

Wilkes/Alleghany/Surry County line intersection;

(15) Then alternately bear northeasterly then northwesterly and then northeasterly again, along Alleghany/Surry County line to the intersection of the Alleghany/Surry/Grayson County lines at the North Carolina/Virginia border;

(16) Then bear east along the Surry/Grayson County line to the Surry/Grayson/Carroll County line intersection;

(17) Then continue east along the Surry/Carroll County line through the intersection of the Surry/Carroll/Patrick County lines following the Surry/Patrick County/North Carolina/Virginia state line to the beginning point, 3.6 miles west of the northeast corner of Surry County.

Dated: January 23, 2002.

**Bradley A. Buckles,**  
*Director.*

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## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 201

[Docket No. RM 2002]

#### Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Office of the Library of Congress is issuing a notice of proposed rulemaking on 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. The Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act enacted in 1998 require the Office to adopt these regulations.

**DATES:** Comments are due by March 11, 2002. Reply comments are due by April 8, 2002.

**ADDRESSES:** An original and ten copies of any comment shall be delivered to: Office of the General Counsel, Copyright Office, James Madison Building, Room LM-403, First and Independence Avenue, SE, Washington, DC; or mailed to: Copyright Arbitration Royalty Panel

(CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024-0977.

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

#### SUPPLEMENTARY INFORMATION:

##### Background

The Digital Performance Right in Sound Recordings Act of 1995 (DPRA) amended 17 U.S.C. 114 to give sound recording copyright owners an exclusive right to perform their works publicly by means of a digital audio transmission, subject to certain limitations and exemptions. Pub. L. No. 104-39, 109 Stat. 336 (1995). Among the limitations placed on the performance of a sound recording was the creation of a statutory license that permits certain subscription digital audio Services to publicly perform those sound recordings through digital audio transmission. In order to operate under the license, eligible subscription digital audio Services must pay the statutorily required fees and comply with certain other conditions, such as adherence to notice and recordkeeping requirements.

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), which expanded the scope of the section 114 license. It amended section 114 by adding three new categories of Services that may operate under the license, and by redesignating the subscription Services covered by the DPRA statutory license as "preexisting subscription Services." Pub. L. No. 105-304, 112 Stat. 2860, 2887 (1998). The three new service categories are: (1) Preexisting satellite digital audio radio Services, (2) new subscription Services and (3) eligible nonsubscription transmission Services. The DMCA also amended 17 U.S.C. 112 to add another new license that is available to permit Services to make ephemeral recordings of a sound recording to facilitate the transmissions permitted under section 114.

Both the DPRA and the DMCA direct the Librarian of Congress to establish regulations to require eligible Services to give copyright owners reasonable notice that their sound recordings are being used under one or both of the licenses and create and maintain records of use and make them available to copyright owners. See Secs. 112(e)(4) and 114(f)(4)(A).

#### Interim Rule for Digital Audio Subscription Transmissions

On May 13, 1996, the Copyright Office published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** requesting comments on the requirements by which copyright owners should receive reasonable notice of the use of their works from subscription digital transmission Services and how records of such use should be kept and made available to copyright owners. The Office asked commentators to consider both the adequacy of notice to sound recording copyright owners and the administrative burdens placed on digital transmission Services in providing notice and maintaining records of use. 61 FR 22004 (May 13, 1996).

On November 14, 1996, and again on January 27, 1999, the Copyright Office met with the parties to facilitate agreement on the notice and recordkeeping requirements under section 114, and to discuss the proper regulatory and recordkeeping role of the Office.<sup>1</sup>

Based on the comments filed in response to the first NPRM and the information gleaned from the subsequent meetings, the Copyright Office published a second NPRM on June 24, 1997, presenting certain preliminary decisions and asking the parties for further comments.<sup>2</sup> 62 FR 34035 (June 24, 1997). In 1998, after extensive study, the Copyright Office issued Interim Regulations to implement the notice and recordkeeping requirements for section 114 that were enacted in 1995 as part of the DPRA. 63 FR 34289 (June 24, 1998). 37 CFR 201.35-201.37. The interim rules took effect on June 28, 1998. The rules were issued on an interim basis in light of the rapidly developing nature of the digital transmission Service industry and the possibility that new technology might be developed which would allow the reporting requirements to be either

<sup>1</sup> The comments, meeting summaries, and meeting handouts are available in the Public Information Office of the Copyright Office, James Madison Memorial Building, Room LM-401, First and Independence Ave., SE., Washington, DC.

<sup>2</sup> The version that was published in the **Federal Register** on June 24, 1998 is a synopsis of the Interim Regulation in Docket No. RM 96-3B, adopted June 15, 1998. The full text is available for inspection and copying during normal business hours in the Public Information Office of the Copyright Office, Room LM-401, and in the Public Records Office of the Licensing Division of the Copyright Office, Room LM-458, James Madison Memorial Building, First and Independence Avenue, SE, Washington, DC 20559-6000. The full text is also available via the Copyright Office home page at <http://www.loc.gov/copyright>.

expanded or reduced, depending upon the needs of the industries.

Since that time, the subscription digital audio Services (now known as the "preexisting subscription Services") have filed notices of use and maintained records of use in accordance with these rules. These rules, however, were not adapted to cover the new categories of Services that operate under the licenses in sections 112 and 114, as amended by the DMCA.

### Current Rulemaking Proceeding

The purpose of this proposed rulemaking is to provide interested parties with an opportunity to comment on the Interim regulations and to amend these same rules to include the requirements of the 1998 DMCA amendments that expanded the section 114 license and created the new section 112 license. For a full discussion of the issues underpinning the Interim regulations, please refer to the earlier NPRMs, 61 FR 22004 (May 13, 1996) and 62 FR 34035 (June 24, 1997), and the notice announcing the interim rules, 63 FR 34289 (June 24, 1998).

#### 1. Preliminary Considerations

On May 24, 2001, the Copyright Office received a petition from the Recording Industry Association of America (RIAA) and its SoundExchange division requesting that the Office conduct rulemaking proceedings to develop notice and recordkeeping requirements that substantively address the 1998 DMCA amendments. RIAA, however, advised against establishing any notice or recordkeeping requirements for pre-existing satellite digital audio radio Services, as defined in 17 U.S.C. 114(j)(10), or for pre-existing subscription Services employing transmission media other than those used by such Services on July 31, 1998. RIAA petition at 1–2. This suggestion was based on the fact that RIAA and identified Services were engaged in negotiation discussions regarding notice and recordkeeping issues for these Services which they hoped would result in agreement that would be jointly proposed to the Office for adoption in a second rulemaking proceeding. RIAA petition at 2.

The Office agrees that there is a need to adopt additional notice and recordkeeping requirements for eligible nonsubscription Services at this time in order to have them in place when the current CARP proceeding is concluded. Adoption of such rules will enable copyright owners to receive their royalty payments as expeditiously as possible. See U.S. Copyright Office, Order in Docket No. 99–6 CARP DTRA 1 & 2,

Docket No. 2000–3 CARP DTRA2 (December 4, 2000 Order.)

The scope of the rules proposed by the Office, however, covers all Services that operate under the section 112 and 114 licenses. The Office takes this approach because preexisting digital audio satellite Services and new types of subscription Services are already in operation and should have the benefit of knowing what record keeping requirements they must use so that they can structure their businesses accordingly. Moreover, it is likely that the basic requirements for notice and recordkeeping will be similar for all Services. For this reason, the proposed rule is an amended version of the interim rule and addresses the notice and record keeping requirements for all categories of Services.

#### 2. Elements of Proposed Regulations

To make it explicit that the provisions of 37 CFR 201.35–201.37 apply to the Services added by the DMCA, statutory references to them have been inserted as appropriate throughout. Also, the statutory definition for each Service has been added to the definition sections of 37 CFR 201.35–201.37, either expressly or by a cross reference. A definition of "AM/FM Webcast" has also been included in the recordkeeping provisions for section 201.36.

The Office also proposes amending 37 CFR 201.35–201.37 throughout to make those provisions applicable to section 112 licenses in the same way that they apply to section 114 licenses, although differences in the statutory requirements have been taken into account where appropriate. Therefore, statutory references to section 112 licenses have been incorporated along with references to section 114 licenses.

This approach follows RIAA's recommendation with regard to the recordkeeping requirements for section 112 licenses. However, while RIAA recommended that 37 CFR 201.35 be used as a model for section 112 notice requirements, it advocated putting the section 112 notice requirements in a separate section because "the existing notice regulations are so replete with references to the subject matter of the statutory license as to make it confusing to integrate the two notice provisions." RIAA petition at 11. However, the Copyright Office has decided not to follow that approach at this time and proposes to amend 37 CFR 201.35 to apply its notice provisions to both section 112 and 114 licenses. The Office does not believe that such an approach is confusing, and believes that such an approach is more efficient and will result in less paperwork for the Office

and for Services operating under the statutory license. For example, the proposed rule provides that a Service may file a single initial notice stating the Service's intention to use either the section 114 statutory license, or the section 112 statutory license, or both.

*Initial Notice.* The proposed changes to the notice requirements of 37 CFR 201.35 are intended to apply to situations in which a Service is operating under only one license and those in which a Service is operating under both. Consistent with that approach, the amended rules propose use of a single standard form for both the section 114 license and the section 112 license. A Service will be required to expressly indicate on a standard form Notice of Use of Sound Recordings under Statutory License the license(s) for which the notice is being filed.<sup>3</sup> The form will also require that the Service indicate the categories of license (e.g., preexisting subscription service, non-subscription transmission service, etc.) for which it seeks the license. In addition, the Service must provide the date or the expected date of the initial digital transmission of a sound recording made under section 114 and the date of creation of an ephemeral phonorecord made under section 112.

The Office proposes to require all Services, including those which have previously filed a general Notice of Use for the section 114 license, to file a new Notice of Use. It is the Office's impression that many Services that have filed Initial Notices under the current regulation have ceased using the statutory license and, in many cases, have gone out of business altogether. Requiring all Services to refile a Notice of Use will make the Office's records more reliable, retiring records identifying Services that are no longer using the statutory license. The Office invites comments on this proposal.

Moreover, the Office proposes that all Notices of Use be prepared using a standard form developed for this purpose. In this way, there will be an accurate uniform record currently identifying all Services using these statutory licenses, indicating which licenses are to be used, the type of transmissions to be made under the section 114 license, and information concerning the date of first transmission or the date for making an ephemeral recording of a sound recording. Under current practice, in which parties may submit a notice based on a suggested,

<sup>3</sup> The Notice of Use of Sound Recordings under Statutory License would replace the Initial Notice of Digital Transmission of Sound Recordings under Statutory License found in the current version of section 201.35.

but nonmandatory, format, a Notice is more likely to be misfiled and the information in the Notice is less likely to be easily recognized. Parties may comment on the elements required as part of the notice, on when the updated notice should be filed, and on the layout and utility of the proposed standard form. A prototype of the proposed form has been posted on the Copyright Office website at: <http://www.loc.gov/copyright/forms/form112-114nou.pdf>.

In general, Services transmitting sound recordings under statutory license will be required to file an initial notice with the Copyright Office as before, including the Service name, address, telephone number, and information on how to gain access to the online website or home page of the Service or entity, where information may be posted under these regulations concerning the use of sound recordings under statutory license. If the proposed rules are adopted, the notices will be placed in the public file in the Licensing Division of the Copyright Office, where copyright owners may go to access the information concerning use of sound recordings under the licenses. The Office proposes to discontinue its current practice of posting copies of all notices on its website. The Office questions the continued utility of making this information available on the website, which requires the expenditure of substantial resources. It does not appear that removing the notices from the website would be likely to deprive interested parties of the information found in the notices. The Office proposes to provide copies of all notices of use to the Collective or Collectives designated through the CARP process to receive and distribute royalties under the statutory license, and believes that this, combined with the availability of the notices for inspection and copying in the Licensing Division, adequately makes the information in the notices available to all interested parties.

Moreover, the Office seeks comment on a possible change to the requirement that all notices be filed in the Copyright Office. Would it be more efficient for a Service to file its Notice of Use directly with the designated collection entity, rather than with the Copyright Office? What would be the propriety and efficiencies of having Services file Notices of Use not with the Office, but directly with the Collective designated to receive royalties from the statutory licensees, and requiring the Collective to make the notices available to the public for inspection and copying?

Moreover, the Office is seeking comment on the advisability of requiring periodic filings of the notices

of use in order to establish a continually current and updated file of Services operating under either the section 114 and section 112 licenses. If the Office finds there is a need for maintaining an updated file, the final rule will specify that each Service must file a new Notice of Use with the Office every year (or other time period to be determined).

In any event, a new Service will still be required to file its Notice of Use prior to the date of first transmission or the making of an ephemeral recording, and a Service will continue to be required to update its filing within 45 days of a change in the information reported. If notices are to be filed with the Copyright Office, all notices shall be accompanied by the filing fee (currently \$20) specified in section 201.3(c) of title 37 of the Code of Federal Regulations. On the other hand, if the Office adopts a rule requiring Services to file the Notices of Use directly with the designated collective, there is an open question on whether there should be a filing fee and how much that fee should be. Interested parties should address this issue in their comments to the Office.

*Reports of Use.* Where appropriate, the existing recordkeeping requirements have been revised to reflect the changes introduced by the DMCA by inserting the appropriate statutory references. The proposed amendment sets forth specific reporting requirements for each Service category. In fashioning the proposed new regulations, the Office is adopting RIAA's recommended changes for recordkeeping requirements for new subscription Services and for Services making eligible nonsubscription transmissions under section 114 and applies the same rules to the preexisting satellite digital audio radio Services. In addition, the proposed regulations incorporate RIAA's recommendation for section 112 recordkeeping requirements. The Office is taking this approach because the required information seems designed to accomplish the basic reporting objective of providing information with which copyright owners can generally monitor compliance with the terms of the licenses.

As before, a preexisting subscription Service making digital transmissions in the same transmission medium used by such Service on July 31, 1998, would be required to submit reports of use with an Intended Playlist containing all the elements required in the Interim regulations. No changes have been made to the requirements for those Services' Intended Playlists. The amended rules, however, require other types of Services to submit Intended Playlists that

provide additional information, such as the type of program and the time zone from which the transmission originated.

In addition to the information in the Intended Playlists, RIAA has made additional requests for information in two instances. In the case of eligible nonsubscription transmissions and transmissions made by a new subscription Service, RIAA has requested that these Services include a "Listener's Log" in the Report of Use. The "Listener's Log" will identify the name of the Service, the channel or program accessed, information on the user, such as date and time the user logged in and out, the time zone of the place at which the user received the transmission, the user identifier, and the country in which the user received the transmission. RIAA has also requested that a Service making ephemeral phonorecords of sound recordings under section 112(e) include an "Ephemeral Phonorecord Log" in its record of use. The "Ephemeral Phonorecord Log" would, among other things, include the name of the Service, the date the phonorecord was made or destroyed, and specific information about the sound recording from which the ephemeral phonorecord was made. Commenters should discuss in detail the reasons for including or excluding specific elements of the Listener's Log and the Ephemeral Phonorecord Log.

On its face, the request for the Intended Playlists, Listener's Log, and Ephemeral Phonorecord Log seems reasonable based on the premise that the copyright owners need certain specific information to monitor compliance and use by the Services. In support of its request for the detailed information, RIAA argues that the information it seeks from the Services is "easily provided, [] not burdensome, and in fact, is currently provided by a number of licensees who have obtained licenses through negotiations with the RIAA and/or Sound Exchange." RIAA Petition at 10-11. RIAA further justifies the need for the additional reporting requirements on the basis of differences in statutory requirements for the different licenses and on the basis of the different business models used within the different categories of Services. RIAA petition at 9. Other interested parties, however, may find the requirements too stringent and burdensome in spite of RIAA's assertions. Such parties should identify any problems they perceive with the proposed regulations and explain with specificity the reasons why the regulations are unworkable or unduly burdensome, or exceed the needs of the copyright owners.

### 3. Final Rules vs. Interim Rules

The Copyright Office issued regulations governing notice and record keeping for the preexisting Services operating under the section 114 statutory licenses as interim regulations because the industry was young and there was a reasonable expectation that the rules would need revision in a short period of time. The Office, however, intends to issue final rules at the conclusion of this proceeding which shall govern all Services operating under both the section 112 and section 114 statutory licenses. Of course, an affected party can always seek revision of the rules at a future time if and when the need for change arises.

#### List of Subjects in 37 CFR Part 201

Copyright, Recordings.

#### Proposed Regulation

In consideration of the foregoing, the Copyright Office proposes amending part 201 of 37 CFR to read as follows:

#### PART 201—GENERAL PROVISIONS

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

**Authority:** 17 U.S.C. 702.

2. Sections 201.35 and 201.36 are revised to read as follows:

##### § 201.35 Notice of Use of Sound Recordings under Statutory License.

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

(b) *Definitions.* (1) A *Notice of Use of Sound Recordings under Statutory License* is a written notice to sound recording copyright owners of the use of their works under section 114(d)(2) or section 112(e) of title 17 of the United States Code, or both, and is required under this section to be filed by a Service in the Copyright Office.

(2) A *Service* is an entity engaged in either the digital transmission of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code or both. For purposes of this section, the definition of a service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable

requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). A Service may be further characterized as either a preexisting subscription service, preexisting satellite digital audio radio service, new subscription service, non-subscription transmission service or a combination of those:

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

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

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

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

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

(1) The full legal name of the Service that is either commencing digital transmission of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both.

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

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

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

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

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

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

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

(e) *Filing notices; Fees.* The original Notice and three copies shall be filed with the Licensing Division of the Copyright Office, and shall be accompanied by the filing fee set forth in § 201.3(c) of this part. Notices shall be placed in the public records of the Licensing Division. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557-6400.

(1) A Service that, prior to [the effective date of the final rule], has already commenced making digital transmissions of sound recordings pursuant to section 114(d)(2) of title 17

of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code, or both, and that has already filed an Initial Notice of Digital Transmission of Sound Recordings under Statutory License, and that intends to continue to make digital transmissions or ephemeral phonorecords following [the effective date of the final rule], shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office no later than 60 days following [the effective date of the final rule].

(2) A Service that, on or after [the effective date of the final rule], commences making digital transmissions and ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of the sound recording and prior to the first digital transmission of the sound recording.

(3) A Service that, on or after [the effective date of the final rule], commences making only ephemeral phonorecords of sound recordings, shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral recording under the statutory license.

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

#### § 201.36 Report of Use of Sound Recordings under Statutory License.

(a) *General.* This section prescribes rules under which Services shall serve copyright owners with reports of use of their sound recordings under either section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both.

(b) *Definitions.* (1) A *Report of Use of Sound Recordings under Statutory License* is a report required under this section to be provided by a Service that is either transmitting sound recordings or making ephemeral phonorecords of sound recordings under statutory license or both.

(2) A *Service* shall have the same definition as provided in § 201.35(b)(2) of this part.

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

(4) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses, either by settlement agreement reached under section 112(e)(3), section 112(e)(6), section 114(f)(1)(A), section 114(f)(1)(C)(i), section 114(f)(2)(A), or section 114(f)(2)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by an order of the Librarian pursuant to 17 U.S.C. 802(f).

(c) *Service.* Reports of Use shall be served upon Collectives designated under the applicable statutory license that are identified in the records of the Licensing Division of the Copyright Office as having been designated under the statutory license, either by settlement agreement reached under section 112(e)(3), section 112(e)(6), section 114(f)(1)(A), section 114(f)(1)(C)(i), section 114(f)(2)(A), or section 114(f)(2)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 112(e)(4), section 112(e)(6), section 114(f)(1)(B), section 114(f)(1)(C)(ii), section 114(f)(2)(B), or section 114(f)(2)(C)(ii) or by an order of the Librarian pursuant to 17 U.S.C. 802(f). Reports of Use shall be served, by certified or registered mail, or by other means if agreed upon by the respective Service and Collective, on or before the twentieth day after the close of each month, commencing with [the month succeeding the month in which the final rule becomes effective].

(d) *Posting.* In the event that no Collective is designated under the applicable statutory license, or if all designated Collectives have terminated collection and distribution operations, a Service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Services shall post their Reports of Use online on or before the 20th day after the close of each month, and make them available to all sound recording copyright owners for a period of 90 days. Services may require use of passwords for access to posted Reports of Use, but must make passwords

available in a timely manner and free of charge or other restrictions. Services may predicate provision of a password upon:

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

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

(e) *Content.* (1) *Heading.* A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading.

(2) *Intended Playlists.* For a Service making digital transmissions of sound recordings pursuant to a statutory license under 17 U.S.C. 114(d)(2), each report of use shall include a Service's "Intended Playlists" for each channel on each day of the reported month.

(i) In the case of transmissions of sound recordings made pursuant to a statutory license under 17 U.S.C. 114(d)(2) by a Service that is a preexisting subscription service in the same transmission medium used by such Service on July 31, 1998, the "Intended Playlists" shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

- (A) The name of the Service or entity;
- (B) The channel;
- (C) The sound recording title;
- (D) The featured recording artist, group, or orchestra;
- (E) The retail album title (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the Service for purchase of the sound recording);
- (F) The recording label;
- (G) The catalog number;
- (H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

- (I) The date of transmission; and
- (J) The time of transmission.

(ii) In the case of all other Services not covered by paragraph (e)(2)(i) of this section, that are transmitting sound recordings pursuant to a statutory license under 17 U.S.C. 114(d)(2), the "Intended Playlists" shall include a consecutive listing of every recording scheduled to be transmitted, or if transmissions are not scheduled in advance, every recording actually transmitted, and shall contain the following information in the following order:

(A) The name of the Service or entity;  
 (B) The channel or program; or in the case of an AM/FM Webcast, the station identifier used by the Service, including the band designation and the FCC facility identification number of the broadcast station that is transmitted; provided that if a program is generated as a random list of sound recordings from a predetermined list, the channel or program must be a unique identifier differentiating each user's randomized playlist from all other users' randomized playlists;

(C) The type of program: "A" (for an "archived program" as defined section 114(j)(2)), "L" (for "looped" if the program is a "continuous program" as defined in section 114(j)(4)), "V" (for "live" if the program is transmitted substantially at the time it is first performed in its entirety), or "PS" (for "prescheduled" if the program is an identifiable program transmitted at times that have been publicly announced in advance);

(D) For programs other than archived programs, the date of transmission;

(E) For programs other than archived programs; the time of transmission of the sound recording;

(F) The time zone of the place from which the transmission originated (as an offset from Greenwich Mean Time);

(G) For archived programs, the numeric designation of the place of the sound recording within the order of the program;

(H) The duration of the transmission of the sound recording (to the nearest second);

(I) The sound recording title;

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

(K) The release year identified in the copyright notice on the album and, in the case of compilation albums created for commercial purposes, the release year identified in the copyright notice for the individual track;

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

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

(N) The recording label;

(O) The Universal Product Code of the retail album;

(P) The catalog number;

(Q) The copyright owner information provided in the copyright notice on the retail album (e.g., following the symbol <sup>(P)</sup>) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual track; and

(R) The musical genre of the channel or program, or in the case of AM/FM Webcast, the broadcast station format.

(3) *Listener's Log.* Except for a preexisting subscription Service, a Service that transmits sound recordings pursuant to a statutory license under 17 U.S.C. 114(d)(2) shall also include such Service's "Listener Log." The "Listener Log" shall contain the following information in the following order for each session during which a user is logged in to receive transmissions as part of the Service:

(i) The name of the Service or entity;

(ii) The channel or program, using an identifier corresponding to that in the Intended Playlist;

(iii) The date and time that the user logged in (local time at user's location);

(iv) The date and time that the user logged out (local time at the user's location);

(v) The time zone of the place at which the user received transmissions (as an offset from Greenwich Mean Time);

(vi) The unique user identifier assigned to a particular user or session; and

(vii) The country in which the user received transmissions.

(4) *Ephemeral Phonorecord Log.* In the case of a Service that has made ephemeral phonorecords of sound recordings pursuant to a statutory license under 17 U.S.C. 112(e), the Service shall include an "Ephemeral Phonorecord Log." The "Ephemeral Phonorecord Log" shall contain the following information in the following order for each act of creation or destruction of ephemeral phonorecords of sound recordings under statutory license:

(i) The name of the Service or entity;

(ii) Whether the ephemeral phonorecord was created or destroyed;

(iii) The date the ephemeral phonorecord was created or destroyed;

(iv) The sound recording title;

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

(vi) The release year identified in the copyright notice on the album and, in the case of compilation albums created for commercial purposes, the release year identified in the copyright notice for the individual track;

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

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

(ix) The recording label;

(x) The catalog number;

(xi) The Universal Product Code of the retail album;

(xii) The copyright owner information provided in the copyright notice of the retail album (e.g. following the symbol <sup>(P)</sup>) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual track; and

(xiii) The number of ephemeral phonorecords that were created or destroyed.

(5) *System failure.* The Report of Use shall include a report of any system failure resulting in a deviation from the Intended Playlists of scheduled sound recordings. Such report shall include the date, time and duration of any system failure.

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

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

(1) In the case of transmissions made as part of a Service that is a preexisting subscription Service in the same transmission medium used by such Service on July 31, 1998:

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

(ii) Carats (^) should surround strings;

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

(iv) Dates should be indicated by: MM/DD/YYYY;

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

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

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

(2) In the case of all other Services not covered by paragraph (g)(1) of this section that are transmitting sound recordings pursuant to a statutory license under 17 U.S.C. 114(d)(2) and in the case of Ephemeral Phonorecord Logs:

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

(ii) Field names should not be included as the first row of the file;

(iii) Carats (^) should surround strings;

(iv) No carats (^) should surround dates and numbers;

(v) Dates and times should be indicated by: DDMMYYYYhhmmss, where DD is the two-digit day of the log period; MM is the two-digit month of the log period; YYYY is the four-digit year of the log period; hh is the two-digit hour of the log period; mm is the two-digit minute of the log period; ss is the two-digit second of the log period; single digit days, months, hours, minutes and second should be prepended with a zero; and times are local times using a 24-hour clock;

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

(vii) All data for one record should be on a single line;

(viii) All data for each month and each log type should be contained in a single file;

(ix) Files may be compressed in ZIP or GZ format; and

(x) Files should be named Service Name\_Log Type\_MMYYYY, where Log Type should be Play List, Listener or Ephemeral.

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

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

3. Section 201.37 (a) and (b) are revised to read as follows:

#### **§ 201.37 Designated Collective.**

(a) *General.* This section prescribes rules governing a Collective designated to collect and distribute statutory royalties for use of the statutory licenses set forth in sections 112(e) and 114(d)(2) of title 17 of the United States Code.

(b) *Definitions.* (1) A *Collective* shall have the same definition as provided in § 201.36(b)(4) of this part.

(2) A *Service* shall have the same definition as provided in § 201.35(b)(2) of this part.

\* \* \* \* \*

Dated: February 1, 2002.

**David O. Carson,**

*General Counsel.*

[FR Doc. 02-2842 Filed 2-6-02; 8:45 am]

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## **DEPARTMENT OF TRANSPORTATION**

### **National Highway Traffic Safety Administration**

#### **49 CFR Part 533**

**[Docket No. 2002-11419]**

**RIN 2127-AI70**

#### **Request for Comments; National Academy of Science Study and Future Fuel Economy Improvements, Model Years 2005-2010**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Request for comments.

**SUMMARY:** The National Energy Policy directs the Secretary of Transportation to:

Review and provide recommendations on establishing Corporate Average Fuel Economy (CAFE) standards with due consideration of the National Academy of Sciences (NAS) study to be released in July 2001. Responsibly crafted CAFE standards should increase efficiency without negatively impacting the U.S. automotive industry. The determination of future fuel economy standards must therefore be addressed analytically and based on sound science.

Consider passenger safety, economic concerns and disparate impact on the U.S. versus foreign fleet of automobiles.

Look at other market-based approaches to increasing the national average fuel economy of new motor vehicles.

The agency is requesting comment on these policy recommendations, particularly the conclusions of the recently completed NAS report on fuel economy, as it looks beyond 2004. The purpose of this request is to acquire information to assist the agency in developing a proposal for those years beyond 2004. NHTSA currently plans to cover some or all of model years 2005 to 2010 in the proposal. The agency is

seeking information that will help it assess the extent to which manufacturers can improve light truck fuel economy during those years, the benefits and costs to consumers of fuel economy improvements, the benefits to the nation of reducing fuel consumption, and the number of model years that should be covered by the proposal. NHTSA is also seeking comments on possible reforms to the Corporate Average Fuel Economy program, as it applies to both passenger cars and light trucks, to protect passenger safety, advance fuel-efficient technologies, and obtain benefits of market-based approaches.

**DATES:** Comments must be received on or before May 8, 2002.

**ADDRESSES:** You should mention the docket number of this document in your comments and submit your comments in writing to: Docket Management, Room PL-401, 400 Seventh Street, SW., Washington, DC, 20590. Comments may also be submitted to the docket electronically by logging onto the Dockets Management System website at <http://dms.dot.gov>. Click on "Help & Information" or "Help/Info" to obtain instructions for filing the document electronically.

You may call Docket Management at 202-366-9324. You may visit the Docket from 10 a.m. to 5 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** For non-legal issues, call Ken Katz, Lead Engineer, Consumer Programs Division, Office of Planning and Consumer Programs, at (202) 366-0846, facsimile (202) 493-2290, electronic mail [kkatz@nhtsa.dot.gov](mailto:kkatz@nhtsa.dot.gov). For legal issues, call Otto Matheke, Office of the Chief Counsel, at (202) 366-5263.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Introduction**

In December 1975, during the aftermath of the energy crisis created by the oil embargo of 1973-74, Congress enacted the Energy Policy and Conservation Act (EPCA). The Act established an automotive fuel economy regulatory program by adding Title V, "Improving Automotive Efficiency," to the Motor Vehicle Information and Cost Saving Act. Title V has been amended from time to time and codified without substantive change as Chapter 329 of Title 49 of the United States Code. Chapter 329 provides for the issuance of average fuel economy standards for passenger automobiles and automobiles that are not passenger automobiles (light trucks).

Section 32902(a) of Chapter 329 states that the Secretary of Transportation