. Parson’s statement, however, was a CD-R version of the sound recording, not a CD PRO as implied in his statement. On the CD PRO version of “Sugarhigh,” an image of which is attached hereto as Exhibit G, the CD and the

packaging identify the following information: Artist Name, Sound Recording Title, Track Label (P)-Line, Duration of the Sound Recording, Album Title, Marketing Label, Catalog Number and Release Year.

Because recipients of promotional materials almost always receive identifying information for the sound recordings they perform, there is no reason for not requiring services to provide the requested information, particularly where royalty distributions cannot be made without identifying information.

3. Identifying Information Is Available For Promotional Products Delivered Electronically.

One entity participating in the joint comments of the Radio Broadcasters in this rulemaking, Clear Channel Communications, through the statement of Brian Parsons, appears to make the following argument – where a station is provided with an electronic delivery of a sound recording (e.g., a digital file containing an encoded copy of the sound recording not embodied in a physical product, such as an MP3 file that is transmitted to the intended recipient via electronic mail), the station should not be required to report information not included with the electronic delivery. See, Radio Broadcasters' Comments at 4; Exhibit B, Statement of Brian Parsons, ¶ 10. This argument grossly mischaracterizes the purpose for which these electronic deliveries are made and the surrounding context under which they are delivered, and fails to note the highly experimental nature of those electronic deliveries to Clear Channel by Sony (the label identified by Mr. Parsons).

As the attached declaration of Peter M. Mullen of Sony Music indicates, Mr. Parsons failed to mention that when an electronic delivery of a sound recording is made to a station, it is usually done for either emergency purposes or test purposes. See Exhibit

B, Tab 1, Declaration of Peter M. Mullen, ¶¶ 12-16; see also id. Tab 2, Declaration of Gretchen Anderson, ¶ 6; Tab 8, Declaration of Heather McBee, ¶ 6.²⁸ Moreover, the station will almost always promptly receive a follow-up delivery of a physical record in the form of either a CD PRO or the commercially released full-length retail album containing the version of the sound recording that was the subject of the earlier electronic delivery, which is sent for the express purpose of superseding the earlier electronic delivery. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 7; see also id., Tab 2, Declaration of Gretchen Anderson, ¶ 7; Tab 8, Declaration of Heather McBee, ¶ 6; Tab 11, Declaration of Bill Macky, ¶ 6. In fact, the recipient of the electronic delivery phonorecord is frequently obligated to destroy the electronic version upon receipt of the physical copy of the sound recording. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 6 and B-1 Attachment 1a; see also id., Tab 2, Declaration of Gretchen Anderson, ¶ 7.

4. Identifying Information Is Available On Commercially Released Product.

As RIAA noted in its initial comments, the identifying information it requests for its proposed uniform report of use can almost always be located on or readily determined from commercially released product. See RIAA Comments, Exhibit F.²⁹ Much of the identifying information is printed on the physical CD, the container or the inserts

²⁸ Many record labels do not distribute any promotional product in electronic form. See, e.g., Exhibit B, Tab 3, Declaration of Suzanne Berg, ¶ 6; Tab 4, Declaration of John Dalton, ¶ 6; Tab 5, Declaration of Dan Hubbert, ¶ 6; Tab 6, Declaration of Bruce Iglauer, ¶ 6; Tab 10, Declaration of Rick Wietsma, ¶ 6; Tab 12, Declaration of Leslie Jose Zigel, ¶ 6.

²⁹ Some labels generally distribute their commercially released product as “promotional product” rather than separately preparing distinct promotional material, although the latter is occasionally also provided. See, e.g., Exhibit B, Tab 4, Declaration of John Dalton, ¶¶ 3-4.

included inside the container, or a combination of those three. The data elements include the Artist Name, Sound Recording Title, Track Label (P)-Line, Album Title, Marketing Label, Catalog Number, UPC and Release Year. There is also information that is readily available from the CD itself, although the information may not be in a printed format. This would include the Duration of the Sound Recording and the ISRC.

The Duration of the Sound Recording, if not printed on any of the materials provided noted above, can be readily determined by inserting the CD into any CD player. In fact, many of the commenting parties in this proceeding acknowledged that they already record the Duration of the Sound Recording in their databases. See SDARS Comments at 29 (“[E]ach [of XM and Sirius] enters the actual duration of the sound recording in its respective database.”); Radio Broadcasters’ Comments, Exhibit A, Statement of Jaime Kartak, ¶ 6; Exhibit B, Statement of Brian Parsons, ¶ 20; Exhibit C, Statement of Gregg Lindahl, ¶ 9; Exhibit G, Statement of Mary Guthrie, ¶ 10.; Exhibit I, Statement of Jim Tinker, ¶ 10; Exhibit J, Statement of Dusty Rhodes, ¶ 9.

There appears to be much confusion about the availability of the ISRC. As noted in RIAA’s initial comments, the ISRC is a unique identifier for sound recordings. See RIAA Comments at 56. It is a key, embedded in the sound recording, that when plugged into a database containing the ISRC, can unambiguously provide all of the identifying information associated with the sound recording in the database (but reporting only the ISRC number provides no margin of safety in the event that numbers are misreported or data is incorrectly entered into a database). This is much like a social security number is a key, assigned to a person, that when plugged into the right database can provide all the identifying information about that person associated with the social security number.

Certain commenting parties have complained that the ISRC is unknown or unavailable to them and, therefore, the services should not have to provide this information. See Beethoven.com Comments at 2; Ultimate-80s Comments at 2; Music Choice Comments at 6; RadioValve Comments at 1. Although not plainly visible on the CD, the ISRC number is embedded in the sound recording and can be read easily using currently available software – including free shareware and commercially released products. Attached hereto as Exhibit H is a list of four ISRC readers currently available that RIAA identified from publicly available sources. Contrary to popular belief, the ISRC is not a secret code maintained solely by the RIAA. See Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 25 (“The fact of the matter is that this information is virtually never available and feasible to report, as RIAA has chosen to guard it as a secret.”). Rather, the ISRC number is available to any person that utilizes an ISRC reader. See, e.g., Exhibit B-1 Attachments 2c-d (ISRC numbers for Korn’s “Here to Stay”); B-2 Attachments 1c-1d (ISRC numbers for Ms. Jade’s “Big Head”); B-4 Attachments 2e-d (ISRC numbers for songs on Bond’s album “Born”); B-7 Attachments 5c-d (ISRC numbers for Britney Spears’ “Overprotected”); B-10 Attachments 6d-e (ISRC numbers for The Flying Tigers album “The Flying Tigers”); B-12, Attachments 8c-d (ISRC numbers for Rocio Duval’s “Nada”); C-3 (ISRC numbers for Nikka Costa “Everybody Got Their Something” Sampler) and D-3, 4 (ISRC numbers for Aerosmith’s “Fly Away From Home”).

The services’ calls for access to an ISRC database, however, are unavailing. In order for an ISRC database to have meaning to a service, the service would first have to accurately and unambiguously identify the sound recording for which it is seeking an

ISRC in the database. This, however, is the very reason why RIAA is requesting the ISRC – to accurately and unambiguously identify the sound recording.³⁰ The services ignore the fact that associating each individual ISRC number to each individual sound recording cannot be accomplished without first knowing the identity of the sound recording. Only by having the services report such information can any such association be made.

As a further accommodation to services, RIAA proposes to have the services provide on their reports of use either the ISRC number that they read off the product that they use to make digital audio transmissions or the duration of the sound recording. With either of these identifiers, a collecting entity will be aided in distinguishing among similarly titled sound recordings or different versions of the same song (e.g., dance version, radio remix, etc.). Because the services select the sound recordings to be performed – copyright owners and performers have no control over this – the services should be required to report this information. See Exhibit B, Tab 2, Declaration of Gretchen Anderson, ¶ 10; Tab 3, Declaration of Suzanne Berg, ¶ 9; Tab 4, Declaration of John Dalton, ¶ 9; Tab 6, Declaration of Bruce Iglauer, ¶ 7; Tab 7, Declaration of Gerry Kuster, ¶ 9; Tab 8, Declaration Heather McBee, ¶ 10; Tab 9, Declaration of Marina Scarlata, ¶ 10; Tab 10, Declaration of Rick Wietsma, ¶ 9. The services are, therefore, in

³⁰ As Mr. Parsons of Clear Channel Communications acknowledged, receiving data from a record company or a third-party provider is only part of the solution; one “would still have to figure out how to integrate [the] database with [one’s] current data systems.” Radio Broadcasters’ Comments, Exhibit B, Statement of Brian Parsons, ¶ 31.

possession of the sound recordings that contain duration information or the ISRC number and should be required to report one of these identifying elements on the reports of use.³¹

B. Complying With Reporting Obligations Is Not Technologically Infeasible, Unworkable Or Unduly Burdensome.

Several commenting parties criticize the proposed reporting requirements as technologically infeasible, unworkable and unduly burdensome. Many of these parties claim that systems are not available to provide reporting,³² the inputting of data to provide the requested reporting would be time consuming³³ or that it is too expensive to provide such reporting.³⁴ To the contrary, RIAA believes that: (1) technological solutions already exist and are used in the marketplace or can rapidly be deployed to meet market needs; (2) the claims about the time required to input necessary data elements are overblown; and (3) the costs of deploying reporting technologies are grossly inflated. Moreover, for the reasons identified above, the reporting requested by RIAA is necessary for royalty collection, royalty distribution and the enforcement of the statutory requirements. The services that have questioned the need for all of the data elements

³¹ Not all record labels assign an ISRC number to all released product. While RIAA is hopeful that all record labels will one day assign ISRC numbers to all released product, that is not guaranteed. However, among those who do, the vast majority also include the ISRC number on CD PRO releases. See Exhibit B, Tab 2, Declaration of Gretchen Anderson, ¶ 4 (95%); Tab 3, Declaration of Suzanne Berg, ¶ 4 (80%); Tab 4, Declaration of John Dalton, ¶ 4 (90%); Tab 6, Declaration of Bruce Iglauer, ¶ 4 (100%); Tab 7, Declaration of Gerry Kuster, ¶ 4 (100%); Tab 8, Declaration of Heather McBee, ¶ 4 (100%); Tab 9, Declaration of Marina Scarlata, ¶ 4 (90%); Tab 10, Declaration of Rick Wietsma, ¶ 4 (100%); Tab 11, Declaration of Bill Macky, ¶ 4 (100%); Tab 12, Declaration of Leslie Jose Zigel, ¶ 4 (85%).

³² See 3WK Comments at 4; Radio Broadcasters' Comments at 31.

³³ See Collegiate Broadcasters, Inc. Comments at 3; NFCB Comments at 3; College Broadcasters' Comments at 18 n.17; ARBA Comments at 3; Radio Broadcasters' Comments, Exhibit D, Statement of Mike Cary, ¶ 6.

³⁴ Ultimate-80s Comments at 3; Radio Broadcasters' Comments, Exhibit A, Statement of Jaime Kartak, ¶7; Exhibit B, Statement of Brian Parsons, ¶ 24; Exhibit C, Statement of Gregg Lindahl, ¶ 10; SDARS Comments at 10.

proposed by RIAA have failed to explain how the types or amounts of data they propose to report would provide copyright owners with reasonable notice of the statutorily permitted use of their sound recordings and ensure the proper and efficient allocation of statutory royalties to the copyright owners and performers entitled to such royalties.

1. The Vast Majority Of Services Use Automated Systems To Deliver Programming To Listeners.

The comments filed by most services indicate that the business of delivering music to listeners, whether it be through terrestrial radio broadcasts, satellite digital audio radio service transmissions or Internet-only webcasting, is largely done through the use of automated systems utilizing encoded phonorecords of sound recordings. These systems include scheduling software, their databases and digital automation systems. The scheduling software generates playlists according to certain user-defined parameters. The database attached to the scheduling software will include the meta-data for sound recordings and may also include a digital audio file for sound recordings. The digital automation system receives instructions from the scheduling software and transmits the sound recordings.

The products currently available in the market allow programming directors to access a library of music and generate a playlist. See Exhibit I. Some systems do not even require the intervention of a programming director and merely develop playlists using computer algorithms. See RIAA Comments at 40-42. The sophistication and price of scheduling tools varies. While there are still some smaller broadcasters that spin vinyl recordings or individual CDs when creating playlists, the majority of radio stations and nearly all Internet-only webcasters use automated systems to facilitate transmissions.

Following are some of the admissions made by parties filing comments in this rulemaking regarding the use of automated systems:

- “XM uses a digital asset management system designed especially for XM by Dalet Digital Media Systems. . . . The ingestion of metadata into the Dalet database system is a labor-intensive data entry and research process that varies significantly depending on the source of the programming. . . . During this process, metadata from those CDs is entered into Dalet by a musician librarian clerk who takes the information from an album or CD cover. Once the ingestion process is complete, a program director or DJ selects the music he wants to play from the music available in the Dalet database, and the metadata, once entered, is associated with that recording. A report of music and associated metadata can then be generated.” SDARS Comments at 6.
- “Sirius uses a reporting system that is a feature of Selector, Sirius’ music scheduling software.” Id. at 9.
- “Among the music format stations, most use music scheduling software to create the desired balance of tempo, mood, and variety. Some radio stations use digital automation systems to manage their over-the-air broadcasts” Radio Broadcasters’ Comments at 4.
- “All of our Chicago stations use Selector software, by RCS, to schedule music.” Id., Exhibit A, Statement of Jaime Kartak, ¶ 6.
- “Most of our stations create their playlists using a music scheduling program known as Selector. . . . Most of our stations employ a digital automation system (usually Prophet) to pull the music listed in the playlist from the station’s music library and actually play it.” Id., Exhibit B, Statement of Brian Parsons, ¶¶ 18-20.
- “A [Digital Automation System] is generally used by radio stations to store and play music, commercials, and other pre-recorded materials, leaving appropriate time for live intervention from radio show hosts. Cox Radio currently employs six different systems with various capabilities. . . .” Id., Exhibit C, Statement of Gregg Lindahl, ¶¶ 12-13.
- “Entercom stations operate using at least ten different digital automation systems (DAS). These DAS include programs from Dalet (at least two versions in use), AudioVault (at least three versions in use)[,] Scott Studios, Enco, Maestro, AudioWizard from Prophet, and RCS. The DAS programs are used to orchestrate the on-the-air programming. They coordinate music, traffic, weather, sports, DJ chatter time, and other programming elements based upon schedules we upload from our scheduling software.” Id., Exhibit E, Statement of Amy Van Hook, ¶ 3.

- “Our stations use Music Master 2.0 to schedule their programs, and the Dalet digital automation system.” *Id.*, Exhibit F, Statement of Harv Hendrickson, ¶ 4.
- “Our daily playlist is generated by our Music Director, Elizabeth Meza, using a computer program called MusicMaster Lite.” *Id.*, Exhibit G, Statement of Mary Guthrie, ¶ 9.
- “Most of our stations schedule their programming using MusicMaster. . . . Our stations also use three different digital automation systems, ENCO, Prophet, and Scott Studios, which create and air broadcast programming based on information they receive from MusicMaster’s playlist.” *Id.*, Exhibit H, Statement of Rick Killingsworth, ¶¶ 11-12.
- “Even within our Los Angeles group of stations, we use two different music-scheduling programs and two different digital automation systems (DAS) to effectuate our broadcasts. . . . Some of our stations use a program called Selector. . . .” *Id.*, Exhibit I, Statement of Jim Tinker, ¶¶ 7-9.
- “Our stations use the popular Selector software by RCS to schedule the music they play. . . . All of our stations that use a Digital Automation System use the Enco DAS to actually play the music and schedule the other elements of the broadcast.” *Id.*, Exhibit J, Statement of Dan Halyburton, ¶¶ 9-10.
- “At our most sophisticated station, our flagship WAYM-FM in Tennessee, the music director uses a computer program called Powergold to generate playlists of music.” *Id.*, Exhibit K, Statement of Dusty Rhodes, ¶ 13.
- “While some major AM/FM Webcasters use live, human announcers, the bulk of their programming is sequenced and transmitted by computer software, making comprehensive and accurate recordkeeping simple. . . . Most large AM/FM Webcasters (and most, but not all, internet-only webcasters) store their sound recordings in digital format on a central harddrive. This makes the process of cataloging, organizing, and documenting the music library much easier.” Harvard Comments at 9.
- “Whereas some stations do use off-the-shelf automation software to play music, many stations like 3WK have developed proprietary software that plays music and displays song titles.” 3WK Comments at 4.

Most of the Internet-only services that participated in the Webcaster CARP also rely upon sophisticated automated systems to deliver programming to listeners. See RIAA Comments at 40-42. Descriptions of some of the automated systems mentioned

above by services filing comments in this rulemaking are included in Exhibit I attached hereto. RIAA obtained the descriptions of the products mentioned in Exhibit I from the websites of the companies manufacturing and/or marketing those products.

Based upon the statements of the services themselves, it simply cannot be true that providing the reports of use requested by the RIAA is impossible, impracticable or too expensive.³⁵ Each one of the services presently using an automated system elected to use such a system, and their reasons for doing so probably included the effort to streamline the process of selling advertising and providing programming to listeners. Many of these services may also have embraced automated systems because of their obligation to provide specific reporting information to performing rights organizations (“PROs”) for the use of musical works. The use of the automated systems facilitates the reporting of information on musical works. Since broadcasters have never had an obligation to provide reports of use to sound recording copyright owners, however, it comes as no surprise that their current systems may not contain all of the data elements needed by collecting entities for the distribution of Section 114 statutory royalties. But any alleged lack of current availability will surely be rectified following the Copyright Office’s adoption of final regulations. It is reasonable to expect that the market will respond to those regulations.

In order for automated systems to function, the services must upload sound recordings into a database and associate those sound recordings to meta-data, otherwise

³⁵ See CPI Interactive Comments at 2 (“The Internet offers a much more accurate record. When a title is performed we can PROVE it. We know how many times it is performed. Our server could easily send daily (hourly?) reports to the performance rights agencies upon which they could pay the rights owners.”) (emphasis in original); DiMA Comments at 11 (“[W]ebcast services that perform music from individual
Footnote continued on following page.

the systems could not serve their intended purpose. Diagrams of the processes involved for simulcasting and Internet-only webcasting are included at Exhibit I attached hereto.³⁶ Several commenting parties described this simple process, which only takes several minutes to enter all of the meta-data for an individual sound recording that can thereafter be used for all reporting purposes.³⁷ The services have obviously developed business practices that make such activities routine, and there is simply no reason to believe that their current business practices cannot (and should not) be modified to incorporate the additional data elements that are needed for the distribution of sound recording performance royalties. See RIAA Comments at 46.

To the extent that services have complained about the amount of time it would take to enter the identifying information for sound recordings into their databases, their arguments are unpersuasive.³⁸ First, as noted above, it only takes a service a few minutes

song files on servers . . . [have] servers [that] can track accurately the number of times in which a performance has been requested.”).

³⁶ In the Webcaster CARP, the services in that proceeding relied upon, *inter alia*, the expert testimony of Professor Jonathan Zittrain, Harvard Law School. Attached to Professor Zittrain’s written testimony (Tab 2) was an exhibit, included herein at Exhibit J, Tab 1, which provided an “Overview” of how music is collected and stored on a company’s server and then transmitted to the user. In step 1 on Professor Zittrain’s exhibit, he noted that services have to “Gather & Prepare Data; File & Index Data; Begin Data Stream.” The services participating in this rulemaking that use automated systems are already gathering and preparing data and filing and indexing that data for transmission. See also Exhibit J, Tabs 2 & 3. RIAA’s data requests merely ask the services to gather and report a few more data elements that are needed for the distribution of statutory royalties for the digital audio transmission of sound recordings.

³⁷ See, e.g., Radio Broadcasters’ Comments, Exhibit D, Statement of Mike Cary (“It takes our music programmers between three and five minutes to enter the data we currently track about a song into our scheduling software.”); Exhibit G, Statement of Mary Guthrie, ¶ 10 (“Not counting the evaluation time, it takes at least 5-7 minutes to enter the information we record into our database for each new song.”); Exhibit I, Statement of Jim Tinker, ¶ 17 (“Even entering the key fields we regularly track, it takes our music directors approximately five to eight minutes to make the appropriate judgments about a song and enter the relevant information into both the scheduling software and the DAS.”).

³⁸ See, e.g., College Broadcaster Comments at 18 n.17; Radio Broadcasters’ Comments, Exhibit D, Statement of Michael Cary, ¶ 6.

to enter data about an individual sound recording into a database. Second, services are already recording meta-data in their databases, so requiring them to record additional identifying information could not possibly be deemed burdensome. Third, any estimates of the total amount of time it would take a service to update an entire library of sound recordings misinterprets RIAA's request. RIAA is not requesting that services be obligated to enter meta-data for every sound recording in their database. Rather, RIAA has only sought to have them record – and report – meta-data for the sound recordings that *they actually perform*. Therefore, the statement that it would take 30,000 hours to enter meta-data for 25,000 compact discs and vinyl recordings³⁹ (or any other time estimates for recording meta-data for entire libraries of sound recordings) is meaningless unless the service makes digital audio transmissions of each one of the individual sound recordings on each of those 25,000 compact discs or vinyl recordings in the possession of the service.

2. Automated Systems Currently In Deployment Are Likely To Be Modified Once The Copyright Office Adopts Final Regulations For Notice And Recordkeeping For The Use of Sound Recordings Under Statutory License.

The fact that certain automated scheduling and reporting systems in use today by broadcasters may not contain fields for recording some of the data elements sought by RIAA (and RLI) is not due to the unavailability of that data on sound recordings, but the result of the historical anomaly that sound recording copyright owners have only recently come to enjoy an exclusive right of public performance in the United States. Put simply, in the absence of a performance right, broadcasters had no need to track the information

³⁹ See College Broadcaster Comments at 18 n.17.

necessary for payment of artists and sound recording copyright owners, and thus, their software vendors had no reason to include that functionality in their products. By contrast, performance royalties have long been payable for the use of musical works, and in a development that should not be surprising to anyone, automated systems were developed for tracking the use of such works.⁴⁰ Because a need developed in the marketplace, third party vendors even developed automated systems that facilitated the tracking and reporting of the use of musical works.⁴¹ There can be no doubt that similar solutions will arise in the marketplace to respond to whatever regulations the Copyright Office adopts for reporting the use of sound recordings under statutory license. See Exhibit I (summary of promotional claims made by vendors offering solutions for services making digital audio transmissions of sound recordings).⁴² Because market-

⁴⁰ For an example of a system developed for reporting performances for musical works, see Radio Broadcasters' Comments, Exhibit I, Statement of Jim Tinker, Attachments at 1 of 4 and 2 of 5. In these attachments, Mr. Tinker shows how Salem Communications' Selector program provides data fields including "Composers," "Publishers," "Arrangers" and "License." See also id., ¶ 9.

⁴¹ These systems were not paid for or subsidized by musical work copyright owners, nor were their databases populated with information provided by PROs. Hence, the Copyright Office should reject out of hand the suggestions that copyright owners or their agents, SoundExchange and RLI, subsidize efforts of the services to comply with notice and recordkeeping requirements by turning over for the services' use, presumably for free, the databases they have developed at enormous expense. See DiMA Comments at 2-3; Herbert W. Robinson ("Robinson") Comments at 2; Music Choice Comments at 2-3. Such an appropriation of private property would be unfair and illegal. It also misses the point of the proposed regulations. As explained in Section V.A, services should be required to report enough information to permit designated agents to match confidently their performances to the agents' databases, and RIAA has narrowed the required information to only what it believes to be the necessary elements. Given this willingness, there is no need for any service to have access to the entire databases of SoundExchange and RLI because SoundExchange and RLI will use the information provided by the services to match their performances to the agents' databases.

⁴² Although not providing technology solutions to services, the company "TM Century" does provide many services with custom compilation CDs of new releases and catalog recordings and has expressed an intent to offer information on its custom compilations that assists services in complying with recordkeeping requirements. See Exhibit B, Tab 13, Declaration of David Graupner; see also SDARS Comments at 11; Radio Broadcasters' Comments, Exhibit I, Statement of Jim Tinker, ¶ 6. As Mr. Graupner states in his declaration, "TM Century is committed to promptly modifying its expanded database – once the Copyright Office issues final notice and recordkeeping regulations – such that the database includes all of the data fields required by the new regulations." Exhibit B, Tab 13, Declaration of David Graupner, ¶ 5.

based solutions are likely to develop, the Copyright Office should not believe the hysteria that solutions will not be available or that they will cost hundreds of thousands or even millions of dollars.⁴³ The development of solutions will likely be handled by the free market.

3. New Products And Services Are Likely To Be Developed For Commercial Use Following The Copyright Office's Adoption Of Final Recordkeeping Regulations.

As noted above, there is currently no available master database that contains meta-data for every sound recording released to the public in the United States. The current unavailability of such a database, however, is not an indication that such a database will not be developed in the future. As mentioned in the proceeding section, where needs arise in the marketplace, entrepreneurs frequently develop solutions for those needs. That is how a free market economy functions.

While many services in this rulemaking call for access to a database, they unfortunately want free access and updates to such a database. If one expects the market to develop solutions for this need, then one cannot expect a business to undertake the time and expense of developing and maintaining such a database only to have that database expropriated by the government for the benefit of commercial businesses. But if the Copyright Office adopts regulations that would benefit from the use of such a

⁴³ Mr. Parsons' (Clear Channel Communications) unsworn statement implies that the software vendor Information Concepts quoted Clear Channel a price of \$1 million for the development of software middleware that could be used for providing reports of use of sound recordings. Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 31. Mr. Parsons also implies that the estimate included additional costs of several million dollars for software support and other costs. *Id.* As the sworn declaration of Wayne Beekman of Information Concepts Inc. indicates, a copy of which is included as Exhibit K hereto, Information Concepts never provided Clear Channel with any such cost estimates, let alone estimates for millions of dollars.

database – or other tools and services that can readily be provided – then it is likely that recordkeeping solutions will rapidly be deployed at reasonable prices.⁴⁴

For example, one commenting party in this proceeding, Websound, has told Ms. Kessler of SoundExchange that it has developed a solution that can provide reports of use containing the data requested by the RIAA in its initial comments. See Exhibit L attached hereto. According to Websound: “[it] has developed and tested a method for efficiently and accurately tracking performances based on server log data, cross-referenced with song specific and playlist data, and correlating the result into a report format consistent with the proposed guidelines. We are pleased to inform the RIAA that Websound intends to offer this end to end reporting solution to any and all webcasters on an ongoing basis.” *Id.* (emphasis added)

RIAA has also been notified by Reliacast, a company based in Herndon, Virginia, of products that measure audience size and record content delivery. In a letter to Ms. Barrie Kessler dated April 18, 2002, a copy of which is enclosed as Exhibit M hereto (along with other materials from Reliacast), Glenn Bloom, Director of Sales for Reliacast indicated that Reliacast “can satisfy the reporting requirements specified in this . . . [rulemaking] and we are willing to deploy a solution once the Copyright Office adopts final regulations to demonstrate our solution, first hand.” Exhibit M at 2 (emphasis added). Reliacast claims that its product can collect information on the Start Date and Time of the Sound Recording’s Transmission, Total Number of Performances and Duration of the Sound Recording, and “[a]ll of the other [requested data] fields could be

⁴⁴ According to RLI, at least three companies offer marketing databases for sound recordings: AMG, Muse and Gracenote. RLI Comments at 4.

imported from other production/scheduling systems and delivered via standard report using our software with some custom modifications.” Id. at 1.

Reliacast’s principal product for tracking this information is the “Audience Manager,” described as follows by Reliacast:

Reliacast’s Audience Manager system is an easy-to-use, web-based application that can be seamlessly integrated into any organization employing unicast or multicast streaming. At its core is the **Reliaserver**TM, the webcast manager and repository of all data collected during a webcast. Communication to the Reliaserver takes place with the help of Reliacast’s proprietary Secure Live Event Access Protocol (SLEAP) that uses cryptography to maintain privacy and integrity of data flows. . . . In a seamless and unobtrusive way, this client-side presence passes participant behavior back to the Reliaserver, all while respecting privacy concerns. During a webcast, the Reliaserver logs participant data in its database for reporting via a customizable reporting engine. Reliacast’s robust reporting system offers a wide variety of standard and customized reports that are designed to measure results and answer these important questions:

- **Participant Profile** - “Who watched?”
- **Audience Size** – “How many?”
- **Participant Behavior** – “What did they do?”
- **Participant Experience** – “How positive was the experience?”

Exhibit M, Corporate Profile at 2 (emphasis in original).

Another company that may deploy a product commercially for services seeking recordkeeping solutions is RLI, a Designated Agent for the receipt of eligible nonsubscription transmission royalties. According to the testimony of Mr. Ronald Gertz in the Webcaster CARP, RLI has developed a substantial, but not complete, database on sound recordings:

- Q: You also talked about Songdex data base, do you recall that testimony?
A: Yes.
Q: And this is a data base that has information on both sound recordings and musical works?
A: Yes.

- Q: **Approximately how many separate sound recordings do you have information for in the Songdex database?**
- A: **Millions. . . .**
- Q: Well, what kind of information do you have on sound recordings?
- A: In sound recordings, we keep the **album** that the song came from, **the recording title**, the **artist**, the **distributing label**, the **label that owns the copyright**. We often have the **UPC code**, **catalog numbers** and various other detail that allows us to match titles to various data inputs.
- Q: And there are millions of copyrighted sound recordings in your data base?
- A: Yes.

Webcaster CARP Tr. 10999-11000 (Gertz) (emphasis added). In light of RLI's close working relationship with many copyright users, including major terrestrial broadcasters, it is not inconceivable that RLI will market its database of millions of sound recordings to statutory services or to third parties that develop recordkeeping and reporting tools.⁴⁵ Again, the Copyright Office should not heed the call of services to expropriate the database of sound recordings developed by RLI, but should instead permit RLI to determine how its database may be marketed for use by services operating under the Section 112 and 114 statutory licenses. Cf. Radio Broadcasters' Comments at 63-64 (record labels should not be entitled to receive for free through the rulemaking data that has substantial value that the labels otherwise have to pay for in the free market).

4. Providing Automated Reports Of Use Is Not Burdensome And Handwritten Reports Of Use Should Not Be Permitted.

The Copyright Office should reject any calls to permit services to provide reports of use in handwritten form. See Radio Broadcasters' Comments at 40. With the delivery

⁴⁵ RIAA is surprised that not a single service called for access to the database of sound recordings maintained by RLI, particularly when RLI appeared on behalf of and was working with the webcasters and broadcasters that participated in the Webcaster CARP. One is left to wonder why so many broadcasters called for access to an RIAA database when they have knowledge of an extant database containing information on millions of sound recordings. See Radio Broadcasters' Comments, Exhibit A, Statement of Jaime Kartak, ¶ 7; Exhibit E, Statement of Amy Van Hook, ¶ 17; Exhibit F, Statement of Harv Hendrickson, Concluding Paragraph.

of music becoming more and more automated, including the use of computer systems to simulcast an over-the-air AM or FM broadcast signal on the Internet, there is simply no reason to permit a service to provide a handwritten report of use that will necessarily have to be entered into a database by a collecting entity in order for statutory royalties to be distributed. By asking for permission to provide handwritten reports of use, services are once again attempting to shift their burden of complying with the statutory license to copyright owners and performers, who would have to pay for entering any handwritten data into an automated database. Such burden shifting should not be permitted, and each service should be required to provide a report of use in a “standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc.” See RIAA Comments, Exhibit A Sec. 201.36(g).

Any claim that providing automated reports would create an undue burden for commercial stations is belied by some of the efforts already undertaken by noncommercial radio stations. For example, Harvard’s WHRB station in Boston, Massachusetts is a college radio station “operated and administered by a volunteer staff composed of undergraduates of Harvard College” Harvard Comments at 3. Operating on an annual budget of less than \$100,000 per year, *id.* at 4, WHRB manages to provide an electronic playlist of all sound recordings that it has performed or intends to perform on its website. A printout of WHRB’s March-April 2002 playlist (from the website www.whrb.org) is attached hereto as Exhibit N. If WHRB – a volunteer-operated college radio station – can find the time to provide printed playlists on its website for use by its listeners, then it and other broadcast stations can surely provide machine-readable reports of use to collecting entities to facilitate payment of statutory

royalties to the copyright owners and performers whose works they are performing under a compulsory license.

5. There Is No Basis For Exempting Third-Party Programming On Reports Of Use.

Radio Broadcasters and XM/Sirius state that they transmit a substantial amount of programming provided by third parties (i.e., so-called syndicated programming), and that information about the recordings performed in those programs is often not provided by the third-party programmer and in any event would likely not meet the proposed requirements. Radio Broadcaster Comments at 32; SDARS Comments at 7 & 9. They assert that they should be exempt from providing reports of use for syndicated programming unless the third-party programmer provides the service with the required information. See Radio Broadcasters' Comments, Exhibit C, Statement of Gregg Lindahl, ¶ 17; Exhibit H, Statement of Rick Killingsworth, ¶ 6. In other instances, services claim that they should only be obligated to "exert a reasonable, good faith effort to obtain information from . . . third-party programmers . . ." Radio Broadcasters' Comments at 35. These proposals fail to provide copyright owners with reasonable notice of use of their sound recordings, and create perverse incentives to minimize the amount of information available to copyright owners to effectuate a proper distribution of royalties by shifting more programming to third parties. These proposals should be rejected by the Copyright Office.

Services elect to enter into contractual arrangements with third-party programmers for the carriage of their programming. Copyright owners and performers have no control over these arrangements and no practical and economical method for monitoring these arrangements or the syndicated programming. Therefore, it is the

service that elects to operate under the statutory license and, at the same time elects to transmit syndicated programming, which is uniquely positioned to ensure that the necessary information is provided to copyright owners and performers. Whether the service or the third-party programmer actually compiles the information and how the additional cost, if any, of compiling such information should be allocated, are matters that can be resolved by contract between those parties. But if they are not forced to address these issues, each inevitably will take the path of least resistance, and copyright owners and performers will be deprived of the information necessary to make a proper distribution of what is assertedly a substantial use of recorded music. Accordingly, services must bear the burden of providing the required reports of use even when they transmit syndicated programming.

To permit services to avoid reporting information on the use of sound recordings in syndicated programming would create a tremendous exception to the recordkeeping requirements that might negate most if not all of the recordkeeping requirements. Such an exception undoubtedly would promote the further use of syndicated programming, if only as a means of avoiding reporting requirements. The result of such an exception could only be to make it more difficult or more expensive to distribute, or to skew the distribution of, a fair share of royalties to the copyright owners and performers whose sound recordings are contained in syndicated programming.

RIAA also doubts claims that requiring reports of use for syndicated programming will result in widespread programming blackouts. See Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 33. Broadcasters simulcasting their programming over the Internet are already engaging in a form of "programming

blackouts.” They strip out their local, over-the-air advertisements and replace them with national advertisements. See Webcaster CARP Tr. 5973-74 (Donahoe) (Aug. 24, 2002) & RIAA Exhibit 164-DPX (June 2001 Clear Channel/Hiwire, Inc. Press Release Describing Advertising Insertion Technology). If services were not able to obtain information on the sound recordings contained in a syndicated program, then they could strip out the syndicated program and replace that with programming for which identifying information on sound recordings is available.

Just as the market adjusted to developing technology solutions for reporting the use of musical works to PROs or the use of sound recordings by preexisting subscription services after the Copyright Office’s notice and recordkeeping rulemaking for such services, the market will adapt to a world where reports of use are required for syndicated programming. No party has presented evidence to the Copyright Office that such an adjustment will not be made in the marketplace. If such reporting is required, then services will demand and third-party programmers will provide such notice.⁴⁶

6. Nothing About The “Proprietary” Nature Of Playlists Warrants A Change In The Proposed Regulations.

Several of the commenting parties asserted that their playlists are “commercially sensitive” and “proprietary” information. See Radio Broadcasters’ Comments at 62; Id., Exhibit A, Statement of Jaime Kartak, ¶ 14; DiMA Comments at 7; Music Choice

⁴⁶ XM has stated that requiring reports of use for syndicated programming would require the development of new systems. See SDARS Comments at 12 (“The Proposed Rule would require the establishment of entirely new systems and recordkeeping processes that are simply not needed by these third-party programmers in the ordinary course of their primary business.”). But there is no reason why the development of new systems should be an obstacle to the Copyright Office’s adopting regulations that require reports of use for syndicated programming. If such reporting is needed for the collection and distribution of statutory royalties and for the enforcement of the statutory requirements, then the Copyright Office must adopt those regulations and the market will adjust accordingly.

Comment at 7-8. The thrust of these claims seems to be to reduce the amount of information that these services must report. This reasoning should be rejected, for two reasons.

First, as the Copyright Office concluded in the Original Determination, playlists that are publicly performed are “historical fact.” Original Determination, 63 Fed. Reg. at 34,295. Indeed, they are by their nature known to the public. As such, they are not trade secrets or confidential information that would warrant limitations on their dissemination.⁴⁷

Second, if there were legitimate concerns about the nature of the data, any such concerns would be addressed adequately by the Copyright Office’s proposed regulations limiting the use of the reports. See Proposed 37 201.36(d)(2) & (h), Notice at 5765; see also Original Determination at 34,295. Nothing in the services’ claims to proprietary data warrants a change in the proposed regulations.

⁴⁷ Even where, as DiMA suggests, proprietary software may be used to generate a different playlist for each individual listener, the listener is at liberty to disclose the playlist, so it does not satisfy any legal definition of trade secret. See Uniform Trade Secrets Act, § 1(4) (defining “trade secret” to mean information that “derives independent economic value, actual or potential, from *not being generally known to, and not being readily ascertainable by proper means by*, other persons who can obtain economic value from its disclosure or use and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”). Even if a service might argue that one listener’s playlist is somehow confidential because it cannot be discovered by another member of the public, this circumstance mostly serves to prove that such playlists must be reported for compliance purposes because monitoring through simple public access is not possible.

IV. THE SERVICES HAVE NOT PROPOSED REASONABLE REPORTING REQUIREMENTS

A. Many Of The Services That Oppose Reporting The Information Contained In the Notice Of Proposed Rulemaking Have Failed To Propose Alternative Reporting Requirements That Would Be Sufficient For Royalty Collection And Distribution.

As noted above, RIAA believes that each service proposing reporting requirements bears the burden of justifying how those reporting requirements will provide copyright owners or their agents with reasonable notice of use of sound recordings that facilitates the accurate collection and distribution of statutory royalties.⁴⁸ Unfortunately, most of the services providing comments neglected to satisfy this obligation. Instead, they merely criticized the Copyright Office's proposal, alleged that the RIAA was seeking data for ulterior motives and sought to perpetuate the current practices used in the terrestrial radio world where different works are transmitted through a different medium.

1. The Proposals To Report Only Artist Name And Sound Recording Title On Reports Of Use Would Not Permit The Accurate Distribution Of Statutory Royalties To Copyright Owners And Performers.

Several parties have stated that the only information needed on a report of use for royalty distribution purposes is the Artist Name and the Sound Recording Title. See

⁴⁸ For the purposes of this Section IV.A, RIAA focuses only on the data needed for royalty collection and distribution. This is because many services filing comments in this rulemaking oppose the reporting of information for ensuring compliance with the statutory requirements. See, e.g., Radio Broadcasters' Comments at 17-21; SDARS Comments at 21-24. However, irrespective of the information needed for testing compliance with the statutory requirements, most of the information requested by RIAA is needed to enable a collecting entity to distribute the statutory royalties. Therefore, the data that various services propose to report would not be sufficient for properly allocating statutory royalties among all parties entitled to receive a portion of those royalties.

Radio Broadcasters' Comments at 41;⁴⁹ Ultimate-80s Comments at 2-3, 5; College Broadcaster Comments at 14 ("The College Broadcasters acknowledge that the following fields of information are necessary to facilitate administration of the licenses, including collection of royalties and expedited distribution of royalties to copyright owners: sound recording title and featured artist. The remaining information requested does not relate to the primary purpose of the notice and recordkeeping requirements."); SDARS Comments at 25 n.4 ("[T]here is reason to believe that artist and title alone suffice to identify a sound recording. Even when a particular song performed by a particular artist appears on more than one album – *i.e.*, on the artist's original release information and on compilation albums – only in the rarest cases would the copyright owner change based on the album on which the song appears.").

Services offer varying reasons why only Artist Name and Sound Recording Title should be provided. Ultimate-80s, for example, says that requiring any other information "is either extremely difficult, cost prohibitive, and/or simply impossible to attain." Ultimate-80s Comments at 2. Radio Broadcasters, on the other hand, believe that "[i]n the vast majority of cases, provision of title and artist information will be sufficient to identify a sound recording." Radio Broadcasters' Comments at 41; see also SDARS Comments at 25 n.4.

⁴⁹ Broadcasters state in their comments that Barrie Kessler, the Chief Operating Officer of SoundExchange, "testified during the nonsubscription services proceeding that for all sound recordings except possibly some included on compilations, title, artist and album name were sufficient to identify the track." Citing Docket No. 2000-9, CARP DTRA 1 & 2, Tr. 11,828-30 (Kessler). This mischaracterizes Ms. Kessler's testimony. Ms. Kessler's written and oral testimony indicates that the data requested on reports of use is needed "to accurately differentiate one sound recording from another." Tr. at 11,874. It is the differentiation among various sound recordings that is the most difficult task of a collecting entity, and the reporting regulations to be adopted by the Copyright Office must take these difficult situations into account.

Mr. Parsons, of Clear Channel Communications, seems to believe that because industry trade publications “routinely identify songs by title and artist alone,” services should only have to report similar information on reports of use under statutory license. Radio Broadcasters’ Comments, Exhibit B, Statement of Brian Parsons, ¶ 11. Mr. Parsons further alleges that “record labels routinely send our radio stations songs with only title and artists information provided, along with the song’s length . . .” *Id.* In Exhibit O attached hereto RIAA has provided a copy of the March 8, 2002 Radio and Records page for “Hot AC Playlists” cited by Mr. Parsons and attached to his statement. Following that page is a spreadsheet prepared by RIAA that lists the five Clear Channel stations (KBIG/Los Angeles; KYSR/Los Angeles; KDMX/Dallas-Ft. Worth; WLCE/Philadelphia; and KMXP/Phoenix) that were listed on the first page of that attachment and the songs that were listed as having been played on those Clear Channel stations. Following the spreadsheet are images of a few of the promotional versions of the sound recordings (or the packaging) sent to radio stations and played by Clear Channel stations that RIAA was able to obtain for this rulemaking. As these images show, and contrary to the assertions of Mr. Parsons, not only is Artist Name and Sound Recording Title not the only information contained on those promotional products, but also the majority of the identifying information requested by RIAA is contained on the products.

In response to claims made in the initial comments, RIAA further explains herein why reporting only Artist Name and Sound Recording Title alone is insufficient for distributing statutory royalties. See also RIAA Comments at 59-61. RIAA detailed in its initial comments how the same artist may record the same sound recording for various

albums or with various background musicians and vocalists. Id. In those instances, different copyright owners and performers may be entitled to royalties for the public performance of those recordings. In Exhibit P attached hereto, RIAA provides examples where reporting only the Artist Name and the Sound Recording Title would not permit the correct identification of the copyright owner or performers entitled to royalties for the public performance of a sound recording by that artist.⁵⁰

The first two pages of Exhibit P are intended to simulate what a report of use might look like if a service reported only Artist Name and Sound Recording Title for the performance of a given sound recording under statutory license. If this minimal reporting were permitted, then a collecting entity would not necessarily be able to identify the copyright owners or performers entitled to royalties for those performances. This is because for the entries listed on the first two pages of Exhibit P, there are at least two different versions of that same sound recording by the same artist on different albums with different rights owners. Those multiple recordings of the same sound recording by the same artist are identified on pages 3-6 of Exhibit P, along with the album title and label name for those recordings.⁵¹ As this Exhibit shows, multiple copyright owners may have rights to identically titled sound recordings by the same artist.

⁵⁰ The examples included in this Section IV.A are for illustrative purposes only and should not be interpreted as a comprehensive listing of those situations where the reporting of the identified information would create uncertainty for royalty distribution purposes.

⁵¹ The column heading "Label" is used in Exhibit P and Exhibit T because RIAA, in developing a sample report of use without the benefit of access to physical product, was not able to determine from its own research whether the listed record company is the "Marketing Label" or the "Track Label (P)-Line" copyright owner. Such a determination generally requires access to the physical product, which the services would have.

For example, on page 1 of Exhibit P, the featured performer Alice Cooper is listed as having recorded a song titled "I'm 18." If a collecting entity were to receive a report of use that contained only that information, the collecting entity would not know whether the service performed the version of "I'm 18" from the album "Classicks" or "Love It To Death." See Exhibit P-3. This information is critical for a collecting entity because different copyright owners may be entitled to royalties depending upon the source album for that sound recording. In this instance, Warner is the Marketing Label and/or Track Label (P)-Line for the album "Love It To Death" while Epic (a Sony label) is the Marketing Label and/or Track Label (P)-Line for the album "Classicks." If services are permitted to exclude the Album Title from a report of use, then collecting entities will not know how to distribute royalties in the instances where multiple copyright owners may have rights to identically titled sound recordings by the same artist.

An additional problem that could occur if services only report Artist Name and Sound Recording Title is the situation where the members of a band (i.e., featured artist) change over time (or different nonfeatured performers appear on studio releases versus live recordings), but the reconstituted band continues to release albums, including new recordings of prior releases. Without specific information on each individual sound recording, a collecting entity would have to guess which version of the sound recording the service performed in order to pay royalties to the correct members of the band.

The first two pages of Exhibit Q attached hereto list instances where a band has recorded a specific sound recording. The Album Title is not identified. From its own limited research, however, RIAA knows that the bands identified on the first two pages of Exhibit Q recorded the identified sound recording on more than one occasion and with

different members of the band. Therefore, if a collecting entity were to receive only Artist Name and Sound Recording Title on a report of use, there would be no way to determine the band members entitled to statutory royalties for the performance of the listed sound recordings. On pages 3-6 of Exhibit Q, however, where Album Title is provided, a collecting entity would have additional information that would be critical for distinguishing among different versions of the same sound recording so that principal members of a band could receive their share of statutory royalties.

For example, on page 3 of Exhibit Q, the band “Black Sabbath” is listed as having recorded the sound recording “Black Sabbath” for two different albums: “Live Evil” and “Black Sabbath.” The composition of the band Black Sabbath, however, was not the same for these two recordings. For the version of “Black Sabbath” on the album “Black Sabbath,” released in 1970, the members of the band Black Sabbath were Ozzy Osbourne, Geezer Butler, Tony Iommi, Bill Ward, Ira Ferguson, Michael Howse and Bill Russell. Twelve years later, when the song “Black Sabbath” was released on the album “Live Evil,” the members of the band Black Sabbath were Vinny Appice, Geezer Butler, Ronnie James Dio, Tony Iommi, Geoff Nichols, Ira Ferguson, Michael Howse and Bill Russell. See Exhibit R, page 2 of 3 “Credits” for Album “Black Sabbath” and page 2 of 3 “Credits” for Album “Live Evil”) (printouts from AMG All Music Guide, www.allmusic.com).

A more striking example of the problems that arise when band members change over time and the band releases multiple versions of the same sound recording is the situation with the “Grateful Dead.” The Grateful Dead released numerous studio albums and live albums, and continues to release “new” recordings from its vault of concert

tapes. But as the members of the Grateful Dead changed over the years (principally the keyboard player), identifying the members entitled to statutory royalties for the performance of a given sound recording is particularly difficult if the same titled sound recording appears on numerous albums. Exhibit S attached hereto includes four sections identifying the significant issues involved in identifying the members of the Grateful Dead. Tabs 1 and 2 of Exhibit S identify the band members for each of the Grateful Dead's studio and live albums, respectively. Each distinct composition of the band is noted with a letter. For example, for the album "The Grateful Dead," the members of the Grateful Dead were identified as Jerry Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann and Ron McKernan (aka "Pigpen"). This composition of the Grateful Dead has been given the designation "A." On the album "Anthem Of The Sun," however, the members of the band were Jerry Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann, Mickey Hart, Ron McKernan and Tom Constanten, and this composition of the band has been given the designation "B."

Tabs 3 and 4 identify the sound recordings released by the Grateful Dead and the albums on which they appear, with Tab 3 being studio releases and Tab 4 live releases. As one can see from a quick review of these two tabs, the band has released the same sound recordings on multiple albums. In the far right column in Tabs 3 and 4, the configuration of the band is noted with the letter designations from Tabs 1 (studio recordings) and 2 (live recordings). For example, the song "Beat It On Down The Line" appears on six live albums but there were four different "versions" of the Grateful Dead for those six albums, including the compositions designated as "C" (Jerry Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann, Mickey Hart, Ron McKernan (Pigpen)) and "G" (Jerry

Garcia, Bob Weir, Phil Lesh, Bill Kreutzmann, Donna Jean Godchaux, Keith Godchaux). If services did not report album information, then there would be no way for a collecting entity to identify the specific band members entitled to statutory royalties.⁵²

While some bands have management companies that handle the collection and distribution of royalties for all individuals who may have been members of the band, that is not always the case. Moreover, even if the management company is willing to collect the royalties for all of the members, the company will need the information regarding the version of the sound recording for which the royalties were collected so that it can divide the money accordingly. Therefore, the reports of use by services must permit collecting entities or managers to distinguish among the various incarnations of the band so that the proper members may receive distributions of statutory royalties.

An additional problem with providing solely Artist Name and Sound Recording Title is differentiating between two artists with the same name. Although not necessarily common, this situation does occur, and a collecting entity will need further information in order to distribute royalties to the copyright owners and performers entitled to royalties for the performance of a sound recording where the identity of the featured artist based upon a shared Artist Name is indeterminate. Attached as Exhibit T hereto is a list of some featured artists (individuals and groups) that have identical or substantially similar names. For example, "Al Jones" is the name shared by two featured artists. If a collecting entity were to receive a report of use that provided only the Artist Name "Al

⁵² Fleetwood Mac is another band that released the same titled sound recordings on multiple albums. The band also had numerous configurations over time. Tab 5 of Exhibit S identifies the different configurations of Fleetwood Mac and Tab 6 provides the band's discography, indicating the different band members entitled to statutory royalties depending upon the source album from which a particular song is played.

Jones” and the title of a sound recording, then the collecting entity would not necessarily know which “Al Jones” was entitled to statutory royalties.

As the examples in Exhibits P, Q, R, S and T attached hereto indicate, the proposal to provide just Artist Name and Sound Recording Title would not provide a collecting entity with sufficient information for distinguishing among different versions of the same titled sound recording by the same artist. Consequently, merely providing Artist Name and Sound Recording Title to copyright owners or their collecting entities does not satisfy the services’ statutory requirement to provide copyright owners with “reasonable notice of use of their sound recordings,” and the Copyright Office should reject any such proposal.

2. The Proposals To Report Only Artist Name, Sound Recording Title and Album Title On Reports Of Use Would Not Permit The Accurate Distribution Of Statutory Royalties To Copyright Owners And Performers.

To the extent services propose reporting only Artist Name, Sound Recording Title and Album Title on a notice of use,⁵³ RIAA contends that such information will not provide collecting entities with sufficient information for the proper distribution of statutory royalties and, therefore, does not constitute reasonable notice of use. For the same reasons identified in Section IV.A.1 above, this limited information would not permit a collecting entity to identify the copyright owners entitled to royalties for the public performance of sound recordings without reference to additional resources.

⁵³ See SDARS Comments at 24-25 (“The following information . . . would allow RIAA to determine the Services’ sound recording usage and accurately to distribute royalties: (i) name of the Service or entity; (ii) sound recording title; (iii) artist; and (iv) retail album title, where available.”).

Merely knowing the Artist Name, Sound Recording Title and Album Title does not identify for the collecting entity the copyright owner entitled to statutory royalties for the performance of that sound recording. For example, if a collecting entity receives a report of use listing Alice Cooper performing "I'm 18" on the album "A Fist Full Of Alice," the collecting entity still needs to research that recording to determine that Warner is the record label entitled to royalties for the performance of that sound recording. Because the services will have this information in their possession, they should be required to report this information on a report of use; copyright owners and performers should not have to expend time and money researching information that is in the possession of the services and critical for the distribution of statutory royalties.

3. The Proposals To Exclude Track Label (P)-Line Information From Reports Of Use Would Not Permit The Accurate Distribution Of Statutory Royalties To Copyright Owners And Performers.

Numerous parties have filed comments objecting to the proposal to require the reporting of Track Label (P)-Line information. These parties have complained that such information is redundant and unnecessary for identifying sound recordings, not available or unduly burdensome. See, e.g., SDARS Comments at 34 (this information "is merely another means of identifying the sound recording and, as such, is duplicative of the title, artist, and album and record label information that the Preexisting Satellite Services have proposed to provide."); Radio Broadcasters' Comments at 53 ("[T]his information is merely another means of identifying the sound recording and, as such, is duplicative of the Broadcasters' proposal to provide title, artist, and album information."); CPI Interactive Comments of March 8, 2002 at 2 (unavailable); Music Choice Comments at 7 (unnecessary); Ultimate-80s Comments at 2 (extremely difficult, cost prohibitive, and/or

simply impossible to attain). If services are going to criticize the proposal to require the reporting of Track Label (P)-Line information, they should also show how copyright owners are to receive reasonable notice of the use of their sound recordings when the service performs a sound recording from a compilation album and fails to identify the sound recording copyright owner.

The entity listed on the Track Label (P)-Line is generally the sound recording copyright owner and entity entitled to royalties for the digital audio transmission of the sound recording. See RIAA Comments at 57 & 60. Requiring reporting of the Marketing Label instead of the Track Label (P)-Line on a report of use, therefore, will not provide a collecting entity with sufficient information for the proper distribution of statutory royalties, as the Marketing Label may be distinct from the Track Label (P)-Line.

Tab 1 of Exhibit U provides examples of sound recordings by different featured artists on different album releases. The Marketing Label is also provided on these pages. But if a collecting entity were to distribute royalties for the performance of any of these sound recordings to the identified Marketing Label it would likely allocate statutory royalties improperly. That is because, as evidenced in Tab 2 of Exhibit U, the Track Label (P)-Line copyright owner may be different from the Marketing Label on a compilation recording.⁵⁴ For example, for the compilation album “Now That’s What I Call Music 8,” there are 20 sound recordings by 20 different artists. Virgin America Records, Inc. is listed as the Marketing Label. See Exhibit U, Tab 1-4. The Track Label (P)-Line copyright owners for those 20 sound recordings, however, include, *inter alia*,

⁵⁴ Even the Radio Broadcasters acknowledge that “[d]ifferent owners may own the rights in different tracks from the same CD.” Radio Broadcasters’ Comments at 18.

Sony Music Entertainment Inc., Zomba Recording Corp., Virgin Records American, Inc., The Island Def Jam Music Group, Blackground Records, LLC, Arista Records, Inc., EMI Records Ltd., Wall of Sound Recordings and Universal Records. Id., Tab 2-5 & 6. In each instance where the version of a sound recording from this album is performed under a statutory license, the statutory royalties are to be distributed to the Track Label (P)-Line copyright owner (which may or may not be the same copyright owner of the initial release of that sound recording) and not to the Marketing Label (unless they are the same).

To reduce the likelihood of the misallocation of statutory royalties, the Copyright Office should require services to report both Track Label (P)-Line information and Marketing Label. If such information is not reported, then it is likely that collecting entities will not distribute royalties to the parties entitled to receive such royalties. If the misallocation of statutory royalties is likely in the absence of Track Label (P)-Line information, then any proposal to exclude the reporting of such information is not reasonable and, therefore, should be rejected by the Copyright Office.

4. The Proposals To Exclude Genre Information From Reports Of Use Would Likely Increase Administration Costs And Reduce Royalties Distributed To Copyright Owners And Performers.

Requiring services to report Track Label (P)-Line information (in addition to Artist Name, Sound Recording Title, Album Title and Marketing Label), however, does not ensure the proper allocation of statutory royalties. This is because there are many instances where labels share identical or substantially similar names, and identifying which label is entitled to statutory royalties is often difficult without additional information. See RIAA Comments at 51 and Exhibit V. For this reason, RIAA has

proposed requiring services to report a field titled "Genre," which would not be an objective designation but rather the subjective classification given by a service to a particular channel of music.⁵⁵ The provision of this information will frequently provide distinguishing data between two identically or similarly titled entities, and this information is readily available to the services and not difficult to provide.

Several commenting parties have stated that RIAA's request for the identification of the musical genre for a channel or program is not necessary for royalty collection and distribution and is simply a "fishing expedition" for marketing data. See Radio Broadcasters' Comments at 54⁵⁶; SDARS Comments at 35.⁵⁷ As noted above, however, the request for Genre designation was made to facilitate the proper distribution of royalties when two entities share the same name but own separate repertoire. The services do not address in their comments how a collecting entity would distribute

⁵⁵ The Genre designation is requested on a per channel basis and not on a per sound recording basis. However, if a service's business practice already incorporated Genre designation on a sound recording basis, such information would be preferable.

⁵⁶ Radio Broadcasters characterized the request for Genre information as follows:

RIAA's quest for station format information is an improper fishing expedition for information that receiving and designated agents plainly do not need. A station's format has no relevance to fee collection or distribution. The more likely explanation for RIAA's attempt to obtain this information is to collect useful marketing information (i.e., determine sound recordings with "cross-over" appeal) in order to target more accurately its promotional efforts and perhaps even program competing webcasting channels.

Radio Broadcasters Comments at 54.

⁵⁷ The satellite digital audio radio services characterized RIAA's request for Genre information as follows:

Genre information has very little, if any, relevance to ascertaining sound recording usage or to identifying sound recordings that are used. For example, is Stairway to Heaven an "oldie," "classic rock," "heavy metal," "rock," "hard rock," "album oriented rock?" The more likely explanation for RIAA's attempt to obtain genre information is to obtain useful marketing information (i.e., to determine sound recordings with "cross-over" appeal) . . ."

SDARS Comments at 35.

royalties to the entitled copyright owners in such circumstances. In Exhibit V, RIAA has identified a number of instances where two or more labels share an identical or similar name. Where a service reports one of these entities as either the Marketing Label and/or Track Label (P)-Line for a sound recording, the collecting entity will not know which entity is entitled to the distribution of statutory royalties without further information. Finding this information may require extensive research or calls to the various labels, efforts that take time and money and reduce the distributions available for copyright owners and performers. However, if the services are required to report their own station format designation (i.e., how they market or define their station for listeners) – a task that cannot be deemed burdensome – then collecting entities would be aided in their efforts to pay royalties only to those entities entitled to statutory royalties.

For example, on the first page of Exhibit V, the labels “Aim Records” and “Aim Records” are listed. The first “Aim Records” is located in Baltimore, Maryland and the second is located in Belgium. Each of these companies owns copyrights to different sound recordings. Therefore, if a service were to report a performance of a sound recording with the Marketing Label or Track Label (P)-Line filled in as “Aim Records,” the collecting entity would not know which entity with that name is entitled to statutory royalties. However, if the service were to provide a designation for its channel of programming as “Classical Indian, Pop or Spiritual” (Aim Records US) or “Electronic” (Aim Records Belgium) (or some close approximation thereto), a collecting entity’s efforts to distinguish between these two companies would be simplified.

5. The Proposals To Exclude ISRC, Catalog Number, UPC And Release Year On Reports Of Use Will Impede The Distribution Of Statutory Royalties To Copyright Owners And Performers And Drive Up The Costs Of Distribution.

Many services have objected to the proposal to require the reporting of ISRC, Catalog Number, UPC and Release Year. As noted in RIAA's Comments, however, such information enables a copyright owner to distinguish among different versions of sound recordings by the same artist. See RIAA Comments at 56-60. This information is particularly important in those limited instances where services are unable to report an Album Title, such as on a promotional single where the album title may not be provided or, as happens more frequently, where services report the Artist Name as "Various." These additional data elements may also help distinguish between similarly named labels where the Genre designation does not clarify any ambiguity. See Exhibit V, Angel Records (overlapping Genres). If the collecting entity has the Release Year along with Catalog Number, ISRC or the UPC number for a sound recording where the artist is reported as "Various" or in instances where two or more labels share the same or similar names, then it may be able to identify the copyright owner of the recording entitled to statutory royalties. Such information is also valuable when services report performances of classical music using the name of the composer as the Artist Name and/or the Album Title, and the only way to determine the identity of the entities entitled to statutory royalties for such performances may be through the ISRC, Catalog Number, UPC and Release Year.

The Catalog Number, UPC and ISRC are also common identifiers that may facilitate the efficient distribution of royalties as such identifiers permit collecting entities and services to utilize multiple databases containing varying degrees of information on

sound recordings, including both proprietary and commercially available databases. By using a common identifier, there will be instances where identifying the copyright owners and performers for particular recordings will be facilitated. Contrary to the suspicions of some of the commenting parties in this proceeding (see, e.g., DiMA Comments at 2;⁵⁸ Robinson Comments at 2⁵⁹), however, there is no existing database of which RIAA is aware that contains information on every sound recording released in the United States. RLI is also not aware of any such database. See RLI Comments at 3 n.2. As noted in Section III.B.3 *supra*, the absence of a current database for all sound recordings lawfully released in the United States does not preclude the development of multiple, comprehensive databases by enterprises seeking to provide solutions to statutory licensees. In fact, such development will likely follow the promulgation of final reporting requirements by the Copyright Office.

B. Each Service Should Be Required To Provide The Requisite Information For All (And Not Merely A Sample) Of The Sound Recording Performances That It Makes.

Broadcasters wish to provide information for only a “small sample” of their sound recording performances, rather than for all of their performances. ARBA Comments at 3; see also Radio Broadcasters’ Comments at 35-40. For example, the Radio Broadcasters

⁵⁸ DiMA hypothesizes “that it would be most efficient and least burdensome for the designated agent to give the services access to its comprehensive database of sound recordings, rather than requiring each service to develop its own database.” DiMA Comments at 2.

⁵⁹ Not only does Mr. Robinson want access to a nonexistent database, he wants such access for no more than a nominal fee and with periodic updates: “I also ask [the Copyright Office] to require that all Collectives provide to webcasters (for no more than a nominal duplication fee) a database with the necessary reporting information for all material cleared through the collective. This requirement should include incremental updates to the database that are also available at nominal cost to webcasters (either by mail subscription, email subscription, or internet download).” Robinson Comments at 2. As noted previously, such efforts to appropriate the private property of the collecting entities for the benefit of other private parties should be rejected immediately by the Copyright Office as an improper proposal for a taking in violation of the 5th Amendment to the United States Constitution.

say they should report only those performances made during “four or five weeks per year.” Radio Broadcasters’ Comments at 35-36. ARBA says that “data could be collected for all performances on one day per month, or one week per calendar quarter, or per a similar formula.” ARBA Comments at 3. None of the arguments advanced by the broadcasters supports reversal of the Copyright Office’s conclusion that census, as opposed to sample, reporting is both necessary and appropriate. See Original Determination, 63 Fed. Reg. 34294 (requiring preexisting subscription services to provide monthly “Intended Playlists” that consist of “a consecutive listing of every sound recording scheduled to be performed, for each of the Service’s channels and each day during the reported month”); proposed Section 201.36(e)(2) (extending that requirement to all services that make transmissions pursuant to Section 114(d)(2)).⁶⁰

To support their proposal for sampling the Radio Broadcasters also erroneously assert that RIAA acceded to sampling in the Original Determination. See Radio Broadcasters Comment at 36-37. This is simply not true. In that proceeding, RIAA proposed as a compromise that services provide intended, summary frequency data (all the data elements except for the date and time each sound recording was performed) so long as the services also provided information on the average amount of time the services overscheduled sound recordings (by channel and period) and a report showing actual performance data for a one-third (30-day) sample period per quarter chosen at random by RIAA (i.e., all the data plus the start date and time of the sound recording’s

⁶⁰ In this proceeding, RIAA has proposed that services file a Uniform Report of Performances that sets forth the sound recordings performed and the total number of performances, among other things, rather than the “Intended Playlists” required in the subscription services proceeding. See RIAA Comments, Exhibit A, § 201.35(e)(1). The Uniform Report of Performances subsumes the information contained in the Intended Playlists.

transmission). The one-third sample data would be used: (1) to verify accuracy of the “summary frequency data” (i.e., to permit RIAA to confirm quarterly performance data by extrapolation from the 30-day sample); and (2) to monitor compliance with the sound recording performance complement.

At no point were the services permitted to use a sample to calculate the number of performances. They were merely offered the option of reporting the performances of each sound recording in totals for the reporting period if they provided the requested sample census data. Indeed, the services ultimately declined the offer to provide samples, concluding that providing the census data was more efficient. See Interim Regulations on Notice and Recordkeeping for Digital Subscription Transmissions (full text version) at 11 (June 22, 1998).

1. There Is A Compelling Need For Performance Reports Based On Census, Rather Than Sample, Data.

To be eligible for the Section 112 and Section 114 statutory licenses, broadcasters and other services must provide sound recording copyright owners with “reasonable notice of use of their sound recordings.” 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A). Reports based on sample rather than census data do not afford such notice because they fail to inform individual copyright owners and performers – particularly those whose copyrighted recordings are transmitted less frequently than others – of instances where their recordings are being used by services that avail themselves of the statutory licenses. Reliance upon census reporting is the only way to ensure that the copyright owners and performers receive the statutorily-required notice of use of their recordings.

Furthermore, there is no question that a survey drawn from a large universe of sound recording performances will omit recordings as well as performances from the

survey. The infrequently transmitted sound recording, that may nevertheless be received by (and thus performed for) scores, hundreds or even thousands of listeners, can be passed over during a survey, with zero compensation flowing to the copyright owners and artists entitled to royalties for such performances. These copyright owners and artists will be denied their rightful share of compulsory licensing royalties as a result of omission from the survey sample. And if they have no other recordings captured in the survey, they will be denied compensation altogether. Royalties that should go to one copyright owner or performer will instead go to another – a result contrary to Congressional intent that all copyright owners and performers should receive royalties based on the usage of their recordings. See 17 U.S.C. §114(f)(2)(B) (requiring CARP to set royalty rates based on, among other criteria, the “quantity and nature of the use of sound recordings”).⁶¹

Indeed, one of the most damaging aspects of relying upon surveys to allocate royalties is the confusion it causes for the collecting entities and its members or principals. It is difficult to explain to individual copyright owners and performers that they will receive no royalties for certain performances of their recordings – just as it is difficult to justify according a zero royalty share to any particular claimant in a compulsory licensing royalty allocation proceeding. See National Ass’n of Broadcasters

⁶¹ The Future of Music Coalition (“FMC”), a “not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities” (FMC Comments at 1), expresses a similar concern. FMC asks the Copyright Office to require “hobbyist webcasters, community broadcasters and non-commercial college radio stations” to report “their ‘playlists’ so that lesser known recording artists and small independent recording labels are properly credited with their share of digital performance royalties for sound recordings. If reporting was limited to commercial webcasters, there is a danger that royalties that should be allocated to less well known recording artists and record labels may in fact be paid to their larger and better financed colleagues.” Id. at 2. FMC’s concerns about hobbyist webcasters, community broadcasters and non-commercial college radio stations apply as well to many larger commercial webcasters who offer tens or even hundreds of highly specific genre channels.

v. CRT, 675 F.2d 367 (D.C. Cir. 1982) (discussing challenge by NAB of CRT's failure to award any cable royalties to commercial radio broadcasters) & Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds, 66 Fed. Reg. 66433, 66448 (Dec. 26, 2001) (concluding that a survey sample methodology generally used to determine relative value of a broad range of programming was flawed when used to determine relative value of an individual television program). Those copyright owners and performers find it equally difficult to accept that they can be denied compensation for particular performances of their recordings simply because services – that voluntarily choose to avail themselves of the privilege of compulsory licensing – do not wish to take the time to report all the performances they make. The problem would be particularly acute for artist-owned labels, where the copyright owner/artist is entitled to 95% of the statutory royalties. Where a survey misses performances by artists who are also the copyright owners of their own recordings, the loss in statutory royalties could deprive the artist/copyright owner of a substantial source of revenue. The costs of resolving the inevitable disputes resulting from Copyright Office-mandated sampling would ultimately (and unfairly) reduce the already minimal fees that all copyright owners and performers receive under Sections 112 and 114.

2. There Is No Record Basis For Choosing Any Reporting Procedure Based On Sample, Rather Than Census, Data.

In seeking to provide only sample data, the services necessarily suggest that the performances and copies they make during some limited period of time are representative of the performances and copies that they make during the entire reporting period. ARBA in effect claims that, for example, if one sound recording accounts for 2% of the total performances during a single day, it will account for 2% of the total performances during

the entire month; and if another recording was not received by any listeners on the sample day, then that recording was not received by any listeners during the entire month. See ARBA Comments at 3. The Radio Broadcasters make essentially the same claim, except they suggest that the identity and frequency of performances and copies during a four- or five-week period are representative of the identity and frequency of performances and copies during the entire year. See Radio Broadcasters' Comments at 39.

Neither the Radio Broadcasters nor any of the other parties who advocate sampling (and who have the data under their control) offer record evidence that the above claims are in fact accurate. There certainly is nothing in the record to support the adequacy of the sampling procedure recommended by the Radio Broadcasters versus the sampling procedure recommended by ARBA versus any other particular sampling procedure. These parties have simply failed to provide the Office with any record basis for adopting any type of sampling methodology as a replacement for the type of census reports subscription services are already providing.⁶²

3. All Services, Broadcasters and Internet-Only Webcasters Alike, Should Be Required To Provide Census Reports.

As noted above, several services oppose detailed reporting requirements because of the large size of their libraries of sound recordings. See Section II.A.2 *supra*. The fact that the services rely upon such large libraries illustrates that a wide variety of recordings

⁶² Claims that royalty payments allocated under a survey balance out in the end are also unsubstantiated. The universe here is not simply a handful of major record companies but literally hundreds of individual record companies. Moreover, even within a major record company, there is a wide variation in the degree to which individual recordings, with different artists entitled to compensation, may be performed. It is little consolation to one artist underrepresented in a sample that another artist backed by the same record company is overcompensated.

may be transmitted under the Section 114 statutory license or copied under the Section 112 license. A basic problem with sampling is that the larger and more varied the library of sound recordings, the more inaccurate is any report based on less than census data.⁶³ The Radio Broadcasters appear to acknowledge as much when they suggest that RIAA's concern with sampling has greater applicability to Internet-only webcasters who typically perform a wider variety of sound recordings than most broadcasters. See Radio Broadcasters Comments at 37.

To be sure, as the Radio Broadcasters suggest, it would be particularly inappropriate to permit Internet-only webcasters to submit reports predicated on only sample rather than census data. However, there is no basis for the Copyright Office treating broadcasters any differently. Just as there are Internet-only webcasters that provide single channels of programming similar to that provided by broadcasters, there are individual broadcasters that provide a varied, eclectic mix of sound recordings that exacerbates the difficulties associated with sampling.⁶⁴

⁶³ Reliance on surveys is especially problematic when one seeks to use surveys from some channels of programming to determine the allocation of royalties on non-surveyed channels of programming. An example of this problem is the case of Spanish language programming. For Latino or Spanish services, there are multiple and distinguishable sub-formats, such as Cuban, Latin, Latin Jazz, Salsa and Tejano, that fail to serve as appropriate proxies for each other. Thus, using a survey of a Salsa channel to allocate royalties on a Tejano channel would not properly compensate the copyright owners and performers whose sound recordings were transmitted on the Tejano channel.

Similar problems arise in a broad range of music genres that can and are divided into distinct sub-genres. Exhibit W attached hereto includes a series of screen shots from the audio player for AOL Time Warner's "Spinner" service. As this illustrates, there are distinct sub-genres for Latin, Alternative & Hard Rock, Classic Rock & Oldies, Classical and Country & Folk. Any attempt to use surveys from one of these sub-genres to allocate the royalties that are attributable to performances on other sub-genres within the same genre is likely to result in many copyright owners and performers not receiving their share of statutory royalties.

⁶⁴ See page 11 *supra*. For example, Harvard Radio Broadcasting Company boasts that its station WHRB plays "70,000-90,000 unique sound recordings annually." Harvard Comments at 8. If one assumes that WHRB broadcasts and simulcasts music 24 hours a day and averages 12 sound recordings per hour, the station would have a total of 105,120 instances during the year in which to transmit sound recordings. Footnote continued on following page.

4. ASCAP And BMI Practices Provide No Support For Permitting Reports Based On Sample, Rather Than Census, Data.

The broadcasters argue that they should not be required to provide SoundExchange with census data because they supposedly do not provide census data to ASCAP and BMI. That argument is both irrelevant and misleading.

First, ASCAP and BMI began operation decades ago in a business and technological environment that is very different from today's digital world. These factors have lead ASCAP and BMI to adopt specific practices that may be appropriate for ASCAP and BMI. That does not mean that such practices are appropriate for, or can be unilaterally imposed on, sound recording copyright owners and performers under the DMCA. Broadcasters in particular – who pay royalties to ASCAP and BMI for performances of musical works but pay nothing to sound recording copyright owners and performers for the analog performance of sound recordings – should not expect that the same rules that apply to ASCAP and BMI will apply equally when they deal with sound recording copyright owners and performers.

Second, the ASCAP and BMI reporting requirements are related to the nature of the royalty that their licensees pay. For most broadcast licensees (those that opt for so-called “blanket licenses”), the fees paid to ASCAP and BMI do not vary depending upon the amount of music that the particular licensee performs. Radio stations that take the

the station performs 70,000 unique sound recordings during the year, then 66% of the sound recordings during that year would be unique, with the remaining 33% being repeat performances. If, however, the number of unique sound recordings rose to 90,000 as WHRB maintains, then 85% of the sound recordings performed on the station during the year would be unique performances and only 15% would be repeat performances. One is left to wonder how any sample of the programming on WHRB would “reasonably” reflect the variety of programming performed and compensate the copyright owners and performers whose recordings were utilized by WHRB.

blanket license pay each PRO a set percentage of the revenues derived from each and every one of the licensee's programs, regardless of how much of that PRO's music is contained in the program or, indeed, whether the program contains any music at all. Because blanket license fees are not tied to usage, broadcasters are not required to make detailed reports to ASCAP or BMI. As ASCAP has explained with specific reference to its television station blanket licensees:

Stations operating under the blanket license do not have to submit reports to ASCAP in order to determine their fee because the fee is not based upon actual usage.

See "ASCAP Licensing: Television FAQ," at

<http://www.ascap.com/licensing/tvfaq.html> (last visited Apr. 24, 2002).⁶⁵

In contrast, the statutory licensing fees paid by broadcasters and other eligible nonsubscription services are based on usage, as they must be under Section 114(f)(2)(B) of the Copyright Act. These services pay a prescribed fee for each performance of each work. To ensure that that fee goes to the appropriate sound recording copyright owner and to the appropriate artists, the service must properly identify each of the performances that it makes.

⁶⁵ ASCAP and BMI also offer so-called "per-program" licenses. Like a blanket license, a per program license permits a broadcaster to perform any musical work in the repertory of the PRO. However, the per program licensee pays a specified percentage of just those revenues attributable to programs which contain that PRO's musical works (in addition to a fee for the right to perform incidental music) – rather than a percentage of revenues attributable to all programs regardless of music content. Because a per program licensee's royalty varies somewhat depending upon music usage, that licensee's reporting requirements are more detailed. The Radio Broadcasters leave the misimpression that ASCAP licensees have the unfettered right to submit paper, rather than electronic, music reports to the PROs. Radio Broadcasters' Comments at 40. That is not true. As ASCAP explains to its television licensees: "Monthly per program reports must be submitted electronically. No paper reports are accepted." *Id.*

5. The Services Have Failed To Demonstrate That Census Reporting Imposes An Unreasonable Burden.

The broadcasters claim that census reporting will add “significant work,” generate an “enormous volume of paper,” and impose a “staggering burden” on radio stations. Radio Broadcasters’ Comments at 35. They also express concern for SoundExchange’s workload, saying that census reporting would “bury SoundExchange in data.” *Id.* at 36. While the broadcasters’ language is colorful, they have failed to demonstrate that the incremental work necessary to report on a census rather than a sample basis is unreasonable – or that the burdens associated with census rather than sample reporting outweigh the benefits described above.

To the contrary, in the digital medium, where services establish a direct connection with each recipient of a transmission, the service’s logs record each transmission of a sound recording. See RIAA Comments at 37 & n.8. The census reporting proposed by RIAA would merely require services to make those transmission logs available to the collecting entities that collect and distribute statutory royalties. For services that do not establish connections with their listeners (i.e., those that utilize a broadcast format), the census reporting would simply require the reporting of data similar to what is currently provided by the preexisting subscription services (i.e., detailed playlist information only). The broadcasters’ cries of “staggering burden” are both unsupported and contrary to fact.

C. Privacy Concerns With Respect To Listener Logs Were Based On A Misunderstanding Of RIAA’s Original Request, But Are Now Irrelevant.

Nearly every party filing comments in this rulemaking has criticized the proposal to require a Listener Log. Because RIAA heard similar complaints before the deadline

for filing initial comments in this rulemaking, RIAA withdrew its support for a Listener Log in its initial comments. However, RIAA feels it is necessary to clarify the original purpose for the Listener Log.

As noted in RIAA's Comments, the Listener Log was never intended to be a mechanism for obtaining personally identifiable data on any individual user. See RIAA Comments at 33 n.7. Rather, it was intended to permit services offering broadcast-type transmissions over the Internet to provide (1) playlists of sound recordings on defined channels available to multiple listeners and (2) a log of unidentifiable users who logged into and out of any portion of the transmission of a given channel. From that material, RIAA would be able to determine the actual number of transmissions of each sound recording to unidentifiable users. RIAA was not interested in the identities of those listening to specific transmissions; it merely wanted to know *that someone* was receiving that transmission. This would have enabled RIAA to calculate the number of performances for each sound recording for both royalty collection and distribution purposes.

Because services have the ability to track the number of transmissions of each sound recording and to report that number on RIAA's proposed uniform report of performances, there is no longer any need for a separate log that tracks *anonymously* the number of recipients of each transmission.

V. RIAA SUPPORTS CERTAIN ACCOMMODATIONS TO FOSTER THE PROMPT ADOPTION OF REGULATIONS AND ADDRESS CERTAIN CONCERNS.

As the Copyright Office would expect, RIAA would like to see effective notice and recordkeeping regulations adopted as soon as possible, so that royalties can be collected and distributed to record companies and recording artists at the earliest

opportunity. We recognize, however, that the Copyright Office has received a substantial number of comments in this proceeding, and we support its efforts to ensure that the legitimate concerns of all interested parties are heard. However, it is nearly 3½ years since the DMCA statutory licenses went into effect, and no royalties have been collected or distributed in that time due to the pendency of various proceedings.

In order to facilitate consensus among the parties and accelerate the implementation of regulations, RIAA hereby offers several accommodations to the proposed regulations. These suggested changes provide alternatives to the set of data fields that services include in their Reports of Use, as well as a phase-in period to aid services in compliance with regulations once they are promulgated by the Copyright Office. It must be noted that implementation of these proposals will almost certainly increase the expenses of SoundExchange and thereby reduce the royalties to be paid to copyright owners and recording artists, as they permit services to report fewer data points than previously proposed, which will make it more difficult for SoundExchange to match confidently and distribute royalties accurately. We are hopeful, however, that these alternatives will increase compliance overall and foster the prompt adoption of regulations.

**A. Reports Of Use Should Contain Mandatory Data Fields And
“Either/Or” Data Fields To Be Determined By The Service.**

As noted in Section IV.A *supra*, there is certain identifying information that is absolutely required in order for royalties to be accurately distributed among copyright owners, featured artists and nonfeatured musicians and vocalists. There is other information that assists collecting entities in distributing statutory royalties, but such information may not be essential for distribution purposes if (and only if) substitute

information is provided. Following are RIAA's proposals for mandatory data fields that must be reported in all instances and substitute "either/or" fields where services have to provide one but not both data elements.

1. Mandatory Sound Recording Identifying Data To Be Provided On A Report Of Use.

The mandatory data fields proposed by the RIAA are those core elements that permit a collecting entity to distinguish generally among all sound recordings lawfully released to the public.

a. Artist Name, Sound Recording Title, Track Label (P)-Line And Album Title.

RIAA requests that every service be required to report for each entry in a report of use the Artist Name, Sound Recording Title, Track Label (P)-Line and Album Title.

With this basic information, collecting entities will have the minimum information that will be needed for identifying many, but certainly not all, sound recordings lawfully released to the public.

If a service receives an advance, promotional release of a sound recording and the forthcoming Album Title is not noted, the service should still be obligated to research and eventually provide the Album Title on which the promotional release appears. As many promotional, single releases given to broadcasters are eventually followed-up with delivery of a CD PRO identifying the forthcoming album or the full-length album itself, such "research" is not at all burdensome. See Exhibit B, Tab 1, Declaration of Peter M. Mullen, ¶ 9; Tab 4, Declaration of John Dalton, ¶¶ 4-5; Tab, Declaration of Bruce Iglauer, ¶ 9; Tab 8, Declaration of Heather McBee, ¶ 8.

There is widespread recognition that the aforementioned data is available and should be reported. Following are some of the commenting parties that either support the

reporting of RIAA's proposed mandatory data or believe that reporting such information would not be difficult:

Data Field	Supporting Commenting Parties
Artist Name	Radio Broadcasters, Websound, Ultimate-80s, Beethoven.com, 3WK, XM, Sirius, Carl Moore, RLI, College Broadcasters, WOBC 91.5 FM, Oberlin College, RadioValve
Sound Recording Title	Websound, Ultimate-80s, Music Choice, Beethoven.com, XM, Sirius, Radio Broadcasters, RadioValve, RLI, 3WK
Track Label (P)-Line	DiMA, Websound, Carl Moore, RLI
Album Title	Beethoven.com, 3WK, Websound, XM, RLI, DiMA (if UPC is not given), Music Choice

Inasmuch as one of the requirements of the statutory license is the display of Artist Name, Sound Recording Title and Album Title during the performance of a sound recording, there is reason to question any service that claims that such information cannot be provided on a report of use. Because those three data fields, however, do not identify the copyright owner entitled to royalties for the performance of a sound recording, identifying information for the copyright owner must also be provided.

b. Marketing Label.

Sound recording copyright owners often market their products and account for the royalties earned from the exploitation of those products through a family of record labels (i.e., the Marketing Labels). While royalty payments are made to the copyright owner (usually indicated on the Track Label (P)-Line), record companies generally account for royalties by Marketing Label. For example, copyright owner Sony Music Entertainment, Inc. ("Sony") markets its products under many different Marketing Labels, including Epic, 550 Music and Columbia. Yet Sony reports sales and usage of those products back

to the label so they can in turn account for royalties earned. The Marketing Label field is essential to ensuring that the copyright owner can accurately account and report the royalty earnings to the label.

Because the Marketing Label is almost always identified on the product used by the services to make transmissions, it is not burdensome for those services to provide that information on a report of use. Moreover, as reporting the Marketing Label will provide copyright owners with “reasonable notice of use,” the Copyright Office should require services to report this information on a report of use.

c. Release Year.

Services should report the Release Year where available, which will be the case in almost every instance. This information is needed for differentiating between re-releases of the same titled album where the copyright owner of the original release is not the same as the copyright owner of the re-release. In those instances, the only differentiating data element could be the Release Year.

2. “Either/Or” Sound Recording Identifying Data To Be Provided On A Report Of Use.

As noted above, there are categories of identifying information that, in light of the provision of other identifying information, may not be essential for effecting distributions. Therefore, in an effort to streamline reporting and increase a service’s ability to comply with the regulations, RIAA proposes that each service be required to provide, at its election, the following additional information on a track-by-track basis.

a. ISRC Or Duration Of The Sound Recording.

Services should be required to report either the ISRC number or the Duration of the Sound Recording on a report of use, in addition to the mandatory data elements

identified in Section V.A.1 *supra*.⁶⁶ As noted above, the ISRC is included in most major-label releases and can be read using commercially available software. The Duration of the Sound Recording is always available to a service and can be read from the CD, the label packaging or from the device used to perform the sound recording. This information is needed to distinguish between different versions of the same sound recording (e.g., live performances versus studio performances) and is used for the identification of nonfeatured artists and musicians.

b. Catalog Number Or UPC.

Services should be required to report either the Catalog Number or the UPC number for the product in which the sound recording is embedded, in addition to the mandatory data elements identified in Section V.A.1 *supra*. These product identifiers permit collecting entities to match sound recordings with external databases and research tools for confirmation of Album Title, Marketing Label and Track Label (P)-Line. As noted previously, this information is particularly useful in instances where services misreport classical sound recordings (e.g., using the composer's name instead of the orchestra's name) or report an Artist Name as "Various."

3. Service Specific Data Should Be Provided In Each Instance.

The data described in Sections V.A.1 & 2 above cover only the identifying information needed for sound recordings on RIAA's proposed Uniform Report of Performances and Ephemeral Phonorecord Log. RIAA does not believe adjustments need to be made to the other data fields in those two reports.

⁶⁶ The field for which data is omitted should be left null, and the field should be surrounded by carets followed by the field delimiter, the pipe character.

With respect to the Uniform Report of Performances, RIAA believes that services are in possession of and can easily report the Name of Statutory Service, Transmission Category, Channel or Program Name, Genre, Type of Program, Influence Indicator, Start Date and Time of the Sound Recording's Transmission and the Total Number of Performances. For the proposed Ephemeral Phonorecord Log, RIAA similarly believes that services are in possession of and should be required to report the Name of Statutory Service, Date Phonorecord Created, Date of First Transmission from Ephemeral Phonorecord, Date Phonorecord Destroyed and Total Number of Ephemeral Phonorecords Created (Ephemeral Phonorecord Log). Many of these categories will not fluctuate and can be programmed to be entered into a report automatically.

B. RIAA Supports Providing Services With Phase-In Periods For Complying With Reporting Requirements.

Numerous commenting parties have called for a phase-in of the Copyright Office's reporting requirements for services operating under the Section 112 and Section 114 statutory licenses. The request for a phase-in is most frequently made by eligible nonsubscription transmission services generally and radio broadcasters in particular. See Radio Broadcasters' Comments, Exhibit B, Statement of Brian Parsons, ¶ 45, Exhibit C, Statement of Gregg Lindahl, ¶ 16, Exhibit G, Statement of Mary Guthrie, ¶ 17. RIAA supports providing services with reasonable phase-in periods for complying with the reporting requirements adopted by the Copyright Office.

In its initial comments, RIAA asked the Copyright Office to adopt final regulations as expeditiously as possible. See RIAA Comments at 62-64. While RIAA noted that all services had constructive notice since June 24, 1998, "of the types of information they would have to report" under the Section 114 statutory license, id., RIAA

recognizes that services – and their service providers and software vendors – will likely not implement recordkeeping systems prior to the adoption of final regulations.

Therefore, some reasonable accommodation should probably be made that balances the needs of collecting entities to receive specific, identifying data for royalty collection and distribution and the enforcement of statutory requirements, with the needs of services to employ systems capable of reporting information on the usage of sound recordings.

1. Three-Month Phase-In Period.

RIAA proposes that all services operating under the Section 112 and/or Section 114 statutory licenses (subject to the exception set forth in the next section) be given until no later than the twentieth day of the month following the three-month anniversary of the effective date of the final regulations adopted by the Copyright Office to commence providing collecting entities with the reports of use proposed by RIAA. The first report of use to be provided by a service would include data for all performances transmitted and ephemeral phonorecords made commencing on the later of October 28, 1998 or the date the service commenced the activity authorized under a statutory license. This would include both the mandatory data fields and the “either/or” data fields specified above. These services are already using sophisticated systems to deliver music and sell advertising. There is no reason why these services should not be able to provide promptly the identifying information needed for royalty collection and distribution.

2. Additional Time For Noncommercial Entities Not Using Automated Programming Systems.

According to the comments filed in this rulemaking, some noncommercial entities (mostly college radio stations) may not use any automated programming systems to generate their playlists and perform sound recordings. These entities are frequently the

stations that transmit some of the most eclectic music over the Internet. And as noted above, it is particularly important for these services to provide detailed reports of use because the copyright owners of and the performers on the sound recordings played by these services are frequently not heard on commercial radio. Therefore, if reports of use are not provided for these performances, many copyright owners and performers are going to be deprived of their fair compensation.

In light of this situation, RIAA proposes that noncommercial entities not using automated programming systems for the majority of their programming⁶⁷ be given an additional three months in which to develop systems to provide copyright owners with required Reports of Use. At that time, these services would be required to report all of the mandatory and “either/or” data as specified above.

VI. THERE IS NO SUBSTANTIAL DISAGREEMENT CONCERNING THE SPECIFIC QUESTIONS RAISED BY THE COPYRIGHT OFFICE

In the NPRM, the Copyright Office set forth several questions for the parties to answer in their initial comments. RIAA provided its views concerning these questions at pages 17-27 of its initial comments. A review of the comments filed by other parties reveals that there is substantial agreement as to many aspects of these issues, and no substantial disagreement.⁶⁸ This section highlights various issues as to which there does not appear to be any substantial disagreement.

⁶⁷ The definition of the class of services to which this additional time applies is provided in the attached proposed regulations. See Exhibit X.

⁶⁸ Several of the parties that filed substantial comments, such as the Radio Broadcasters, Digital Media Association and XM/Sirius, did not provide specific answers to the Copyright Office’s questions.

A. Filing Of A New Notice Of Use

RIAA supports the Copyright Office's proposal to have services currently operating under the Section 114 statutory license file a new Notice of Use with current information. RIAA Comments at 17-18. The Collegiate Broadcasters and Music Choice agreed that such filings with current information would be acceptable. See Collegiate Broadcasters at 6-7; Music Choice at 3 (filing a new Notice of Use "would not be burdensome").

B. Use Of A Standard Form Notice Of Use And Elements Of That Notice

RIAA supports the Copyright Office's proposal to require all services to file a standard form Notice of Use and to have that form identify the statutory license(s) upon which the service relies, as well as the category of service. RIAA Comments at 18-19. Collegiate Broadcasters and Music Choice generally agree with the use of a standard form, although they suggest that it be simplified and the process for filing be electronic if possible. Collegiate Broadcaster Comments at 6; Music Choice at 3.

Music Choice, however, objects to the identification of the statutory license category on the Notice of Use, strangely asserting that this information "does not have anything to do with providing 'notice' of use to copyright owners." Music Choice at 3. However, identification of which statutory license is being relied upon is central to the proper administration of the royalties collected under that license. Each of the licenses can have different statutory conditions and payment metrics, including different minimum payments, so collecting entities must know the requested information to be able to verify whether a service's payments and operation are in accordance with the appropriate requirements. There is also no hardship whatsoever imposed on a service in providing this information, or in updating it if circumstances change.

C. Posting Notice Of Use On The Copyright Office Website

The Copyright Office proposed to discontinue its practice of posting Notices of Use on its website, which RIAA opposes. RIAA Comments at 20. Collegiate Broadcasters share the RIAA's concern, as they "implore the Office to retain [posting of Notices] to ensure an easily-accessible public record." Collegiate Broadcasters at 8. Also, like the RIAA Comments, they suggest that the Copyright Office provide for electronic filing of Notices of Use to help ease the burden of making the Notices available on the website. The Copyright Office should reconsider this proposal and continue to post Notices of Use on its website.

D. Filing Notice Of Use With Collecting Entities

RIAA strongly opposes the Copyright Office's proposal that Notices of Use be filed directly with collecting entities, for the reasons set forth in its initial Comments. RIAA Comments at 22-25. Collegiate Broadcasters and Music Choice also oppose the Copyright Office proposal, arguing that "it would be inappropriate and ineffective to require statutory licensees to submit Notices of Use to privately-owned designated collectives rather than to the Office." Collegiate Broadcasters at 6-7; see also Music Choice at 4. In addition, RLI agrees with RIAA that requiring a collecting entity to make its records of such Notices of Use available for public inspection would be a needless administrative burden. RLI Comments at 2. This proposal should be reconsidered and rejected by the Copyright Office.

E. Periodic Filing of Notice of Use

RIAA supports the Copyright Office's proposal for periodic filing of Notices of Use, RIAA Comments at 25-26, and several of the commenting parties do not oppose that proposal. See, e.g., Collegiate Broadcasters Comments at 7 (noting that it will result in

“current and accurate files” in the Copyright Office); RLI Comments at 3-4 (suggesting annual filings). As RLI explained, periodic filing is necessary for collecting entities to track compliance by services. RLI Comments at 3. In addition, RLI agrees with RIAA that a new Notice of Use should be filed within 45 days of a change in the information contained in the Notice of Use. Id.

Music Choice opposes periodic filing, suggesting that Notices be filed initially – up to six months after commencing operations – and only when an amendment is necessary. Music Choice Comments at 4. As RIAA explained in its Initial Comments, this approach will not result in “current and accurate” files, as services are likely to overlook the need to file an amended notice. Moreover, there can be no justification for a six-month delay in filing a simple one-page form that secures the content at the heart of a service offering. Such delay would only inconvenience everyone concerned as copyright owners inquired how a service happened to be using sound recordings without any manifestation of a license. After an initial transitional period, a service that elects to rely upon a statutory license should have no difficulty filing its notice before doing so. A periodic filing requirement is clear and can be easily implemented by the services. The Copyright Office’s proposal should be adopted.

F. Payment of Filing Fees

As RIAA explained in its initial comments, because the Copyright Office should continue to collect Notices of Use rather than imposing that function on collecting entities, there is no need for a filing fee to be paid to the collecting entity if that situation remains the same. RIAA Comments at 26-27. RLI agrees with RIAA that if collecting entities are required to receive Notices of Use, then a filing fee is appropriate. RLI Comments at ¶ 2.

VII. CONCLUSIONS

The statutory licenses created by the DMCA became effective on October 28, 1998. In the intervening 3½ years, digital music services have enjoyed the benefits that those statutory licenses provide, including access to the entire catalog of copyrighted sound recordings. In exchange for access to this license, the Copyright Act requires that those services pay the appropriate royalty and provide information about their use of sound recordings necessary to distribute those royalties accurately and fairly. To date they have been required to do neither, as proceedings to establish those rates and reporting requirements have been pending.

The time has come to put appropriate mechanisms in place so that artists and record companies - whose creative works are at the center of those services' businesses - can be paid as Congress so long ago envisioned. To that end, RIAA created SoundExchange - at considerable expense to sound recording copyright owners - and proposed reasonable regulations for notice and recordkeeping necessary to operate SoundExchange efficiently. These proposals have been modified in several respects over time to reflect some of the concerns raised by the services that will operate under them.

RIAA urges the Copyright Office to adopt notice and recordkeeping regulations as soon as possible, and has provided ample support for adoption of the proposed regulations submitted with these Reply Comments. To the extent that the services continue merely to complain about alleged burdens without offering constructive solutions, their unfounded assertions should not be permitted to limit the reporting requirements necessary for efficient and fair distribution of royalties, or to delay these proceedings any further with needless additional filings.

By creating the digital performance right, Congress sought to give recording artists and copyright owners effective copyright protection in the evolving digital arena. By promptly adopting notice and recordkeeping regulations, the Copyright Office will take an important step towards satisfying Congress' vision.

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For the reasons set forth above, RIAA respectfully requests that the Copyright Office adopt RIAA's revised, proposed regulations set forth in Exhibit X attached hereto.⁶⁹

Respectfully submitted,

**RECORDING INDUSTRY
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April 26, 2002

⁶⁹ A compare version showing the changes between the version attached hereto at Exhibit X and the version included in RIAA's initial Comments at Exhibit A is attached hereto as Exhibit Y.