

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

NOV 12 2009

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Appeal No. 09-

09-1276

COLLEGE BROADCASTERS, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY BOARD,
Respondent.

Petition for Review

09-1276

PETITION FOR REVIEW

College Broadcasters, Inc. (“CBI”), Petitioner, hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the attached final rule of the Copyright Royalty Board (“CRB”) regarding certain recordkeeping requirements for the use of sound recordings pursuant to 17 U.S.C. §§ 112 and 114 licenses. See Final Rule, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 74 Fed. Reg. 52418 (Publication Date: October 13, 2009) (Effective Date: November 12, 2009) (“Final Rule”) (attached hereto).

On October 28, 2009, CBI, the American Council on Education (“ACE”), and Intercollegiate Broadcasting Systems, Inc. (“IBS”) filed with the CRB a Joint Petition For Clarification with respect to the issue now raised in this Petition For Review. As of November 12, 2009, the Copyright Royalty Board had not responded to the Joint Petition For Clarification.

The Final Rule moves all stations toward full census actual total performances (“ATP”) reporting – except those “broadcasters” who pay for no more than the minimum fee for their use of the license (i.e., “minimum fee broadcasters”). These minimum fee broadcasters may continue to report aggregate tuning hour (“ATH”) sampled data on a quarterly basis. 37 C.F.R. § 370.4(d)(3)(ii). All other services must report census ATP data on a monthly basis. 37 C.F.R. § 370.4(d)(3)(i).

A “minimum fee broadcaster” is a nonsubscription service that (i) meets the definition of a broadcaster pursuant to 37 C.F.R. § 380.2(b) and (ii) the service’s payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. §§ 112 and 114. See 37 C.F.R. § 370.4(b)(3) (“Definitions”) (emphasis added). “Broadcaster” is defined in 37 C.F.R. § 380.2(b) as “a type of Commercial Webcaster or Noncommercial Webcaster that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission [“FCC”].” 37 C.F.R. § 380.2(b) (emphasis added). Therefore, the current version of the Final Rule reads that FCC-licensed stations that pay only the minimum fee may continue to report ATH sampled data quarterly rather than ATP census data monthly. But, minimum fee FCC-unlicensed Educational Stations (i.e., webcast-only stations and others), must report ATP census data on a monthly basis.

The Final Rule makes no mention of this distinction and offers no rationale for it. Yet, the distinction presents a serious problem for unlicensed minimum fee Educational Stations, like many of the CBI’s members. For the same reasons that the Copyright Royalty Judges found it was unreasonable for minimum fee FCC-licensed Educational Stations to move toward census

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reporting, it is also unreasonable for minimum fee unlicensed Educational Stations to move toward census reporting. Accordingly, CBI requests review of the Final Rule.

Venue is lodged under 17 U.S.C. § 803(d)(1).

Date: November 12, 2009

Respectfully submitted,

By: 

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List of Subjects

33 CFR Part 155

Alaska, Hazardous substances, Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 157

Cargo vessels, Incorporation by reference, Oil pollution, Reporting and recordkeeping requirements.

46 CFR Part 162

Fire prevention, Incorporation by reference, Marine safety, Oil pollution, Reporting and recordkeeping requirements.

Accordingly, the interim rule amending 33 CFR parts 155 and 157 and 46 CFR part 162, which was published at 74 FR 3377 on January 16, 2009, as amended by the correction published at 74 FR 6358 on February 9, 2009, is adopted as a final rule with the following changes:

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

PART 155—OIL OR HAZARDOUS MATERIAL POLLUTION PREVENTION REGULATIONS FOR VESSELS

1. The authority citation for part 155 continues to read as follows:

Authority: 33 U.S.C. 1231, 1321(j); 46 U.S.C. 3703; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1. Sections 155.100 through 155.130, 150.350 through 155.400, 155.430, 155.440, 155.470, 155.1030(j) and (k), and 155.1065(g) are also issued under 33 U.S.C. 1903(b). Section 155.490 also issued under section 4110(b) of Public Law 101–380. Sections 155.1110 through 155.1150 also issued under 33 U.S.C. 2735.

Note: Additional requirements for vessels carrying oil or hazardous materials are contained in 46 CFR parts 30 through 40, 150, 151, and 153.

2. In § 155.350, revise paragraph (a)(3) to read as follows:

§ 155.350 Oily mixture (bilge slops)/fuel oil tank ballast water discharges on oceangoing ships of less than 400 gross tons.

(a) * * *

(3) For equipment installed after 2004 to be approved under paragraph (a)(2) of this section, it must meet current standards in 46 CFR part 162, subpart 162.050 by the date set forth in paragraphs (a)(3)(i) and (a)(3)(ii) of this section, unless the equipment is installed on a ship constructed before 2005 and it would be unreasonable or impracticable to meet those current standards.

(i) A ship entering international service for the first time since 2004, must comply with the requirements of paragraph (a)(3) of this section by the date of its initial survey prior to receiving its International Oil Pollution Prevention (IOPP) certificate.

(ii) Any ship, other than a ship described in paragraph (a)(3)(i) of this section, must comply with the requirements of paragraph (a)(3) of this section by the date of the ship's first drydock after October 13, 2009.

* * * * *

3. In § 155.360, revise paragraph (a)(2) to read as follows:

§ 155.360 Oily mixture (bilge slops) discharges on oceangoing ships of 400 gross tons and above but less than 10,000 gross tons, excluding ships that carry ballast water in their fuel oil tanks.

(a) * * *

(2) For equipment installed after 2004 to be approved under paragraph (a)(1) of this section, it must meet current standards in 46 CFR part 162, subpart 162.050 by the date set forth in paragraphs (a)(2)(i) and (a)(2)(ii) of this section, unless the equipment is installed on a ship constructed before 2005 and it would be unreasonable or impracticable to meet those current standards.

(i) A ship entering international service for the first time since 2004, must comply with the requirements of paragraph (a)(2) of this section by the date of its initial survey prior to receiving its International Oil Pollution Prevention (IOPP) certificate.

(ii) Any ship, other than a ship described in paragraph (a)(2)(i) of this section, must comply with the requirements of paragraph (a)(2) of this section by the date of the ship's first drydock after October 13, 2009.

* * * * *

4. In § 155.370, revise paragraph (a)(4) to read as follows:

§ 155.370 Oily mixture (bilge slops)/fuel oil tank ballast water discharges on oceangoing ships of 10,000 gross tons and above and oceangoing ships of 400 gross tons and above that carry ballast water in their fuel oil tanks.

(a) * * *

(4) For equipment installed after 2004 to be approved under paragraph (a) of this section, it must meet current standards in 46 CFR part 162, subpart 162.050 by the date set forth in paragraphs (a)(4)(i) and (a)(4)(ii) of this section, unless the equipment is installed on a ship constructed before 2005 and it would be unreasonable or impracticable to meet those current standards.

(i) A ship entering international service for the first time since 2004, must comply with the requirements of paragraph (a)(4) of this section by the date of its initial survey prior to receiving its International Oil Pollution Prevention (IOPP) certificate.

(ii) Any ship, other than a ship described in paragraph (a)(4)(i) of this section, must comply with the requirements of paragraph (4) of this section by the date of the ship's first drydock after October 13, 2009.

* * * * *

Dated: October 7, 2009.
J.G. Lantz,
Director of Commercial Regulations and Standards, U.S. Coast Guard.
[FR Doc. E9–24670 Filed 10–9–09; 8:45 am]
BILLING CODE 4910–15–P

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: Final rule.

SUMMARY: The Copyright Royalty Judges are issuing final regulations 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.

DATES: Effective Date: November 12, 2009.

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.

SUPPLEMENTARY INFORMATION:

I. Background

On October 6, 2006, the Copyright Royalty Judges (“Judges”) 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. 71 FR 59010. The goal of those interim regulations was to establish format and delivery requirements for reports of use so that royalty payments to copyright owners pursuant to section 112 and 114 licenses could be made from April 1, 2004,

forward based upon actual data on the sound recordings transmitted by digital audio services. During the interval since the Judges issued the interim regulations, the Judges have monitored the operation of these regulations as well as developments in recordkeeping requirements agreed upon by parties to various settlements relating to the use of section 112 and 114 licenses.

Subsequently, on December 30, 2008, the Judges published a notice of proposed rulemaking ("NPRM") setting forth proposed revisions to the interim regulations adopted in October 2006. 73 FR 79727. The most significant revision proposed by the Judges was to expand the reporting period to implement year-round census reporting. Further, on April 8, 2009, the Judges published a notice of inquiry ("NOI") to obtain additional information concerning the likely costs and benefits stemming from the adoption of the proposed census reporting provision as well as information on any alternatives to the proposal that might accomplish the same goals as the proposal in a less burdensome way, particularly with respect to small entities. 74 FR 15901. With the issuance of today's regulations, the Judges establish requirements for census reporting for all but those broadcasters who pay no more than the minimum fee for their use of the license. The Judges are adopting these regulations substantially as proposed in the NPRM with minor modifications in response to comments received. These final regulations establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings and under which records of use shall be kept and made available by entities of all sizes performing sound recordings. See, e.g., 17 U.S.C. 114(f)(4)(A). As with the interim regulations adopted in 2006, today's final regulations 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 effectively supersede the existing regulations.

II. This Proceeding

The Judges' December 30, 2008, NPRM set forth proposed revisions to the regulations governing the format and delivery requirements for reports of use of sound recordings that provided for three potential categories of change.

First, the Judges proposed eliminating obsolete provisions of the interim regulations. Second, the Judges proposed placing definitions that were duplicated in various sections of the interim regulations into a new single definition section applicable throughout Part 370 unless otherwise defined in a specific section. Third, the Judges proposed expanded reporting to implement year-round census reporting. In connection with this expanded census reporting, the Judges proposed eliminating the aggregate tuning hours ("ATH") approach previously available for nonsubscription services and requiring that such services now report actual total performances ("ATP"). However, the Judges proposed allowing pre-existing satellite digital audio radio services, new subscription services and business establishment services to achieve census reporting by continuing their use of the ATH option if technological impediments existed which thwarted the measurement of actual listenership. 73 FR 79727. In addition to these specific proposals, the Judges also solicited comments on technological developments which might warrant additional revisions to rules governing the method of reporting specific data elements and/or the delivery mechanism employed for reporting.

In response to the NPRM, the Judges received 43 comments from various categories of interested parties: (1) Representatives of copyright owners and performers, including SoundExchange, the Collective charged with collecting and distributing royalties; (2) copyright users and/or their representatives, including the National Association of Broadcasters ("NAB"), College Broadcasters Inc. ("CBI"), Intercollegiate Broadcasting System ("IBS"), various radio broadcasters affiliated with educational institutions, a noncommercial religious broadcaster, and an operator of radio and Internet stations featuring Christian programming; an Internet service that simulcasts the over-the-air and Internet-only broadcasts of primarily noncommercial terrestrial radio stations; and (3) several software providers of recordkeeping solutions to radio stations and Webcasters.

Most of the comments received from interested parties centered on the proposed move to full census ATP reporting. Comments focused on the technological reporting capabilities of small entities or less intensive users (particularly, users associated with educational institutions), as well as on various assertions about the costs and benefits of moving to full census ATP

reporting for such users. Consequently, the Judges' April 8, 2009, NOI sought to obtain additional, more concrete information concerning the likely costs and benefits stemming from the adoption of the proposed census reporting provision as well as information on any alternatives to the proposal that might accomplish the same goals as the proposal in a less burdensome way, particularly with respect to small entities. 74 FR 15901.

In response to the NOI, the Judges received 14 comments and 6 reply comments from the following categories of interested parties: (1) Representatives of copyright owners and performers, including SoundExchange; (2) copyright users and/or their representatives and allied interested parties, including the NAB, CBI, IBS, the National Federation of Community Broadcasters ("NFCB"), various radio broadcasters affiliated with educational institutions, the American Council on Education ("ACE"); and (3) a software provider of recordkeeping solutions to radio stations and Webcasters.

III. Obsolete Provisions and General Definitions

Obsolete provisions proposed for deletion by the Judges in their December 30th NPRM raised no concerns for commenting parties. Similarly, the deletion of duplicative definitions for nine common terms that appeared in various sections of the interim regulation and their replacement by a single definition for each of the nine terms in a new General Definitions section at the head of the proposed regulation¹ proved noncontroversial. Therefore, given the efficiency gains these changes will bring users, the Judges adopt the changes as proposed in the December 30, 2008, NPRM at 73 FR 79728.

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

Current requirements for the data to be included in reports of use and the frequency of reporting still largely reflect interim regulations adopted on March 11, 2004 (69 FR 11515) by the Copyright Office during an earlier phase of the recordkeeping rulemaking process that predated the transfer of rulemaking

¹ 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 proposed a new § 370.1, General Definitions, to provide definitions for these nine terms that would apply generally throughout Part 370, unless otherwise specifically indicated.

authority to the Judges pursuant to the Copyright Royalty and Distribution Reform Act of 2004. The Copyright Office in its interim regulations determined to phase in the new reporting process by requiring periodic reporting of sound recording performances, although the Copyright Office noted that: "[O]nce 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. Such census reporting provides a more complete record on which to base payments for the use of sound recordings compared to periodic reporting.² After providing users with ample time—some five years—to familiarize themselves with the methods of acquiring and keeping the necessary data for compliance, the Judges now adopt a final regulation adopting census reporting for all but the lowest intensity users of sound recordings in a single category of users—broadcasters typically engaged in simulcasting their over-the-air broadcasts on the Web. All other nonsubscription services, such as pure play Webcasters, are required to provide full reporting of the actual total performances of the sound recording for each reporting period during the year.³ 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 hours⁴ is maintained for such services.⁵

² 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.

³ The final 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 at the end of the 2007 calendar year. Digital Performance Right in Sound Recordings and Ephemeral Recordings Final Rule, 72 FR 24096 n.33.

⁴ This alternative requires an estimate of census reporting by means of reporting the following data for each reporting period: Aggregate tuning hours, channel or program name and play frequency.

⁵ 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 and the services did not object to census reporting in general so long as the reporting exceptions

A number of the most intensive users of the 114 and 112 licenses are already reporting on a census basis according to SoundExchange. See Comments of SoundExchange, Docket No. RM 2008–7 at 5–6 (January 29, 2009); Comments of SoundExchange, Docket No. RM 2008–7 at 15–20 (May 26, 2009). Further, the fact that many of the largest commercial Webcasters and other intensive users such as satellite radio have not filed comments in this proceeding clearly indicates an absence of controversy among more intensive users concerning the Judges' proposed census reporting regulations. Rather, many of the comments focused on the impact of the NPRM on less-intensive users such as a number of noncommercial broadcasters affiliated with educational institutions.

Both commercial and noncommercial broadcasters that are low-intensity users who typically simulcast over the Web appear to share a common technological characteristic—anachronistic systems or procedures that are not designed for easily reporting data on sound recordings simultaneously played as a Webcast. See, e.g., Comments of the National Association of Broadcasters, Docket No. RM 2008–7 at 8–9 (January 29, 2009); Comments of the National Association of Broadcasters, Docket No. RM 2008–7 at 5 (May 26, 2009). For example, in some cases, the manual play of music without the aid of a computer hampers the effective collection of information on the usage of sound recordings. See, e.g., Comments of the National Association of Broadcasters, Docket No. RM 2008–7 at 9 (January 29, 2009); Comments from Tom Worster and Spintron, Docket No. RM 2008–7 at 3–4 (January 29, 2009); Reply Comments of the American Council on Education, Docket No. RM 2008–7 at 2 (June 8, 2009).

While the absence of automated playlists represents one particular approach followed by some broadcasters for a variety of reasons—sometimes creative, sometimes pedagogical, and sometimes financially driven (See, e.g., Comments of the National Association of Broadcasters, Docket No. RM 2008–7 at 8–9 (January 29, 2009); Comments of the National Association of Broadcasters, Docket No. RM 2008–7 at 4–5 (May 26, 2009); Comments of University of California NCE Broadcast Radio Stations and Associated College

currently found 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' final recordkeeping rule retains those exceptions in the new § 370.4(b)(3)(i)–(iii) adopted today.

and University Broadcasters Who Simulcast, Docket No. RM 2008–7 at 3 (May 26, 2009); Comments of WSOU–FM, Docket No. RM 2008–7 at 3–4 (May 26, 2009))—these reasons do not necessarily overlap. For example, some low-intensity simulcasters who maintain partial or fully manual playlists may well be affiliated with large, financially well-endowed educational institutions and those institutions may claim to be training future broadcasters irrespective of the broadcast industry trend toward the adoption of automated programming; yet, they may choose to continue manual programming to allow their students more room to pursue a more creative approach to playing music either as part of a structured learning experience or as part of a less structured extracurricular experience. Thus, even in those instances where an educational institution's financial resources appear fully capable of providing for more investment in newer technology for proper recordkeeping and reporting under the Copyright Act, the educational institution may have little incentive to make such investments given the relatively unimportant stature of the activity in its overall mission. As a result, from the user's standpoint in such situations, there may appear to be a reasonable relationship between the low intensity use of Webcasting and the amount of resources the noncommercial broadcasting entity is willing to invest in the effort.

Some parallel exists in a commercial setting where small broadcasters with limited resources may engage small numbers of listeners through simulcasts on the Web of their over-the-air programming, but may not find such listenership sufficiently rewarding to make an immediate investment in adapting their old technology to permit easier recordkeeping. Here again, from the user's standpoint, there may be a reasonable relationship between the very low intensity use of Webcasting and the amount of resources the broadcasting entity is willing to invest in the effort. However, in the commercial case, broadcasters who do not adapt in the long run will fail as commercial entities to achieve the critical mass necessary to justify their presence on the Web. Therefore, they ultimately have a strong financial incentive to become more than very low intensity users, adapt their technology, ultimately achieve the same capabilities as their competitors on the Web and, in the process, attain comparable capabilities for full census reporting. Indeed, this process has been

recognized by the NAB and SoundExchange in their recent settlement pursuant to the Webcaster Settlement Act of 2008 (Pub. L. 110-435, 122 Stat. 4974), where they agreed to reporting requirements applicable to commercial broadcasters⁶ that require census reporting for all but a small group of low-intensity users that qualify for a "small broadcaster" status.⁷ See 74 FR 9301 (March 3, 2009). Such "small broadcasters" are not subject to the full census reporting applicable to other broadcasters in recognition of the "unique business and operational circumstances currently existing with respect to these entities" and are granted this exception to the general rule "on a transitional basis for a limited time." 74 FR 9301. Some of the operating circumstances that differentiate low-intensity commercial broadcasters from other low-intensity commercial Webcasters include the former's continued use of disparate systems not designed in the first instance to provide sound recording performance data and their inability as small entities to quickly pay for the costs of renovating such systems.⁸ See Comments of the National Association of Broadcasters, Docket No. RM 2008-7 at 4-5 (May 26, 2009).

By contrast, many low-intensity noncommercial broadcasters do not have similarly pressing financial incentives or, indeed, may only be secondarily motivated by financial considerations as noted above. Therefore, for low-intensity noncommercial broadcasters, the transition from old technological equipment and approaches may well proceed at a slower pace until such time as the activity in question generates more support in terms of its relative position in the overall mission of the affiliated institution. This is not to say that a permanent exception to the census reporting rule for low-intensity noncommercial broadcasters is in order. Clearly, the failure to report the full

actual number of performances of a sound recording is at odds with the purpose of the recordkeeping 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. Yet, at the same time, the low-intensity noncommercial broadcaster, by definition, does not enjoy the same pecuniary benefit from the use of the sound recordings at issue in this proceeding as does the low-intensity commercial broadcaster. Aggregate payments owed by low-intensity noncommercial broadcasters are dwarfed by payments by other users. Therefore, the tension between the relative cost of potential undercompensation to copyright owners and the relative cost of replacing outmoded systems employed by the low-intensity noncommercial broadcaster appears best resolved by allowing low-intensity noncommercial broadcasters to continue to report estimated usage on a quarterly basis in the same manner as under previous requirements until such time as either a reasonably priced technological solution is developed to facilitate census reporting under their current operational configurations and practices⁹ or where such noncommercial broadcasters finally move to more state-of-the-art technology and practices.

Despite recognizing that there may be situations in which some low-intensity noncommercial broadcasters are not in a position to provide census reporting, SoundExchange nonetheless urges the adoption of census reporting as the default rule in this proceeding. The Judges decline to do so for this narrow class of users. While the rate of progress toward achieving census reporting capabilities among low-intensity noncommercial broadcasters is frustratingly slow, it would be unreasonable to adopt a regulation that may well reduce the ability of such users to submit reports beyond even their current level of effort. Such an action may also raise the transactions costs for both users and the Collective. Neither of these two results would inure to the benefit of copyright owners.

Most educationally affiliated noncommercial broadcasters and/or their representatives initially urged the

Judges to allow them to continue to report two weeks out of every quarter and to continue to use ATH as a reporting alternative to ATP. See, e.g., Comments of University of California NCE Broadcast Radio Stations and Associated College and University Broadcasters Who Simulcast, Docket No. RM 2008-7 at 3 (January 28, 2009); Supplemental Comments of Harvard Radio Broadcasting Company, Docket No. RM 2008-7 at 22 (May 26, 2009). In particular, many of these comments urged the continuation of the two-week sampling approach with ATH reporting "for educational stations paying only the minimum fee"—i.e., for the lowest intensity users. See, e.g., Comments of Collegiate Broadcasters, Inc., Docket No. RM 2008-7 at 29 (May 26, 2009). However, some subsequent comments urged the Judges to consider, at least in the alternative, rolling back even the current two-week sampling requirement in favor of a complete reporting exemption for minimum fee users willing to pay an additional \$100 "data proxy fee" annually. See, e.g., Reply Comments of Collegiate Broadcasters, Inc., Docket No. RM 2008-7 at 11, 16 (June 8, 2009). Supplemental Reply Comments of Harvard Radio Broadcasting Company, Docket No. RM 2008-7 at 20 (June 8, 2009).

We do not agree that an additional data proxy fee in lieu of any reporting obligation represents a reasonable alternative to the continuation of the two-week sampling approach with ATH reporting for educational stations paying only the minimum fee. The data proxy fee alternative as proposed here represents a step backward in achieving better accuracy in reporting. As a result, it makes undercompensation stemming from inaccurate reporting even more problematic, inasmuch as it is the low-intensity educational station user that both such users and the Collective agree plays more diverse sound recordings. See, e.g., Supplemental Reply Comments of Harvard Radio Broadcasting Company, Docket No. RM 2008-7 at 20 (June 8, 2009). Because of such greater diversity, many more sound recording copyright owners may well forfeit a distribution of earned royalties when their use is not reported at all. See, e.g., Reply Comments of SoundExchange, Inc., Docket No. RM 2008-7 at 2 (June 8, 2009) ("These services do not pay very much in royalties, but what they pay may be the only statutory royalties earned by the copyright owners and performers of many obscure recordings."). In short, it is hardly reasonable to propose a complete exemption from even the

⁶ Broadcasters, as used in the NAB-SoundExchange settlement, do not include noncommercial Webcasters as they are defined in 17 U.S.C. 114(f)(5)(E)(i).

⁷ "Small Webcasters" in the NAB-SoundExchange settlement generally refers to those broadcasters who make eligible transmissions of less than 27,777 aggregate tuning hours in a given year. This level of actual transmissions in a given year, under the rate provisions of the settlement, appears likely to be largely covered by the credit obtained by the broadcaster towards usage upon payment of the \$500 per channel minimum fee under the settlement. In other words, where usage clearly exceeds the minimum fee credit, census reporting typically applies.

⁸ No comments were received from any pure commercial Webcaster claiming to be similarly situated.

⁹ The Corporation for Public Broadcasting ("CPB") in its recent settlement with SoundExchange, pursuant to the Webcaster Settlement Act of 2008, has agreed on behalf of its covered entities to "cooperate in good faith with efforts by SoundExchange to develop and test a technological solution that facilitates reporting." See 74 FR 9298 (March 3, 2009).

existing sample-based recordkeeping requirements, for even if the current requirements produce results that are less than perfectly accurate as collected, observed and administered, they at least provide some rational basis for royalty distribution to owners and performers who would otherwise be completely shut out of the royalty distribution process notwithstanding the use of their works.

The expanded scope of census reporting adopted in the final regulation also gave rise to two ancillary changes. One is a minor, noncontroversial change to harmonize references to the frequency of report delivery with the reporting period. That is, in those instances where monthly reports of use are required, the corresponding reporting period is defined as one month; and, in those cases where quarterly reports of use are maintained as the requirement, the corresponding reporting period is defined as one quarter. Second, a change to the previously existing rate category codes was required in the new § 370.4(d)(2)(ii) adopted today so as to prevent inconsistencies with different categories used during prior reporting periods. SoundExchange proposed the use of a new list of category codes with the addition of language indicating that the Collective "may from time to time publish an updated list of categories then applicable under the Webcaster Settlement Act or regulations, and Services shall identify the most specific category then applicable to them." See Comments of SoundExchange, Docket No. RM 2008-7, Proposed Regulations Exhibit A at 6 (January 29, 2009). On the other hand, another proposal instead recommends obsoleting and reserving the 2006 codes which would be no longer used going forward, while maintaining the same 2006 codes for categories which have not changed. See Comments from Tom Worster and Spintron, Docket No. RM 2008-7 at 7 (January 29, 2009). The Spintron proposal is supported by the NAB as promoting more clarity for users. See Comments of the National Association of Broadcasters, Docket No. RM 2008-7 at 6, (May 26, 2009). Because the Judges agree that this latter approach makes clear that anyone previously reporting under one of the obsolete codes must choose another one, we adopt the proposal put forward by Tom Worster on behalf of Spintron as part of this final regulation.

V. Additional Revisions Proposed by the Parties

In addition to the specific recordkeeping regulatory changes

proposed by the Judges in the December 2008 NPRM, the Judges solicited comments on any technological developments that pointed to 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. For example, the Judges specifically inquired as to what further improvements to the reporting regulations could be made in light of recent technological developments since the promulgation of the interim regulation, the new availability of reporting software or the advent of substantially reduced costs for certain delivery mechanism alternatives.

While approximately 18 proposals for additional regulatory changes beyond those proposed in the December 30, 2008 NPRM were submitted by SoundExchange, users and other interested parties, a number of the additional proposals went beyond the scope of the Judges' specific inquiry. That is, such proposals did not reflect technological developments which might warrant additional revisions to rules governing the method of reporting specific data elements and/or the delivery mechanism being employed for reporting. For example, SoundExchange proposed the addition of late fees for incomplete or tardy reports of use; or, as another example, Frederick Wilhelms III proposed the addition of various detail to the Collective's annual report requirements. See Comments of SoundExchange, Docket No. RM 2008-7 at 30-32 (January 29, 2009); Comments of Frederick Wilhelms III, Docket No. RM 2008-7 at 8-9 (January 27, 2009).

Other proposals, such as SoundExchange's request for the delineation of a separate certification form provided by SoundExchange to accompany the report of use (See Comments of SoundExchange, Docket No. RM 2008-7 at 30-32 (January 29, 2009)) generated significant controversy concerning the design process and/or contents of the proposed new form, indicating that such proposals not only were likely beyond the scope of the Judges' specific technological change inquiry, but also not yet likely ripe for determination. See, e.g., Comments of National Association of Broadcasters, Docket No. RM 2008-7 at 5-6 (May 26, 2009); Reply Comments of SoundExchange, Docket No. RM 2008-7 at 13 (June 8, 2009). Similarly, SoundExchange's proposal to require nonsubscription services to provide copyright owner information in exactly the same form as it appears in the commercially released product met with

objections as to practicality for some users that merit more detailed consideration than the focus of this proceeding permits. See, e.g., Comments of National Association of Broadcasters, Docket No. RM 2008-7 at 6-7 (May 26, 2009).

A proposal that syndicated programming that is simulcast by broadcasters should be exempted from recordkeeping requirements (See Comments of the National Association of Broadcasters, Docket No. RM 2008-7 at 8 (May 26, 2009)) raises serious issues concerning the recordkeeping obligations of users and, at the same time, offers no solution for improving reports of actual use to facilitate owners receiving more accurate payment distributions. Moreover, inasmuch as the interim reporting regulation in place has functioned for some time without such an exemption, albeit with less frequent quarterly reporting requirements, it is not at all clear that the adoption of the final regulation proposed in the NPRM merits rethinking at this juncture.¹⁰ Indeed, the Collective suggests that any reporting problems for broadcasters associated with syndicated programming have been adequately addressed going forward in their recently completed NAB-SoundExchange Webcaster settlement agreement. See Reply Comments of SoundExchange, Docket No. RM 2008-7 at 14 (June 8, 2009). In short, the syndication exemption proposal has not been sufficiently developed for the Judges' consideration in this proceeding.

Similarly, SoundExchange's proposal to authorize the Collective to distribute royalties based on a reasonable proxy when sufficient reports of use have not been filed within one year after receiving payment has been insufficiently developed in this proceeding. See Comments of SoundExchange, Docket No. RM 2008-7 at 4-5 (May 26, 2009). It was raised for the first time in this proceeding in response to the April 8, 2009 NOI and even SoundExchange admits to originally contemplating making this request in a subsequent petition. *Id.* at 4 n.7.

Still other proposals, such as the proposal that the Collective be required to provide confirmation of the receipt of reports of use within a time certain (See, e.g., Comments of Tom Worster and Spintron, Docket No. RM 2008-7 at 7 (January 29, 2009)), might arguably fit

¹⁰ For example, there will be no differential impact on low-intensity, minimum fee broadcasters since the interim reporting regulation remains unchanged in the final regulation for such users.

within a very broad view of the Judges' specific technological change inquiry, but were not addressed by the Collective in terms of either technological feasibility or costs of adoption (if any).

In short, some of the proposals included in comments received by the Judges in this proceeding may merit further examination in a future rulemaking. However, they are not ripe for either adoption or rejection at the present time.

As a result, only a small number of proposals put forward in the parties' comments have been adopted in the final regulations. Some of these proposals relate to clarifying the final regulations as a result of changes made to the frequency reporting rule and are described herein above in connection with that rule. Of the remaining three party proposals adopted by the Judges, one adopted proposal reflects recent technological developments, another adopted proposal reflects a physical change of address for the Collective, and the remaining adopted proposal corrects an inconsistency in the delineation of the use of report dates in the NPRM. No controversy was raised by any of the commenting parties concerning these three proposals.

The change in the final regulation adopted from comments received by the Judges that is directly related to technological developments is the elimination of the delivery of reports of use by means of floppy diskette.¹¹ See Comments of SoundExchange, Docket No. RM 2008-7 at 25 (January 29, 2009). We agree with SoundExchange that the use of floppy diskettes has been rendered obsolete by recent technological developments and that it is not technologically efficient for the Collective to maintain old disk drives and equipment applicable only to such physical media. Moreover, delivery by means of CD-ROM is readily available and maintained in the final regulation for any license user needing a physical media delivery alternative.

The remaining two changes adopted by the Judges from comments submitted by the parties are: (1) a correction in the e-mail address for the Collective to reports@soundexchange.com and (2) the consistent reference to dates of a reporting period throughout the final regulation in the format "year, month and day." See Comments of SoundExchange, Docket No. RM 2008-7 at 29-30 (January 29, 2009). These

¹¹ Under the interim regulation, SoundExchange supported four methods of delivery for electronic data files: File Transfer Protocol ("FTP"); electronic mail attachment; CD-ROM delivery; and floppy diskette delivery. The final regulation eliminates floppy diskette delivery.

changes adopted by the Judges will add clarity and consistency to the final regulation for reporting and delivery.

List of Subjects in 37 CFR Part 370

Copyright, Sound recordings.

Final Regulation

For the reasons set forth in the preamble, the Copyright Royalty Judges 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(e) 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: YYYY/MM/DD;

(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 minimum fee broadcaster is a nonsubscription service that meets the definition of a broadcaster pursuant to § 380.2(b) of this chapter and the service's payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114.

(4) 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).

(5) 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 reporting period identified in paragraph (d)(3) of this section.

(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) [Reserved].

(E) [Reserved].

(F) [Reserved].

(G) [Reserved].

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

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

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

(K) 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 except those qualifying as minimum fee broadcasters: 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, a business establishment service or a nonsubscription service qualifying as a minimum fee broadcaster: 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:

(i) For each calendar month of the year by all services other than a nonsubscription service qualifying as a minimum fee broadcaster; or

(ii) For a two-week period (two periods of 7 consecutive days) for each calendar quarter of the year by a nonsubscription service qualifying as a minimum fee broadcaster and the two-week period need not consist of consecutive weeks, but both weeks must be completely within the calendar quarter.

(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, or CD-ROM 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.

(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) reports@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 year, month, and day (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: October 7, 2009.

James Scott Sledge,

Chief U.S. Copyright Royalty Judge.

[FR Doc. E9-24556 Filed 10-9-09; 8:45 am]

BILLING CODE 1410-72-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2009-0620; FRL-8956-9]

Revisions to the California State Implementation Plan, San Diego Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the San Diego Air Pollution Control District portion of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from cold