Dated: July 8, 2004.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 04–15853 Filed 7–12–04; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 270

[Docket No. RM 2002–1F]

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 proposing to amend its regulations to provide for the reporting of uses of sound recordings performed by means of digital audio transmissions pursuant to statutory license for the period October 28, 1998, through March 31, 2004.

DATES: Comments are due no later than August 12, 2004.

ADDRESSES: If hand delivered by a private party, an original and five copies of any comment should be brought to: Room LM–401 of the James Madison Memorial Building and addressed as follows: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM–401, 101 Independence Avenue, S.E., Washington, D.C. 20559–6000. If delivered by a commercial, non-government courier or messenger, an original and five copies of any comment must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Streets, N.E. between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Copyright Office General Counsel, Room LM–403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. If sent by mail, an original and five copies of any comment should be addressed to: GC/I&R, P.O. Box 70400, Southwest Station, Washington D.C. 20024–0400. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

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

SUPPLEMENTARY INFORMATION:

Background

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

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

Both the section 114 and 112 licenses require services to, among other things, report to copyright owners of sound recordings on the use of their works. Both licenses direct the Librarian of Congress to establish regulations to give copyright owners reasonable notice of the use of their works and create and maintain records of use for delivery to copyright owners. 17 U.S.C. 114(f)(4)(A) and 17 U.S.C. 112(e)(4). The purpose of this notice and recordkeeping requirement is to ensure that the royalties collected under the statutory licenses are distributed to the correct recipients.

On March 11, 2004, the Copyright Office published interim regulations specifying notice and recordkeeping requirements for use of sound recordings under the section 112 and 114 licenses. *See* 69 FR 11515 (March 11, 2004).[1] Those interim regulations, however, apply only prospectively to the use of sound recordings commencing during the second calendar quarter of 2004, leaving the question of what records of use must be prescribed for uses of sound recordings from October 28, 1998 (the date the statutory licenses first became available for services other than preexisting subscription services), to March 31, 2004 (the ''historic period'').[2]

The task of crafting regulations to govern records of prior use is complicated by the fact that many services have maintained few or, in many instances, no records of such use. As a result, the Office published a notice of inquiry seeking public comment on the form and content that such regulations should take. 68 FR 58054 (October 8, 2003). Specifically, the Office sought comment on the following: how it should deal with the problem of incomplete or absent records for prior uses; whether licensees should be required to report actual performance data for the historical period, if available, so that copyright owners and performers whose works were performed could be identified; and whether any proxies could be used in lieu of incomplete or missing prior records, taking into account the attendant costs and who should bear such costs. *Id.*

Before discussing the comments filed in response to the notice of inquiry, the Office notes that as a threshold matter, the National Association of Broadcasters (''NAB'') argues that the Office is without authority to conduct this phase of the rulemaking as any resultant rule would apply retroactively. NAB asserts that neither the ''general rulemaking power of the Copyright Office nor the recordkeeping rulemaking authority provided in Sections 112 or 114 provides'' the express authority to promulgate retroactive rules as required under Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), and Motion Picture Association of America, Inc. v. Oman, 969 F.2d 1154 (D.C. Cir. 1992). NAB comment at 2. Furthermore, if the Office were to promulgate such a rule, it would be unenforceable ''as the Copyright Office cannot retroactively turn licensed performances into infringement.'' Accordingly, NAB argues that ''as a matter of law and as a matter of policy,'' the Office should

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

[2] The Office noted that the interim regulations also did not address the format in which records of use should be preserved because of the ≥highly technical nature of delivery of data in an electronic format and the widespread disagreement among SoundExchange and the users of the statutory licenses over formatting.≥ 69 FR at 11517, n.7. As stated on March 11, the Office will deal with such requirements in the future.

not issue retroactive regulations. NAB comment at 1; NAB reply at 1. As will be discussed below, the Office is not imposing any retroactive requirements, but is proposing to use a proxy in lieu of imposing reporting requirements on licensees for the historical period. Since the Office's proposal does not require a licensee to file or report historical data under specific rules, it is not enacting retroactive rules. Thus, there is no need to address NAB's argument at this time.

Discussion

The Office received comments from: the Digital Media Association (''DiMA''); Music Choice; Royalty Logic, Inc. (''RLI''); Sirius Satellite Radio, Inc. (''Sirius'') and XM Satellite Radio, Inc. (''XM Satellite''), jointly; Montpelier Communications LLC d.b.a. Onion River Radio (''Montpelier''); SoundExchange, Inc.; the National Association of Broadcasters (''NAB''); and Intercollegiate Broadcasting System, Inc. (''IBS'') and Harvard Radio Broadcasting Co., Inc. (WHRB [FM]) (''Harvard Radio''), jointly. Reply comments were filed by Collegiate Broadcasters Inc. (''CBI''); DiMA; NAB; SoundExchange; and IBS and Harvard Radio, jointly.

The comments confirmed that the Office faces a formidable task in fashioning regulations governing the reporting of uses of sound recordings that have occurred over the last five years that on the one hand provide copyright owners and performers with sufficient information to identify such use and that on the other hand are not overly burdensome to licensees or too costly to either side. After careful review and consideration of the comments, the Office concludes that there is no effective way to establish reporting requirements for the historic period that would achieve this goal by requiring licensees to report actual performance data.

The primary obstacle in achieving this goal is the fact that few, if any, records of prior use have been maintained to date and those that do exist will be of little or no use in forming the basis of distribution of royalties for the historic period. In other words, in many instances, the information simply does not exist. Therefore, it would make no difference whether services were required to report sample data for up to one week per quarter, as suggested by DiMA, whether the services report only the information actually available to them, as proposed by RLI, or whether the reporting requirements were to be of a more comprehensive nature, as advocated by SoundExchange. The likelihood of obtaining any useful and meaningful data is small. Even assuming that specific reporting requirements for the historic period could be imposed, the comments make clear that some services would be able to provide reports of prior uses with varying degrees of compliance with such requirements while others would not be able to provide any reports at all. This creates inequity among the services. *See* DiMA comment at 3; SoundExchange reply at 4. In addition, the cost and effort that would be required of SoundExchange to process such inconsistent data would be disproportionate to the amount of useful data that would result. Thus, there simply is no way to fully and accurately reflect actual performances for the historical period. Any attempt to do so would impose significant costs on the services and SoundExchange and ultimately would not result in any meaningful or useful data upon which to base a distribution.

The commenters reached the same conclusion as evidenced by their reply comments in which they advocated that a proxy be used in lieu of reporting requirements for the historic period. The proxy that emerged as the one most favored by the commenters was the data already provided by the preexisting subscription services to SoundExchange under the regulations announced in 1998 and now codified at 37 CFR 270.2 for transmissions made under section 114(f). SoundExchange reply at 3–4; DiMA reply at 6; NAB reply at 2. Specifically, SoundExchange would take the royalties paid for a given period in the historic timeframe and then would ''allocate those royalties according to the same percentages used for the allocation of royalties paid by the preexisting subscription services for the corresponding period.'' SoundExchange comment at 19.

The commenters identified several advantages to using this proxy. First, DiMA notes that the transmissions made by preexisting subscription services are the most analogous to the statutorily licensed webcaster transmissions, as both offer ''multiple themed and genre-based channels, and many channels programming varied styles of music within particular genres.'' DiMA reply at 6–7. Similarly, SoundExchange points out that ''royalties paid by one class of statutory licensee can be matched up with a corresponding period'' from the preexisting subscription services, thus providing ''some comfort that new releases and popular songs likely to have been performed by webcasters . . . would be captured in the reports of use'' of the preexisting subscription services. SoundExchange comment at 20. Furthermore, the preexisting subscription services ''transmitted a diverse number of individual sound recordings'' during the historic period so the royalties paid by the licensees here can be allocated among many copyright owners and performers. *Id.*

Another advantage of using reports of the preexisting subscription services as a proxy is that it is cost effective for both licensees and copyright owners and performers. Licensees do not have to spend time and money to compile information that likely would be incomplete or inconsistent. *See* NAB reply at 2. Likewise, since the preexisting subscription services have been providing their reports of use to SoundExchange in a ''standardized, electronic format'' since 1998, these reports have already been ''cleaned up'' and therefore require no additional processing by SoundExchange. Consequently, administrative costs will be lower, which will result in more money being available for distribution. SoundExchange comment at 19; DiMA reply at 7–8.

Moreover, adoption of the reports provided by the preexisting subscription services as a proxy for reporting for the historic period would also level the ''reporting playing field'' among licensees so that ''certain licensees would not be burdened with having to provide reports of use while competitors were permitted to provide no reports of use.'' SoundExchange reply at 4. Therefore, this eliminates any disproportionate burden on licensees that would result from the imposition of reporting requirements for the historic period.

Finally, use of the reports of the preexisting subscription services as a proxy for records of prior use does not impose any reporting requirements on licensees for the historic period. DiMA reply at 8. Therefore, NAB's concerns about the Office engaging in retroactive rulemaking are allayed. *Id.*

While the use of reports of the preexisting subscription services as a proxy for reporting for the historic period has many advantages, the commenters acknowledged the existence of certain disadvantages. For instance, while the reports of the preexisting subscription services may be a reasonably close approximation of the performances of sound recordings for the historic period, it is unavoidable that some copyright owners and performers will not receive full compensation for use of their works and others will receive no compensation at all if their works were performed by webcasters but not by any of the preexisting subscription services.

SoundExchange comment at 16 n.7, 20; SoundExchange reply at 2; DiMA reply at 6. However, there is no good alternative method for identifying and accounting for such performances. As a result, the commenters felt that the benefits of using the reports of the preexisting subscription services as a proxy outweighed the unavoidable drawbacks associated with the use of these reports. *Id.*

Because there is no feasible way to obtain meaningful and useful data through the imposition of reporting requirements, the Office agrees with the commenters that use of a proxy in lieu thereof is the proper course to take. Furthermore, the Office is persuaded by the comments that the reports of the preexisting subscription services represent the most appropriate proxy. Therefore, the Office is proposing to adopt regulations specifying that the records of use submitted by the preexisting subscription services during the period between October 28, 1998 and March 31, 2004, shall be considered the records of use for all services operating under the section 112(e) and section 114 licenses and that no additional records need be filed by the nonsubscription services, the satellite digital radio audio services or new types of subscription services.

In so proposing, the Office acknowledges that use of such a proxy, indeed any proxy, is far from a perfect solution to the problems posed by historical reporting. However, given the futility that would result in requiring licensees to report information that most simply do not have, the Office must conclude that the perfect solution does not exist, and that use of the data from the preexisting subscription services is the optimal method to ensure that royalties collected for the historic period are equitably distributed to copyright owners and performers with minimal delay, cost, and effort. For the reasons set forth in the comments, the Office believes that use of the reports of the preexisting subscription services as a proxy represents the simplest, most practical and most cost-effective solution.

Parties Affected

When the Copyright Office issued interim regulations governing the notice and recordkeeping regulations on a prospective basis, it rejected a request that those regulations not be applicable to the preexisting satellite digital audio radio services which had reached an agreement with SoundExchange. *See*69 FR 11515, 11517 (March 11, 2004). Sirius, XM Satellite and SoundExchange make the same request here that any regulations governing prior uses not apply to preexisting satellite digital audio radio services because of an agreement between those services and SoundExchange ''address[ing] prospective and retroactive notice and recordkeeping requirements.'' Sirius/XM Satellite comment at 1; SoundExchange reply at 3–4.

The Office again denies this request for the reasons set forth in the March 11 **Federal Register** document, specifically that ''it is the Library's responsibility, and the Library's alone'' to promulgate notice and recordkeeping requirements for all services, including the preexisting satellite digital audio radio services that operate under sections 112 and 114. 69 FR at 11518 citing Letter to RIAA, AFM, AFTRA, XM Satellite, and Sirius from the Copyright Office at 1–2 (May 8, 2003). The Office reiterates that the parties to this agreement could have requested that the Office adopt the agreed-upon terms regarding historical reporting, but they did not do so. 69 FR at 11518. Consequently, the proposed regulation governing prior uses will apply to preexisting satellite digital audio services,[3] as well as to non-subscription services, business establishment services, and new subscription services. We once again note that presumably no copyright owner or performer who is a party to the negotiated agreement would be in a position to complain of the failure by a service that is also a party to the agreement to comply with the proposed regulation announced today, assuming that the regulation is adopted as final. *Id.*

Moreover, the proposed regulation announced today will not apply to those entities, such as Montpelier, IBS/Harvard Radio, and CBI, who are signatories to either of the agreements published by the Office on December 24, 2002, (67 FR 78510), or June 11, 2003, (68 FR 35008), in accordance with the Small Webcaster Settlement Act of 2002, Public Law 107–321, 116 Stat. 2780.[4] *See also* 69 FR at 11517 (March 11, 2004). The proposed regulations will also not apply to the three preexisting subscription services because they have already reported their records of use for the relevant license period under the notice and recordkeeping requirements set forth in § 270.2. *See*69 FR at 11517 (March 11, 2004).[5]

Designated Agents

SoundExchange was designated by the Librarian of Congress as the Receiving Agent to receive statements of account and royalty payments from licensees for the license period October 28, 1998, through December 31, 2002. 37 CFR 261.4(b). Additionally, the Librarian designated SoundExchange and RLI as Designated Agents to distribute said royalty payments to copyright owners and performers. *Id.* However, RLI would serve as a designated agent only for those copyright owners and performers who expressly elected RLI as their agent for the distribution of royalties. 37 CFR 261.4(c). In order to make such election, a copyright owner or performer had to notify SoundExchange in writing of his or her desire to elect RLI as their designated agent by ''no later than thirty days prior to the receipt by the Receiving Agent of that royalty payment.'' *Id.* Otherwise, SoundExchange would be the default designated agent. *Id.*

It is the Office's understanding that no copyright owners or performers have elected RLI as their designated agent in accordance with § 261.4(c). If that understanding is incorrect, SoundExchange and RLI are requested to correct it in their comments to this notice of proposed rulemaking. In the meantime, the Office presumes that such an election of RLI as a designated agent has not been made and therefore the proposed regulation does not require SoundExchange to provide to RLI any data from the preexisting subscription services.

Limitation of Liability

In its comments, SoundExchange requested that in the event the Office

[3] The Office notes that currently no statutory rate exists for transmissions made by preexisting satellite digital audio radio services. Therefore, conceivably a question could be raised whether any royalties paid by such services are covered by the license. The Office takes no position, however, regarding the status of these royalties.

[4] The Small Webcaster Settlement Act provided in pertinent part that SoundExchange could enter into agreements with small commercial webcasters and noncommercial webcasters that would, among other things, provide that for a period ending on December 31, 2004, small commercial webcasters and noncommercial webcasters would be governed by notice and recordkeeping provisions other than those established by the Library of Congress.

[5] Music Choice has also asked the Office to apply the same notice and recordkeeping requirements to any eligible subscription, satellite digital audio, business establishment or new subscription services operated by a pre-existing subscription service. Since the adopted rules apply to all licensees who were operating under the section 112(e) and section 114 statutory licenses prior to the second calendar quarter of 2004, its request is moot with respect to the historical time period. Moreover, consideration of the request on a going forward basis has already been addressed. In the Office's earlier notice announcing its interim regulations, it stated that ≥the recordkeeping interim regulations announced today will not apply to preexisting subscription services,≥ thus making it clear that preexisting subscription services are the only services not covered by the interim regulations. 69 FR at 11518.

decided to use the reports of the preexisting subscription services as a proxy for historical reporting, the Office should also adopt regulations ''holding SoundExchange harmless from any under- or over- payments resulting from the use of such data for distribution purposes.'' SoundExchange comment at 20. The Copyright Office does not have the power to excuse SoundExchange, or anyone else, from liability for a breach of a legal obligation. *See*67 FR 45239, 45269 (July 8, 2002). Therefore, we cannot comply with SoundExchange's request. However, we believe that regulations already exist that provide SoundExchange with the reassurance it seeks. Specifically, §§ 261.4(h) and 262.4(g) require that the designated agent distribute royalty payments on a basis that values all performances equally based upon information obtained pursuant to regulations governing records of use. Because the rules proposed today would provide that the reports of the preexisting subscription services shall constitute the records of use for the other services for the historic period, SoundExchange may-indeed, it has no choice but to-rely on those reports in making its distributions.[6]

Comments on the Proposed Regulation

Any party objecting to the proposal to use the reports of the preexisting subscription services as a proxy for reporting requirements for the historic period is requested to set forth in detail how the Office can obtain more accurate information for the historic period and respond to NAB's argument that the Copyright Office does not have the authority to promulgate retroactive recordkeeping regulations.

List of Subjects

Copyright, Sound recordings.

Proposed Regulation

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

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

Authority: 17 U.S.C. 702.

[6] Because the Librarian's decision setting rates and terms for the license period from October 28, 1998 through December 31, 2002 is the subject of an appeal pending before the United States Court of Appeals for the District of Columbia Circuit, the only royalties from the historic period that can be distributed prior to the resolution of that appeal are those collected for the period from January 1, 2003 through March 31, 2004, a period for which final rates and terms have been established. See 69 FR 5693 (February 6, 2004).

PART 270—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSEES

2. Part 270 is proposed to be amended as follows:

a. By redesignating § 270.4 as § 270.5; and

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

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

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

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

Dated: July 8, 2004

Marybeth Peters,

Register of Copyrights.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 30

RIN 0991–AB18

Claims Collection

AGENCY: Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Health and Human Services (HHS) proposes to amend its regulations to implement the provisions of the Debt Collection Improvement Act of 1996 (DCIA), as implemented by the Department of Justice (Justice) and the Department of the Treasury (Treasury) as the Federal Claims Collection Standards (FCCS). The proposed rule implements the final rule promulgated by Justice and Treasury, and would amend the process by which HHS can administratively collect, offset, compromise, suspend and terminate collection activity for civil claims for money, funds, or property, and the rules and process by which HHS can refer civil claims to Treasury, Treasury-designated debt collection centers, or Justice for collection by further administrative action or litigation, as applicable.

DATES: Submit comments on or before September 13, 2004.

ADDRESSES: Comments concerning this proposed rule can be mailed to: Jeffrey Davis, Acting Associate General Counsel, General Law Division, Office of the General Counsel, Department of Health and Human Services, Room 4760 Cohen Building, 330 Independence Avenue SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Jeffrey Davis, Acting Associate General Counsel; his telephone number is 202–619–0153.

SUPPLEMENTARY INFORMATION:

Background

The Debt Collection Act of 1982 (DCA), Pub. L. 97–365, was implemented on a government-wide basis by the FCCS, set forth at 4 CFR part 101 *et seq.* issued by Justice and the General Accounting Office on March 9, 1984. See 49 FR 8889 (1984). HHS implemented the FCCS at 45 CFR part 30. As mandated by the DCIA, Justice and Treasury jointly promulgated the revised FCCS at 31 CFR parts 900–904 to reflect the legislative changes to the Federal debt collection procedures enacted by the DCIA. The revised FCCS supercede the current FCCS, and removed the Comptroller General as promulgator of the FCCS. HHS is required to implement regulations, consistent with the DCIA and the regulations promulgated by Justice and Treasury. To the extent any provision of this rule is inconsistent with a more specific provision of parts 31, 32 or 33 of this Title, the more specific provision shall apply.

Basic Provisions

In accordance with the requirements of the DCIA and the implementing regulations promulgated by Justice and Treasury at 31 CFR parts 900–904, the proposed regulation establishes the rules and procedures for the