Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Library of Congress

Notice of Proposed Rulemaking)	
)	**37 C.F.R. Part 370**
)	**Docket No. RM 2008-7**
Notice and Recordkeeping for)	
Use of Sound Recordings)	
Under Statutory License)	
)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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INTRODUCTION

The National Association of Broadcasters, on behalf of its members, including Bonneville International Corporation, Clear Channel Communications, Inc., Cox Radio, Inc., Citadel Broadcasting Corp., Cumulus Media, Inc., Emmis Communications, Entercom Communications Corp., NRG Media, Regent Communications, Inc., and Salem Communications Corp., (collectively, "Broadcasters") hereby provides its comments on the Copyright Royalty Judge's proposed rule for filing notice of use and the delivery of records of use of sound recordings under the two statutory licenses set forth in 17 U.S.C. §§ 112 and 114 and for how records of such use shall be kept and made available to copyright owners. *See* Copyright Royalty Board, *Notice of Proposed Rulemaking,* Docket No. RM 2008-7, 73 Fed. Reg. 79727 (Dec. 30, 2008) (the "NPRM" or the "Proposed Rule").

In the NPRM, the Copyright Royalty Judges (the "Judges") propose to adopt year-round census reporting, based on the belief that "ample time has passed... to facilitate familiarity with the methods of acquiring and keeping the necessary data for compliance." But this assumption underestimates the burden on and efforts by Broadcasters to comply with quarterly reports of use. Nor has it been demonstrated before either the Judges or the Copyright Office that year-round census reporting would improve the accuracy of royalty calculations or facilitate the distribution of royalty payments. Although the Copyright Office has previously speculated that "perfect" census reporting might be achievable, the record is devoid of evidence that such reporting is (1) necessary or even advisable, (2) possible, (3) required by the statute, or (4) worth the attendant costs and burdens that would be placed on services (and SoundExchange) required to provide and process this information. Simply put, there has been no cost-benefit analysis to justify census reporting.

First, with regard to burden, in practice, compliance with the current data reporting requirements is more complex for Broadcasters than simply acquiring a technology or software "out-of-the-box" and proceeding to implement it. In the few years that have passed since the adoption of, first, rules concerning notice and records of use and, then, formatting and delivery rules, Broadcasters have had to *develop* the methods of acquiring and keeping this data, either by themselves or with the assistance of companies that hope to provide a simple solution to Broadcasters' recordkeeping dilemma. In order to comply with the quarterly recordkeeping requirements, Broadcasters have had to coordinate a multitude of disparate systems that were never designed to provide sound recording performance data. Although outside companies can provide assistance to those Broadcasters who can afford them, none have yet discovered the silver bullet for recordkeeping compliance.

In theory, Broadcasters have two options for complying with the current recordkeeping requirements. The least viable option is for a Broadcaster to disregard its essential business identity – broadcasting – and create what amounts to a separate webcasting venture, by implementing a complete new build-out of infrastructure and technology. Few Broadcasters have the financial ability to exercise this option, even if

they desire to invest the vast amounts of time and resources required to undertake such a fundamental shift in business focus. The other option is for a Broadcaster to use its current infrastructure and systems – designed for over-the-air broadcasting – and supplement them with new technology, services, and/or software to produce the required reports of use.

Because the radio industry is exceptionally diverse, the ways in which Broadcasters have individually adapted their businesses in order to provide reporting information vary widely. Variables include the financial ability to pay outside companies or to build infrastructure, the potential to generate revenue from streaming, whether a station uses a music scheduling system and/or a digital automation system, and the capabilities of the content delivery mechanism transmitting the stream of the over-the-air broadcast. As resourceful as Broadcasters have been in adapting their businesses and infrastructure to comply with quarterly reporting, they still struggle with the current requirements in many respects. Increasing this burden to year-round reporting at this time would present Broadcasters with a Sisyphean challenge of speculative benefit.

Significantly, there is no real need for year-round census reporting. Copyright owners and performers can receive reasonable notice and payment for use of their sound recordings by means of sampling. For decades, other copyright owner collectives such as ASCAP and BMI have used and refined sampling methodologies to implement their licensing and distribution functions. Indeed, the broadcasting industry itself has been built on the use of sampling and surveys, such as Arbitron and Nielsen. Most significantly, there has been no evidence presented in this rulemaking to show that the sampling methodology currently utilized by SoundExchange is inefficient, or results in significant misallocation of royalty payments. There is certainly nothing in the record to even suggest that royalties resulting from streaming by Broadcasters are misallocated.

In conjunction with implementing census reporting, the Judges also propose to eliminate – for nonsubscription services only – the Aggregate Tuning Hour (ATH) option for calculating the number of performances of each sound recording. The ATH reporting option, however, is critical for some Broadcasters. Payment of streaming royalties by Broadcasters on the basis of actual performances does not mean that Broadcasters can report performances of any given recording on an actual performance basis. The former relies upon server logs, often maintained by third parties, and does not depend on matching the identity of the song with the number of listeners. A performance is a performance regardless of the song. The latter would require merging internal song-identification and automation software. These disparate systems may not communicate; it is not uncommon for them not even to be operated by the same entities. Accordingly, the ATH option should remain available for *all* services, including Broadcasters, when more detailed listenership data is not actually or constructively possible.

Broadcasters urge the Judges to continue the interim regulations in their current form until census reporting has been demonstrated to be necessary to the collection and distribution of statutory license royalties and is reasonably available to all services without undue burden.

In the comments that follow, Broadcasters:

- o Discuss the standard for determining reasonable notice and records of use and the burden of proof;
- o Provide a description of how radio Broadcasters obtain the sound recordings they perform, the information they receive, and how they manage that information;
- o Demonstrate why the Judges should not expand the reporting requirements to census reporting at this time, at least not with regard to radio Broadcasters.

I. THE NATURE OF THIS PROCEEDING

A. Congress Has Mandated "Reasonable" Reporting Requirements That Do Not Place an Undue Burden on Digital Transmission Services

Congress has directed the Copyright Royalty Judges to "establish requirements by which copyright owners may receive *reasonable* notice of the use of their sound recordings under this section, and under which records of use shall be kept and made available by" licensees. 17 U.S.C. § 114(f)(4)(A) (emphasis added); *id.* § 112(e)(4) (same). By the express terms of Section 114, the records need only give *reasonable* notice – perfection is not required. *See* 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A).[1] As the legislative history for the statutory licenses makes clear, the hallmark of the reasonableness requirement is that it must not impose undue burdens on statutory licensees.

Congress has expressly stated that, in establishing the digital sound recording performance statutory license, it attempted "*to strike a balance* among all of the interests affected thereby." S. Rep. No. 104-128, at 15-16 (Aug. 4, 1995) (emphasis added); *see also* H.R. Rep. No. 104-274, at 14-15 (asserting that "legislation reflects a *careful balancing of interests*, reflecting the statutory and regulatory requirements imposed on U.S. broadcasters, recording interests, composers, and publishers") (Oct. 11, 1995) (emphasis added). As both the Senate and House Judiciary Committees made clear in their reports accompanying the 1995 Digital Performance Rights in Sound Recordings Act ("DPRA"), the intent of that legislation was:

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[1] Moreover, the Judge's interpretation of the statutory term "reasonable" must itself be reasonable and consistent with the goals of the underlying statute described above. As the United States Court of Appeals for the D.C. Circuit has observed, an administrative rule must be "reasonable and consistent with the statutory purpose." *Troy Corp. v. Browner,* 120 F.3d 277, 285 (D.C. Cir. 1997); *see also City of Cleveland v. U.S. Nuclear Regulatory Comm'n,* 68 F.3d 1361 (D.C. Cir. 1995) (an agency's interpretation must be "reasonable and consistent with the statutory scheme"). A court will not uphold a rule "that diverges from any realistic meaning of the statute." *Massachusetts v. Dep't of Transp.,* 93 F.3d 890, 893 (D.C. Cir. 1996).

> to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, *without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters*, which often promote, and appear to pose no threat to, the distribution of sound recordings.

S. Rep. No. 104-128, at 15 (emphasis added); *accord* H.R. Rep. No. 104-274 at 14.[2]

To accomplish the statutory purpose of fostering the development of new digital transmission services in a manner consistent with the express statutory requirement of "reasonable" notice, a notice and recordkeeping rule must strike the balance described above between being sufficient to provide notice of use, on one hand, and not unduly burdensome to collect, provide, and maintain on the other. As the Copyright Office has recognized in this context, "the burdens associated with reporting information cannot be so high as to be unreasonable or to create a situation where many services cannot comply." Copyright Office, *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License: Interim Regulations,* Docket No. RM 2002-1E. 69 Fed. Reg. 11515, 11521 (Mar. 11, 2004). In requiring year-round census reporting and eliminating the ATH reporting option, the Proposed Rule seeks to achieve perfect accuracy, but imposes an unreasonably (and in many respects, impossibly) high compliance burden upon Broadcasters.

By far the most important benchmark in construing the term "reasonable" is found in the recordkeeping regulations that were established pursuant to the Section 118 statutory license governing noncommercial radio broadcasters, which Congress used to model the reporting and recordkeeping requirements of Section 112 and 114. *See* 17 U.S.C. § 118(b)(4). The recordkeeping requirements governing that section contain a number of significant limitations that effectuate Congress's intent not to burden radio broadcasters unduly. Significantly, stations affiliated with National Public Radio need only make available to copyright owners their standard cue sheets; other stations need produce records for no more than one week per year, and, even then, ASCAP, BMI, and SESAC may only request such records from no more than ten college-licensed stations and ten non-college-licenses stations. 37 C.F.R. §§ 381.4(c), 381.5(e), 381.6(e).

Based on this Section 118 precedent, a reasonable allocation of reporting burdens would allow Broadcasters to continue to provide sample reporting information, particularly given that the current regulations already require eight times the amount of

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[2] Previously, the Copyright Office has expressly recognized the importance of balancing the interests of sound recording copyright owners and transmission services in establishing notice and recordkeeping requirements. In an earlier recordkeeping rulemaking for the preexisting subscription services, the Office directed the commenting parties to focus on "both the adequacy of the notice to the copyright owners of the sound recordings *and the administrative burdens placed on the digital transmission services in providing notice and maintaining records of use.*" Copyright Office, *Notice and Recordkeeping for Subscription Digital Transmissions: Notice of Proposed Rulemaking,* 61 Fed. Reg. 22004, 22004 (May 13, 1996) (emphasis added).

records (and from all Broadcasters who stream, not just ten or twenty) as do the Section 118 regulations.

B. The Onerous Requirements of Census Reporting Have Not Been Proven To Be Effective, Efficient, or Necessary

The Proposed Rule does not begin to achieve the required balance between information and burden mandated by the Copyright Act. The NPRM seems to assume that Broadcasters have only had to "familiarize" themselves with a process that was somehow readily apparent and available. Rather, Broadcasters have had to figure out how to locate or supply the information required, and to develop and implement systems to log, retain, process, and deliver it, with or without the assistance of outside services that have sprung up over the past two or three years. They have made great progress, but the vast majority of streaming Broadcasters currently struggle to comply with providing eight weeks of reporting data. To be asked now to provide an additional forty-four weeks would impose on Broadcasters an unrealistic and unreasonable burden. The obligations imposed by the Proposed Rule are so out of keeping with the ancillary nature of Internet streaming for Broadcasters that they could prevent many from starting to stream and prompt many of them to stop streaming, in particular, those stations that stream only as a service to their listeners, without generating revenue from the activity. And, in that situation, all lose, including the record labels and artists who lose not only royalties but also exposure for their works and the listening public that Broadcasters are licensed to serve.

The Proposed Rule also assumes, without substantiation, that census reporting is the best approach for providing copyright owners and performers with notice of use and for distributing royalties. Although the Copyright Office has *imagined* that year-round reporting *could* be possible, there has been no evidence in the record to show that census reporting, in fact, *is* possible for the majority of broadcasters or, even if possible, that it would yield more accurate or efficient results than sampling. "*In principle,* one *might imagine* that recordkeeping for many webcasters *could* be a simple matter. Webcasting necessarily requires use of computers for storage and transmission of the performances of sound recordings. Thus, webcasters *might be expected* to have the requisite resources and sophistication to maintain and transmit detailed reports identifying each and every sound recording they transmit, as well as the number of performances transmitted." 69 Fed. Reg. at 11521 (emphasis added). But all services are not equal in this respect. Even if it might be "a simple matter" for Internet-only webcasters to provide census reports of data, the different structure of the broadcasting industry means that Broadcasters face additional challenges in supplying this data.

The Copyright Office theorizes that "[b]ecause SoundExchange *could, in theory,* obtain perfect information about the number of performances of each sound recording, it *could* divide the total royalty pool by the total number of performances of all sound recordings, and then allocate to each sound recording the corresponding share based on the number of times it is performed." *Id.* (emphasis added). Such speculation does not meet the standard necessary to impose burdensome regulations. Before the Judges

implement year-round reporting requirements, SoundExchange should demonstrate why it needs census reporting data and, in particular, (1) why its sampling methodology is not sufficient, (2) why it cannot be improved, and (3) why receiving census information will actually improve the distribution of royalties. Under basic principles of administrative law, rules cannot be based on speculation.[3]

C. The Judges Must Consider the Effect of Census Reporting on Small Broadcasters Struggling to Survive

In addition, the NPRM fails to consider the severe burden that the requirements would place on small broadcast simulcasters. Under the Regulatory Flexibility Act ("RFA"), it must consider such impact. *See* 5 U.S.C. §§ 601-612.

In the NPRM, the Judges did not discuss the impact of its proposed recordkeeping requirements on small businesses and non-profit organizations pursuant to the RFA. The RFA requires notices of proposed rulemaking promulgated under 5 U.S.C. § 553 either to (a) include "for public comment an initial regulatory flexibility analysis ... [that] describe[s] the impact of the proposed rule" on those entities or (b) certify "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. §§ 603, 605. The regulatory analysis must consider various factors set forth in the statute, including a description of the steps "taken to minimize the significant economic impact [of the rule] on small entities." *Id.* § 603 (b), (c). Failure to comply with the RFA calls into question the validity of administrative rules.[4]

Although the Judges issued a proposed rule pursuant to 5 U.S.C. § 553 and is otherwise subject to the provisions of the Administrative Procedure Act (*see* 17 U.S.C. § 701(e)), it did not address the potentially devastating impact that its proposed recordkeeping requirements would have on the numerous small and non-profit radio stations that are struggling to keep their streaming operations alive. As a result, the very parties that the RFA was designed to protect may instead be harmed by the Judges' failure to consider their special circumstances in issuing the NPRM. In light of the devastating impact that unreasonable reporting requirements would have on small businesses -- especially in today's challenging economic environment, which has seen radio stations' revenues decline seven percent in 2008 alone[5] -- both the letter and the underlying policies of the RFA require the Judges to continue the interim regulations in their current form, until it becomes more feasible for small broadcasters to be able to comply with census reporting.

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[3] *See, e.g., Cincinnati Bell Tel. Co. v. FCC,* 69 F.3d 752, 764 (6th Cir. 1995) (reviewing court found rules regarding spectrum auctions to be arbitrary because agency offered no factual or documentary support for them).

[4] *See, e.g., U.S. Telecom Ass'n* v. FCC, 400 F.3d 29 (D.C. Cir. 2005) (agency's failure to comply with RFA resulted in remand of challenged rules and a stay of future enforcement of such rules against entities that qualified as small entities under the RFA).

[5] BIA Advisory Services, *Investing in Radio Market Report* (4th ed., 2008).