Before the
COPYRIGHT OFFICE
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Washington, D.C.

In the Matter of Notice and Recordkeeping for Use of Sound Recordings Under Statutory License	Docket No. RM 2002

Comments of the Electronic Frontier Foundation
the Electronic Privacy Information Center,
Fresno Free College Foundation, KFCF (88.1 FM),
and KPFA Radio.

The Electronic Frontier Foundation ("EFF"), Electronic Privacy Information Center ("EPIC"), the Fresno Free College Foundation, KFCF (88.1 FM), and KPFA Radio submit the following comments in response to the Copyright Office's Notice of Proposed Rulemaking, published at 67 Fed. Reg. 5761 (February 7, 2002) (proposing revision of 37 CFR 201.35 - 201.36). In its Notice, the Copyright Office seeks comment on proposed requirements for giving copyright owners reasonable notice of the use of their works for sound recordings under statutory license, as well as proposed recordkeeping requirements for such use.

In particular, these comments address the recordkeeping requirements associated with the "Intended Playlist," "Listener's Log," and "Ephemeral Phonorecord Log" as defined in proposed 37 CFR 201.36.

I. Commenting Parties

EFF is a nonprofit, donor-supported membership organization that has been working since 1990 to protect civil liberties in the digital age. Based in San Francisco,

California, the EFF engages in public education, litigation, and grassroots advocacy aimed at ensuring that established principles of civil liberties, privacy, and other fundamental rights survive undiminished in the digital realm. Further information regarding EFF's mission and activities can be obtained at http://www.eff.org.

EPIC is a nonprofit public interest research center based in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. Further information regarding EPIC can be obtained at http://www.epic.org.

KFCF (88.1 FM) began broadcasting on June 9, 1975, and, at that time, was the only public electronic medium serving the Fresno, California area. The station broadcasts 24 hours a day with 50,000 watts of equivalent effective power from a transmitter site 30 miles northeast of Fresno in the Sierra Nevada. KFCF's parent organization, Fresno Free College Foundation, was founded in 1968 and is a nonprofit, community-based membership organization dedicated to the principles that the well-being of the community is measured by the respect that it shows for the civil liberties, intellectual and artistic freedom of its citizens, and that the exercise of this freedom enriches the individual and society as a whole.

Founded in 1949, KPFA was the first community-supported radio station in the United States. KPFA is listener funded and does not take corporate sponsorship. KPFA was the original station of the Pacifica Foundation which owns four other stations located in New York, Washington D.C., Los Angeles and Houston. KPFA's signal reaches one third of California.

II. The "Listener's Log" and Listener Privacy

The requirement that Services[1] (other than pre-existing subscription services) keep a "Listener's Log" would constitute an unprecedented change in the privacy landscape facing music listeners. As a result, unlike many of the other aspects of the proposed regulations, the details of the "Listener's Log" are a matter of concern not just for the industries involved, but also for the listening public at large.

Until now, listeners of broadcast media have enjoyed a high degree of privacy. When tuning into terrestrial broadcast FM music programming, for example, the listener is and has always been anonymous—neither the broadcasters nor copyright owners know who is tuning in. Absolutely no "listener-side" information is gathered—not even the listener's existence.

In an unprecedented change to this status quo, the Copyright Office has proposed regulations that would require Services (other than pre-existing subscription services) to gather and report "listener-side" information to copyright owners, including the listener's country, local time zone, local log-in time, local log-out time, channel, and a "unique user identifier." 37 CFR 201.36(e)(3). This important change in the privacy landscape is all the more remarkable in light of the absence of any indication in the legislative history accompanying 17 U.S.C. 114(d)(2) that Congress meant to diminish listener privacy in any manner as part of its creation of a statutory license.

In light of the privacy that the public has come to expect when listening to music broadcasts[2], and the absolute absence of any indication that Congress intended to diminish these public expectations in creating the section 114(d)(2) statutory license, we

[1] "Services" refers to the entities identified in proposed 37 CFR 201.35(b)(2).
[2] For an illustration of the public's privacy expectations in the music realm, recall the widespread public outrage that followed the revelation that RealNetworks' RealJukebox product was surreptitiously tracking user listening habits. *See* Sara Robinson, "RealNetworks to Stop Collecting User Data," N.Y. TIMES, Nov. 2, 1999, at C2.

submit the following governing principle in evaluating the "Listener's Log" reporting requirements: listener privacy should be compromised only where and to the extent absolutely *necessary* to meet the requirements of section 114(d)(2).

When viewed under this rubric, the "Listener's Log" reporting requirement is insupportable. Proper administration of the section 114(d)(2) statutory license requires that Services report which sound recordings have been transmitted, how many times, and to how many listeners. This can be accomplished without collecting any listener-side information. Similarly, the proposed "Listener's Log" is not necessary to verify compliance with the sound recording performance complement. In fact, the record-keeping requirements for pre-existing subscription services makes it clear that compliance with the terms of section 114(d)(2) does not require a "Listener's Log." Pre-existing subscription services are subject to section 114(d)(2)'s strictures, yet are not required to maintain "Listener's Logs" under the proposed recordkeeping rules.

The justifications offered by the Recording Industry Association of America ("RIAA"), as described in the Notice of Proposed Rulemaking, do not establish that a "Listener's Log" is necessary for administration of the statutory license. The RIAA suggests that a "Listener's Log" is "easily provided, [] not burdensome, and in fact, is currently provided" by some RIAA/SoundExchange voluntary licensees. Of course, none of these contentions establish that gathering listener-side information is *necessary* to administer the section 114(d)(2) statutory license, or otherwise justifies the unprecedented step of gathering listener-side information.

In particular, it is difficult to see why a listener's country, local time zone, and listening periods expressed in local time is relevant to the section 114(d)(2) statutory license. There has been no showing that knowing what time it is *on the listener's end* is necessary to administer the statutory license, given that the time *at the transmitting end* is already provided as part of the "Intended Playlists" reports. Although the listener-side

information may provide valuable demographic data, there is nothing in section 114(d) to suggest that Congress intended to compromise listener privacy in order to obtain demographic data for copyright owners. Similarly, knowing the country and time zone of the listener has no necessary connection to the section 114(d)(2) statutory license, as demonstrated by the fact that pre-existing subscription services do not have to report this information under the proposed regulations, yet still can qualify for the statutory license. Unless the intrusion on listener privacy and anonymity is necessary in light of the section 114(d)(2) requirements, settled expectations of listener privacy should be preserved.

At a minimum, the Copyright Office should consider making it clear that nothing in the "Listener's Log" requires a Service to gather or report any *personally-identifiable* information, or deploy technologies that facilitate the gathering of this sort of information. For example, 37 CFR 201.36(e)(3)(vi) should make it clear that a Service is not required to employ a "unique user identifier" that is persistently associated with a user, whether in the form of a persistent user ID or "serialized" music player software (i.e., player software that includes a unique persistent serial number). A unique identifier assigned *only for a particular session* should generate all the information necessary to calculate the statutory royalty and verify adherence to the sound recording performance complement.

The regulations should further be revised to prohibit copyright owners, their agents, and Collectives from combining data derived from "Listener's Logs" with any other data (whether licensed from a partner or independently gathered) with the intention of deriving personally-identifiable information regarding listeners, or otherwise building individual user profiles. Without such a prohibition, the temptation may be strong to partner with streaming audio player vendors (such as RealNetworks or Microsoft) or

others (such as Doubleclick[3]) to profile individual listeners. While industry players remain free to engage in such activities in the open marketplace (within the bounds of privacy policies and applicable law), the data gathered pursuant to Congress' section 114(d)(2) statutory license should not hasten or contribute to the erosion of listener privacy.

III. Listener's Log and Competition in Media Players

Nothing in the Congressional record surrounding 17 U.S.C. 114(d) suggests an intention to "pick a winner" or otherwise interfere in the rapidly developing market for streaming media player technology. We assume the Copyright Office had no similar intention in its proposed recordkeeping regulations.

Nevertheless, an ambiguity in the "Listener's Log" provisions may create unintended uncertainty in the marketplace. Section 201.36(e)(3)(vi) requires logging of "the unique user identifier assigned to a particular user or session." This provision may suggest to some a requirement that "serialized" player technologies must be used (e.g., player software with a unique, persistent serial number). A requirement of serialized players, however, would strongly favor proprietary server-player systems (such as those deployed by Microsoft and RealNetworks) at the expense of systems that support open streaming media standards (such as streaming MP3 or Ogg Vorbis). Services that choose to utilize an open standard, such as streaming MP3, are not in a position to insist that listeners use a serialized player, because listeners are free to choose any interoperable player. For example, because Shoutcast offers its webcasts in streaming MP3 format, listeners may tune in using Apple's iTunes software, AOL's WinAmp software, or any of

[3] Doubleclick has recently settled litigation involving their own practices of combining databases in order to profile Internet users and obtain personally-identifiable information. *See* "Doubleclick Plaintiffs Reach Deal to Settle Online Privacy Litigation," WALL STREET JOURNAL, March 31, 2002.

a myriad of other MP3 player software, whether or not the software contains a unique serial number or similar identifier.

The proposed regulations state that the Listener's Log may report a unique user identifier that corresponds to the individual session, rather to the user. This suggests that a serialized player is not required. A simple clarification would go far to dispelling any confusion on this point, avoiding any unintended marketplace distortions.

IV. Recordkeeping and Small Terrestrial Broadcasters

The proposed recordkeeping requirements, including the "Intended Playlist," "Listener's Log," and "Ephemeral Phonorecord Log," will impose an onerous and unprecedented burden on smaller terrestrial broadcasters interested in extending their reach via Internet webcasting. In effect, these recordkeeping requirements will impose an unfunded technology mandate on the very broadcasters least able to bear the expense of a technology overhaul.

The proposed recordkeeping requirements presuppose extensive automation; gathering 25 pieces of information for every sound recording played simply is not feasible without computer-based playlists. Larger, commercial stations and Internet-only broadcasters can build their playlists from ephemeral phonorecords tagged with meta-data and stored on computer hard drives or similar media (e.g., digital automation systems like those offered by Enco Systems, Inc. or Broadcast Electronics). Smaller, non-commercial terrestrial broadcasters, in contrast, may still be relying on pre-digital systems embracing multiple formats, including turntables, cassettes, and open reel tape. Programmers and disc jockeys on these stations may pull from diverse musical genres and assemble their playlists while on the air, rather than in advance.

In this environment, it would be prohibitively expensive for some broadcasters to comply with the detailed recordkeeping requirements set out in the proposed regulations,

requiring either the acquisition of a modern digital automation system or dramatically increasing administrative staff to manually log every sound recording played (including searching out information such as issuing record label, ISRC numbers, catalog numbers, release year, and UPCs). In the face of these expenses, all related solely to recordkeeping, many small, noncommercial broadcasters may be forced to forgo Internet broadcasting altogether. This outcome harms everyone—copyright owners will be denied royalties, broadcasters will be unable to reach new listeners, and listeners will face a less diverse Internet music environment.

As an example of the burden that the proposed recordkeeping obligations would have on a non-automated, community broadcaster, KFCF (88.5 FM Fresno) would expect to have to hire a full time person to track and manually enter the requested data. There would also be additional one time costs covering computers, storage and software to support this position. The total additional expenses for recordkeeping would likely total $2,000 in one time expenses, along with $15,000 to $20,000 a year in salary costs. Currently, KFCF expects to serve an average of 20 concurrent streams, using donated bandwidth and streaming infrastructure. KFCF is ready and willing to pay the relevant section 114(d)(2) royalties, expected to be the minimum of $500 a year under the proposed CARP rates and terms. KFCF can absorb the royalties into its budget. Absorbing the additional expense of the associated proposed recordkeeping obligations, however, would be impossible.

This proposed recordkeeping burden also stands in stark contrast to the status quo. Currently performing rights organizations ("PROs") such as BMI and ASCAP rely on periodic "sampling" to determine distribution of musical work performance royalties to copyright owners. Stations are asked to fill out a log during one week each year indicating what was played (cut, artist, album) at what time. This process has minimal impact on the programmers, operators (disk jockeys) and stations in complying.

We urge the Copyright Office to consider adopting a less onerous recordkeeping requirement for Services that can demonstrate hardship. In place of the otherwise applicable recordkeeping, an alternate system, preferably based on a sampling regime similar to that administered by PROs such as BMI and ASCAP, should be available. In order to opt into this alternative recordkeeping process, Services would petition the Copyright Office for a limited time, renewable waiver. Criteria governing grants of such waivers would turn on a satisfactory demonstration of hardship, based on annual revenues, the installed technology infrastructure, types of programming broadcast (e.g., eclectic programming with large quantities of "live" improvisation by non-employee disc jockeys would argue in favor of granting a waiver), and the relationship between recordkeeping costs and royalties owed. Waivers could be reviewed and renewed on a periodic basis, in order to consider changes in technology and circumstance.

The availability of a "hardship waiver" for the recordkeeping requirements would go a long way toward enabling small, noncommercial broadcasters to enter the digital age in a gradual, low-cost manner. By reducing the cost of recordkeeping, this would increase the monies available to pay royalties directly to copyright owners, as well. This outcome better comports with Congress' intent in enacting section 114(d)(2), namely encouraging digital Internet broadcasting while creating a new revenue stream for owners of sound recordings.

V. Conclusion

For the foregoing reasons, the undersigned ask that the Copyright Office consider eliminating the "Listener's Log" requirements now set forth in proposed section 201.36(e)(3) in order to protect listener privacy and robust competition in media players. In addition, we urge the Copyright Office to craft a mechanism that will relieve small, noncommercial terrestrial broadcasters from the onerous burdens of the proposed recordkeeping requirements.

Respectfully submitted,

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