

responsibilities among the various levels of Government; therefore, consultation with State and local officials is not required.

#### List of Subjects in 32 CFR Part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

Accordingly, 32 CFR part 199 is proposed to be amended as follows:

#### PART 199—CIVILIAN HEALTH AND MEDICAL PROGRAM OF THE UNIFORMED SERVICES (CHAMPUS)

1. The authority citation for part 199 continues to read as follows:

**Authority:** 5 U.S.C. 301; 10 U.S.C. chapter 55.

2. Section 199.6 is amended by revising paragraphs (b)(4)(xii)(A)(2)(i) and (b)(4)(xii)(E)(7) to read as follows:

#### § 199.6 TRICARE—authorized providers.

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(xii) \* \* \*

(A) \* \* \*

(2) *Eligibility.* (i) Every free-standing psychiatric partial hospitalization program must be certified pursuant to TRICARE certification standards. Such standards shall incorporate the basic standards set forth in paragraphs (b)(4)(xii)(A) through (D) of this section, and shall include such additional elaborative criteria and standards as the Director, TRICARE Management Activity, determines are necessary to implement the basic standards. Each psychiatric partial hospitalization program must be either a distinct part of an otherwise authorized institutional provider or a free-standing program. Approval of a hospital by TRICARE is sufficient for its partial hospitalization program to be an authorized TRICARE provider. Such hospital-based partial hospitalization programs are not required to be separately certified pursuant to TRICARE certification standards.

\* \* \* \* \*

(E) \* \* \*

(7) Free-standing partial hospitalization programs shall certify that:

\* \* \* \* \*

Dated: December 22, 2008.

**Patricia L. Toppings,**  
OSD Federal Register Liaison Officer,  
Department of Defense.

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## LIBRARY OF CONGRESS

### Copyright Royalty Board

#### 37 CFR Part 370

[Docket No. RM 2008-7]

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

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Royalty Judges, on behalf of the Copyright Royalty Board, are proposing to revise its interim regulations for filing notice of use and the delivery of records of use of sound recordings under two statutory licenses of the Copyright Act.

**DATES:** Comments are due no later than January 29, 2009.

**ADDRESSES:** Comments may be sent electronically to [crb@loc.gov](mailto:crb@loc.gov). In the alternative, send an original, five copies, and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means of transmission. Comments may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977. If hand delivered by a private party, comments must be brought to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000. If delivered by a commercial courier, comments must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site located at 2nd and D Street, NE., Washington, DC, and the envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue, SE., Washington, DC 20559-6000.

#### FOR FURTHER INFORMATION CONTACT:

Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor, by telephone at (202) 707-7658 or e-mail at [crb@loc.gov](mailto:crb@loc.gov).

**SUPPLEMENTARY INFORMATION:** On October 6, 2006, the Copyright Royalty Judges ("Judges"), on behalf of the Copyright Royalty Board ("Board"), issued interim regulations published in the **Federal Register** for the delivery and format of reports of use of sound recordings for the statutory licenses set

forth in sections 112 and 114 of the Copyright Act, title 17 of the United States Code. 71 FR 59010. As part of the Judges' continuing oversight of regulations governing notice of use and the delivery of records of use of sound recordings under these two statutory licenses, we herewith propose such final regulations.

#### I. Overview

Digital audio services transmit performances of copyrighted sound recordings of music to the users of those services. In order to transmit these performances, however, a digital audio service must license the copyrights to each musical work, as well as the sound recording of the musical work.<sup>1</sup> With respect to the copyright in the sound recording, the digital audio service may seek to obtain a licensing agreement directly with the copyright owner or, if it is an eligible service,<sup>2</sup> may choose to license use of the sound recording through statutory licenses set forth in the Copyright Act. There are two such licenses that enable an eligible digital audio service to perform a copyrighted sound recording for its listeners: section 114 and section 112 of the Copyright Act. Section 114 permits an eligible digital audio service to perform copyrighted sound recordings to its listeners, provided that the terms and conditions set forth in section 114, including the payment of a royalty fee, are met. Section 112 permits an eligible digital audio service to make the digital copies of a sound recording that are necessary to transmit a sound recording to listeners, provided again that the terms and conditions set forth in section 112, including the payment of a royalty fee, are met.

The royalty fees collected under the two statutory licenses are paid to a central source known as a Collective. See 37 CFR 370. Before the Collective,<sup>3</sup> or other agents designated to receive royalties from the Collective, can make a royalty payment to an individual

<sup>1</sup> Recorded music typically involves two separate copyrights. There is a copyright for the song itself—the lyrics and the music—and there is a separate copyright for the sound recording of the music. The copyright to the musical work typically belongs to the songwriter and/or his or her music publisher, and the copyright to the sound recording is typically owned by the record company that recorded it.

<sup>2</sup> These services include preexisting subscription services, preexisting satellite digital audio radio services, business establishment services, nonsubscription services and new subscription services.

<sup>3</sup> SoundExchange, Inc., originally created by the Recording Industry Association of America, Inc. on behalf of its member companies, is currently the Collective for receiving both section 112 and 114 royalties.

copyright owner, they must know the use the eligible digital audio service has made of the sound recording. To obtain this information, both section 112 and section 114 direct the Judges to prescribe regulations that identify the use of copyrighted sound recordings, as well as provide copyright owners with notice that a particular eligible digital audio service is making use of the section 112 and/or 114 license. *See* 17 U.S.C. 112(e)(4) and 114(f)(4)(A).

Interim regulations setting forth the filing requirements for notice of use, the types of information that constitute a record of use of a particular sound recording, the format of the record of use data and the acceptable means of delivering such use data to the Collective, have already been adopted. 71 FR 59010 (October 6, 2006). However, the Judges, as part of their continuing oversight of these regulations, have identified certain portions of the regulations that are obsolete as well as other portions that are duplicative. Obsolete provisions are proposed to be eliminated. Definitions previously duplicated in the various sections of these regulations are proposed to be gathered into a new single definition section applicable throughout this Part unless otherwise indicated within a specific section.

Effectively, the Judges propose only one substantial change—to expand the reporting period to implement census reporting. In addition, as indicated herein below, the Judges also welcome comments on technological developments that may imply the need for further adjustment of the rules either in terms of the method of reporting specific data elements or with respect to the delivery mechanism employed for reporting.

As with the interim regulations adopted in 2006, the final regulations proposed in this document represent baseline requirements. In other words, digital audio services are free to negotiate other formats and technical standards for data maintenance and delivery and may use those in lieu of regulations adopted by the Judges, upon agreement with the Collective. We have no intention of codifying these negotiated variances in the future unless and until they come into such standardized use as to supersede the existing regulations.

## II. General Definitions

As the regulations governing reports of use covering different services have evolved over time and resulted in somewhat different reporting requirements for the different services, several separate sections of the interim

regulations are devoted to one or more of the various services. Yet at the same time, certain basic definitions share a common meaning across these various sections. The Judges have identified nine common terms that are currently defined in different definition subsections within the current interim regulations. These terms include: (1) Notice of Use, (2) Service, (3) Preexisting Subscription Service, (4) New Subscription Service, (5) Nonsubscription Transmission Service, (6) Preexisting Satellite Digital Audio Radio Service, (7) Business Establishment Service, (8) Collective and (9) Report of Use. In the interest of administrative efficiency, the Judges propose a new § 370.1, General Definitions, to provide definitions for these nine terms that will apply generally throughout Part 370, unless otherwise specifically indicated. To that end, duplicative definitions of these nine common terms that currently appear in other sections of this Part are proposed to be removed. In addition to the efficiency gains this proposed change would bring for users of these regulations, it is anticipated that the identification of such common terminology will also encourage their usage among services and collectives in their negotiations and, thus, facilitate the negotiation process over rates and terms.

## III. Obsolete Provisions

On November 30, 2004, the President signed into law the Copyright Royalty and Distribution Reform Act of 2004 (“Reform Act”), Public Law 108–419, 118 Stat. 2341. The Reform Act, among other things, transferred the authority for prescribing notice and recordkeeping regulations for sections 112 and 114 from the Librarian of Congress (“Librarian”) and the Copyright Office to the Judges. The Reform Act went into effect on May 31, 2005, just after the Copyright Office published a Notice of Proposed Rulemaking on April 27, 2005 proposing regulations for the format and delivery of reports of use. 70 FR 21704. As notice and recordkeeping rulemaking authority passed to the Judges under the Reform Act, the subsequent interim regulation was issued under their authority. However, the interim regulation on notice of use and recordkeeping retained a rule identical to the one adopted by the Copyright Office addressing reports of use under the section 112 and 114 licenses for the period October 28, 1998 through March 31, 2004. Similarly, the interim regulation retained requirements for reporting certain category transmission codes for certain services relevant to

noncommercial and small commercial webcasters reporting for 2003 and 2004 pursuant to the Small Webcaster Settlement Act of 2002, Public Law 107–321, 116 Stat. 2780.

In adopting the current interim regulation on October 6, 2006, the Judges indicated that even though jurisdiction for adopting notice and recordkeeping rules as of that date lay solely with the Judges, it was not their intention in the interim regulation to revisit the rules the Librarian and Copyright Office adopted, and further, that the Judges would replicate the notice and recordkeeping provisions then located in Part 270 of the Copyright Office’s regulations in the interest of placing all regulations related to notice and recordkeeping under the section 112 and 114 licenses within the same part number in the CFR.<sup>4</sup> However, the Judges indicated they would monitor the operation of those regulations and request public comment in the future as to the need for amendment or improvement prior to adopting final regulations.

Because the prior Copyright Office final rule addressing reports of use under the section 112 and 114 licenses for the period October 28, 1998 through March 31, 2004 has been superseded for subsequent periods by the current interim regulation, the Judges propose the deletion of all references to this prior period reporting requirement. Similarly, inasmuch as the requirements for reporting certain category transmission codes for certain services (i.e., noncommercial and small commercial webcasters reporting for 2003 and 2004 pursuant to the provisions of the Small Webcaster Settlement Act of 2002) have expired by their terms, the Judges propose the deletion of the requirement for reporting such category transmission codes information.

## IV. Reports of Use Content and Reporting Period; Census Reporting

Currently, services must provide the total number of performances of each sound recording during the relevant reporting period. However, the relevant reporting period is limited to two periods of seven consecutive days for each calendar quarter of the year. This results in an estimate of the use of a sound recording rather than a report of actual use. The failure to report the full actual number of performances of a sound recording is at odds with the purpose of the recordkeeping

<sup>4</sup> It should be noted, however, that the Copyright Office has not repealed its similar Part 270 regulations.

requirement to the extent that, as a result, many sound recordings are under-compensated or not compensated at all from the section 114 and 112 royalties. On the other hand, where it is not possible to technologically obtain the necessary listenership data, some reasonable alternative means of estimating total actual performances should be available to the reporting services.

When the Copyright Office adopted interim regulations in 2004 during an earlier phase of the recordkeeping rulemaking process (prior to transfer of recordkeeping rulemaking authority to the Judges), the Copyright Office determined it was advisable to phase in the new reporting process by requiring periodic reporting of sound recording performances rather than year-round census reporting. However, in doing so, the Copyright Office announced that: "Once final regulations are implemented, year-round census reporting is likely to be the standard measure rather than the periodic reporting that will now be permitted on an interim basis." 69 FR 11526 (March 11, 2004). Given that ample time has passed since the adoption of the new reporting requirements to facilitate familiarity with the methods of acquiring and keeping the necessary data for compliance, the Judges propose to adopt year-round census reporting at this time. For nonsubscription services, such census reporting requires full reporting of the actual total performances of the sound recording for each calendar quarter of the year.<sup>5</sup> To the extent that technological impediments to measuring actual listenership continue to hamper actual listenership measurement with respect to each sound recording for preexisting satellite digital audio radio services, new subscription services or business establishment services, the alternative of census reporting by means of a construct utilizing aggregate tuning hours<sup>6</sup> is maintained for such services.<sup>7</sup>

<sup>5</sup> In other words, the proposed rule eliminates the aggregate tuning hours approach to reporting previously available to nonsubscription services. It should be noted that the aggregate tuning hours payment alternative to the per performance rate available to certain webcasters was phased out as of the end of the 2007 calendar year. *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule*, 72 FR 24096 n.33 (May 1, 2007).

<sup>6</sup> This alternative requires an estimate of census reporting by means of reporting the following data for each calendar quarter: Aggregate tuning hours, channel or program name and play frequency.

<sup>7</sup> It should be noted that in the recent preexisting satellite digital audio radio service ("SDARS") ratemaking proceeding, the collective (SoundExchange) requested that the recordkeeping regulations be amended to require census reporting

## V. Requests for Further Information

The organization and format in which recordkeeping data is to be maintained for delivery to collectives has been the subject of considerable disagreement between copyright owners and users over the years. While we have no desire to revisit the same disagreements that the parties have previously commented on at length, we are interested in determining if further improvements to the reporting regulations can be made in light of recent technological developments, newly available software or substantially reduced costs for certain delivery mechanism alternatives. In particular, we are interested in answers to several specific factual questions.

### A. Spreadsheets and Other Commercially Available Software for Completing Reports of Use

Although the NPRM only addresses commercially available spreadsheets as a means of creating records of use, the Board is interested in knowing what, if any, software has become commercially available since the promulgation of the interim regulation that could be used to compile records of use.

#### Questions:

What, if any, commercially available software has become available since the promulgation of the interim regulation in 2006 that could be used to compile records of use? Would such software produce records of use that are format compatible with SoundExchange's data processing system? What are the costs associated with such software?

### B. Report Delivery

SoundExchange supports four methods of delivery for electronic data files: File Transfer Protocol ("FTP"); electronic mail attachment; CD-ROM delivery; and floppy diskette delivery. Each of these delivery methods has specific requirements (examples: CD-ROM delivery must compress the reporting data to fit onto a single CD-ROM per reporting period; FTP delivery requires securing username and password; floppy diskettes must measure 3.5 inches in diameter). SoundExchange has previously opposed allowing delivery of records of use to a Web site, citing unspecified cost and

and the services did not object to census reporting in general so long as the current reporting exceptions in § 370.3(b)(8)(i)–(iii) were retained. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Final rule and Order*, 73 FR 4101 (January 24, 2008). The Judges' proposed recordkeeping rule retains those exceptions. See proposed § 370.4(b)(3)(i)–(iii).

security concerns. See 70 FR 21704, 21707 (April 27, 2005).

#### Questions:

Have technological developments or software improvements reduced the average estimated costs of creating and maintaining a Web site for receipt of records of use since the interim regulation was promulgated in 2006? Have data security methods improved since the promulgation of the interim regulation such that maintaining a Web site for receipt of records of use is now subject only to the same general level of risks as other methods of electronic delivery? What are the current security concerns and how may they be addressed? Is there now commercially available software that could facilitate the electronic delivery of reports of use to a Web site and, if so, would the benefits of such software justify its costs? Is it more efficient for the Collective to develop a system to report and deliver the records of use and make that system available to the Services?

In addition to the particular technical questions presented above, interested persons are also encouraged to supply their views on the following questions of a more general nature.

#### Questions:

What further improvements to the reporting regulations can be made in light of recent technological developments, newly available software or substantially reduced costs for certain delivery mechanism alternatives since the promulgation of the interim regulation? To what extent are such improvements currently being utilized in negotiated agreements between services and SoundExchange?

### List of Subjects in 37 CFR Part 370

Copyright, Sound recordings.

### Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to revise 37 CFR Part 370 to read as follows:

## PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

### Sec.

- 370.1 General definitions.
- 370.2 Notice of use of sound recordings under statutory license.
- 370.3 Reports of use of sound recordings under statutory license for preexisting subscription services.
- 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio

services, new subscription services and business establishment services.

370.5 Designated collection and distribution organizations for reports of use of sound recordings under statutory license.

**Authority:** 17 U.S.C. 112(e)(4), 114(f)(4)(A).

### § 370.1 General definitions.

For purposes of this part, the following definitions apply:

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

(b) 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. The definition of a Service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). A Service may be further characterized as either a preexisting subscription service, preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service, business establishment service or a combination of those.

(c) A *Preexisting Subscription Service* is defined in 17 U.S.C. 114(j)(11).

(d) A *New Subscription Service* is defined in 17 U.S.C. 114(j)(8).

(e) A *Nonsubscription Transmission Service* is a service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under section 114(d)(1) of title 17 of the United States Code and are made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(f) A *Preexisting Satellite Digital Audio Radio Service* is defined in 17 U.S.C. 114(j)(10).

(g) A *Business Establishment Service* is a service that makes ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code and is exempt under section 114(d)(1)(C)(iv) of title 17 of the United States Code.

(h) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses by determination of the Copyright Royalty Judges.

(i) A *Report of Use* is a report required to be provided by a Service that is transmitting sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code, or both.

### § 370.2 Notice of use of sound recordings under statutory license.

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

(b) *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 Web site or from the Licensing Division, and shall include the following information:

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

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

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

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

(5) Identification of each license under which the Service intends to operate, including identification of each of the following categories under which the Service will be making digital transmissions of sound recordings: preexisting subscription service,

preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service or business establishment service.

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

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

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

(d) *Filing notices; fees.* The original and three copies shall be filed with the Licensing Division of the Copyright Office and shall be accompanied by the filing fee set forth in § 201.3(c) of this title. Notices shall be placed in the public records of the Licensing Division. The Notice and filing fee shall be sent to the Licensing Division at either the address listed on the form obtained from the Copyright Office or to: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557-6400. A Service that, on or after July 1, 2004, shall make digital transmissions and/or 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.

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

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

(a) *General.* This section prescribes the rules for the maintenance and delivery of reports of use for sound recordings under section 112(e) or section 114(d)(2) of title 17 of the

United States Code, or both, by preexisting subscription services.

(b) *Delivery.* Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each month.

(c) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a preexisting subscription service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Preexisting subscription services shall post their Reports of Use online on or before the forty-fifth day after the close of each month, and continue to make them available thereafter to all sound recording copyright owners for a period of 90 days. Preexisting subscription services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. Preexisting subscription services may predicate provision of a password upon:

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

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

(d) *Content.* A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include a preexisting subscription service's "Intended Playlists" for each channel and each day of the reported month. 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:

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

(2) The channel;

(3) The sound recording title;

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

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

(6) The marketing label of the commercially available album or other product on which the sound recording is found;

(7) The catalog number;

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

(9) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(10) The date of transmission; and

(11) The time of transmission.

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

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

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

(2) Carats should surround strings;

(3) No carats should surround dates and numbers;

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

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

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

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

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

(h) *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use.

**§ 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.**

(a) *General.* This section prescribes rules for the maintenance and delivery of reports of use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services.

(b) *Definitions.* (1) *Aggregate Tuning Hours* are the total hours of programming that a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment service transmissions, less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a nonsubscription transmission service transmitted one hour of programming to 10 simultaneous listeners, the nonsubscription transmission service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the nonsubscription transmission service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a nonsubscription transmission service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the nonsubscription transmission service's Aggregate Tuning Hours would equal 10.

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

(3) A *performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(4) *Play frequency* is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the reporting period, then the play frequency is one. If the sound recording is transmitted 10 times during the reporting period, then the play frequency is 10.

(c) *Delivery*. Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each month.

(d) *Report of Use*. (1) *Separate reports not required*. A nonsubscription transmission service, preexisting satellite digital audio radio service or a new subscription service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code and makes ephemeral

phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code need not maintain a separate Report of Use for each statutory license during the relevant reporting periods.

(2) *Content*. For a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (d)(3) of this section:

(i) The name of the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service making the transmissions, including the name of the entity filing the Report of Use, if different;

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

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

(B) For eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming;

(C) For eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming;

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

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

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

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

(iii) The featured artist;

(iv) The sound recording title;

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

(A) Album title; and

(B) Marketing label;

(vi) For a nonsubscription transmission service: the actual total performances of the sound recording during the reporting period.

(vii) For a preexisting satellite digital audio radio service, a new subscription service or a business establishment service: the actual total performances of the sound recording during the reporting period or, alternatively, the:

(A) Aggregate Tuning Hours;

(B) Channel or program name; and

(C) Play frequency.

(3) *Reporting period*. A Report of Use shall be prepared for each calendar quarter of the year.

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

(5) *Confidentiality*. Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, without consent of the service providing the Report of Use.

(6) *Documentation*. A Service shall, for a period of at least three years from the date of service or posting of a Report of Use, keep and retain a copy of the Report of Use.

(e) *Format and delivery*. (1) Electronic format only. Reports of use must be maintained and delivered in electronic format only, as prescribed in paragraphs (e)(2) through (8) of this section. A hard copy report of use is not permissible.

(2) *ASCII text file delivery; facilitation by provision of spreadsheet templates*. All report of use data files must be delivered in ASCII format. However, to facilitate such delivery, SoundExchange shall post and maintain on its Internet Web site a template for creating a report of use using Microsoft's Excel spreadsheet and Corel's Quattro Pro spreadsheet and instruction on how to convert such spreadsheets to ASCII text files that conform to the format specifications set forth below. Further, technical support and cost associated with the use of spreadsheets is the

responsibility of the service submitting the report of use.

(3) *Delivery mechanism.* The data contained in a report of use may be delivered by File Transfer Protocol (FTP), e-mail, CD-ROM, or floppy diskette according to the following specifications:

(i) A service delivering a report of use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall maintain on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.

(ii) A service delivering a report of use via e-mail shall append the report as an attachment to the e-mail. The main body of the e-mail shall identify:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iii) A service delivering a report of use via CD-ROM must compress the reporting data to fit onto a single CD-ROM per reporting period. Each CD-ROM shall be submitted with a cover letter identifying:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iv) A service delivering a report of use via floppy diskette must compress the reporting data to fit onto a single floppy diskette per reporting period. Each floppy diskette must measure 3.5 inches in diameter and be formatted using MS/DOS. Each floppy diskette shall be submitted with a cover letter identifying:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, the counting of the rows should begin with row 1; and

(E) The name of the file attached.

(4) *Delivery address.* Reports of use shall be delivered to SoundExchange at the following address: SoundExchange, Inc., 1121 14th Street, NW., Suite 700, Washington, DC 20005; (Phone) (202) 640-5858; (Facsimile) (202) 640-5859; (E-mail) [info@soundexchange.com](mailto:info@soundexchange.com).

SoundExchange shall forward electronic copies of these reports of use to all other collectives defined in this section.

(5) *File naming.* Each data file contained in a report of use must be given a name by the service followed by the start and end date of the reporting period. The start and end date must be separated by a dash and in the format of day, month and year (YYYYMMDD). Each file name must end with the file type extension of ".txt". (Example: [AcmeMusicCo20050101-20050331.txt](#)).

(6) *File type and compression.* (i) All data files must be in ASCII format.

(ii) A report of use must be compressed in one of the following zipped formats:

(A) .zip—generated using utilities such as WinZip and/or UNIX zip command;

(B) .Z—generated using UNIX compress command; or

(C) .gz—generated using UNIX gzip command.

(iii) Zipped files shall be named in the same fashion as described in paragraph (e)(5) of this section, except that such zipped files shall use the applicable file extension compression name described in this paragraph (e)(6).

(7) *Files with headers.* (i) If a service elects to submit files with headers, the following elements, in order, must occupy the first 14 rows of a report of use:

(A) Name of service;

(B) Name of contact person;

(C) Street address of the service;

(D) City, state and zip code of the service;

(E) Telephone number of the contact person;

(F) E-mail address of the contact person;

(G) Start of the reporting period (YYYYMMDD);

(H) End of the reporting period (YYYYMMDD);

(I) Report generation date (YYYYMMDD);

(J) Number of rows in data file, beginning with 15th row;

(K) Text indicator character;

(L) Field delimiter character;

(M) Blank line; and

(N) Report headers (Featured Artist, Sound Recording Title, etc.).

(ii) Each of the rows described in paragraphs (e)(7)(i)(A) through (F) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (e)(7)(i)(G) through (I) of this section should not exceed eight alphanumeric characters.

(iii) Data text fields, as required by paragraph (d) of this section, begin on row 15 of a report of use with headers. A carriage return must be at the end of each row thereafter. Abbreviations within data fields are not permitted.

(iv) The text indicator character must be unique and must never be found in the report's data content.

(v) The field delimiter character must be unique and must never be found in the report's data content. Delimiters must be used even when certain elements are not being reported; in such case, the service must denote the blank data field with a delimiter in the order in which it would have appeared.

(8) *Files without headers.* If a service elects to submit files without headers, the following format requirements must be met:

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

(ii) Carats (^) should surround strings;

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

(iv) A carriage return must be at the end of each line;

(v) All data for one record must be on a single line; and

(vi) Abbreviations within data fields are not permitted.

#### **§ 370.5 Designated collection and distribution organizations for reports of use of sound recordings under statutory license.**

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

(b) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a "Notice of Designation as Collective under Statutory License," which shall be identified as such by prominent caption or heading, and shall contain the following information:

(1) The Collective name, address, telephone number and facsimile number;



(2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and

(3) Information on how to gain access to the online Web site or home page of the Collective, where information may be posted under this part concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557-6400.

(c) *Annual Report.* The Collective will post and make available online, for the duration of one year, an Annual Report on how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses.

(d) *Inspection of Reports of Use by copyright owners.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner, and the copyright owner's written agreement not to utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use. The Collective shall render its best efforts to locate copyright owners in order to make available reports of use, and such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(e) *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.

(f) *Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Licensing Division of the Copyright Office, the Copyright Royalty Board and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such

Service with information identifying the copyright owners it has served.

Dated: December 23, 2008.

**Stanley C. Wisniewski,**

*Copyright Royalty Judge.*

[FR Doc. E8-30976 Filed 12-29-08; 8:45 am]

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## POSTAL SERVICE

### 39 CFR Parts 233, 261, 262, 263, 264, 265, and 266

#### Freedom of Information Act

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service proposes to amend its regulations relating to records and information management. The proposed revisions contain, in part, new provisions to comply with Executive Order (EO) 13,392, entitled "Improving Agency Disclosure of Information."

**DATES:** Comments must be received by January 29, 2009.

**ADDRESS:** Comments may be mailed or delivered to the Manager, Records Office, U. S. Postal Service, 475 L'Enfant Plaza, SW., Room 5821, Washington, DC 20260. Copies of all written comments will be available at this address for public inspection and photocopying between 8 a.m. and 4 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Jane Eyre, Manager, Records Office, 202-268-2608.

**SUPPLEMENTARY INFORMATION:** The Postal Service is proposing to remove § 233.3 (h)(4) from Title 39 Code of Federal Regulations. The current regulation provides an 8-year retention period for files and records pertaining to mail covers. The Postal Service proposes to remove § 233.3(h)(4) because the retention periods for files and records are already in the records retention schedule for the Postal Service. Furthermore, USPS System of Records 700.100—Mail Cover Program Records, contains procedures for record storage, retrieval, safeguards, and disposal of mail cover records and information.

#### Records and Information Management (Parts 261–264)

The Postal Service proposes to revise parts 261–264 concerning Postal Service records and information management for administrative purposes, to clarify existing text, and to update and add definitions.

#### Release of Information (Part 265)

The Postal Service proposes to revise part 265, release of information, for administrative purposes, to clarify existing text, and to comply with provisions of EO 13,392. The EO requires, in part, that the Postal Service name a chief Freedom of Information Act officer, establish one or more requester service center(s), and name public liaisons. The Postal Service also made changes to update computer search fees incurred in processing records requests. We amended the computer search fees to reflect changes in the actual direct cost of retrieval, including computer search time and personnel costs. Computer search fees are subject to periodic revision, and have not been updated since September 2003. The new computer search fees are based on current industry standards and Postal Service salary schedules.

#### Privacy Information (Part 266)

The Postal Service proposes to revise part 266, privacy of information, for administrative purposes, to clarify existing text, and to update definitions.

#### List of Subjects

##### 39 CFR Part 233

Administrative practice and procedure, Banks, Banking, Credit, Crime, Infants and children, Law enforcement, Penalties, Privacy, Seizures and forfeitures.

##### 39 CFR Part 261

Archives and records.

##### 39 CFR Parts 262 and 263

Archives and records.

##### 39 CFR Part 264

Archives and records, Security measures.

##### 39 CFR Part 265

Administrative practice and procedure, Courts, Freedom of information, Government employees.

##### 39 CFR Part 266

Privacy.

For the reasons stated in the preamble, the Postal Service proposes to amend 39 CFR chapter I as follows:

#### PART 233—INSPECTION SERVICE AUTHORITY

1. The authority citation for part 233 continues to read:

**Authority:** 39 U.S.C. 101, 102, 202, 204, 401, 402, 403, 404, 406, 410, 411, 1003, 3005(e)(1); 12 U.S.C. 3401–3422; 18 U.S.C. 981, 1956, 1957, 2254, 3061; 21 U.S.C. 881; Omnibus Budget Reconciliation Act of 1996, sec. 662 (Pub. L. No. 104–208).