

**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 (“NAB”), on behalf of its members (collectively, “Broadcasters”), hereby provides its comments on several issues raised in (1) the Copyright Royalty Judges’ Notice of Inquiry regarding revision of the interim regulations for filing notices 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 (2) certain comments submitted in response to the Judges’ earlier Notice of Proposed Rulemaking on the same subject. *See* Notice of Proposed Rulemaking, Docket No. RM 2008-7, 73 Fed. Reg. 79727 (Dec. 30, 2008) (the “NPRM”) and Notice of Inquiry, Docket No. RM 2008-7, 74 Fed. Reg. 15901 (Apr. 8, 2009) (the “NOI”).

NAB is a nonprofit incorporated association that serves and represents America’s radio and television broadcast stations and networks. Today, over 14,000 licensed commercial and non-commercial radio stations operate across the United States.¹ These radio stations come in a diverse mix of sizes, formats, and other characteristics.

I. Response to the NOI

In the NOI, the Copyright Royalty Judges seek comment on the approximate number of small entities that would be impacted by the proposed rulemaking and, in particular, by the proposed census reporting requirement. To determine what constitutes a “small entity” in this context, the Judges should look to the definition that is commonly accepted in administrative law and in broadcast regulation.

The Federal Communications Commission (the “Commission”) relies on the Small Business Administration (“SBA”) definition of a small business with regard to radio stations – a radio broadcasting entity that has \$7 million or less in annual receipts is considered a small business.² The Regulatory Flexibility Act of 1980, as amended (“RFA”),³ defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental entity” under Section 3 of the SBA.⁴ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁵ A small business concern is

¹ *See* Broadcast Station Totals as of June 30, 2008 (visited May 23, 2009) http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-285458A1.pdf.

² Report and Order and Fourth Further Notice of Proposed Rulemaking, MB Docket No. 07-294, MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228, released May 5, 2009 (hereinafter, “Report and Order”), App. B, ¶ 7, citing 13 C.F.R. § 121.201, 2008 NAICS Code 515212.

³ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁴ 5 U.S.C. § 601(6).

⁵ 5 U.S.C. § 601(3) incorporates by reference the definition of “small business concern” in 15 U.S.C. § 632. Pursuant to the RFA, the statutory definition of a small business applies, “unless an agency, after

one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁶ Business concerns included in this industry are those “primarily engaged in broadcasting aural radio programs by radio to the public.”⁷

According to NAB staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database (“BIA Database”), 11,304 music radio stations have annual revenues less than \$7 million.⁸ There are 8,610 commercial music stations that make less than \$7 million in annual revenue.⁹

As currently proposed, the rules would apply to both commercial and noncommercial radio stations. All 2,694 non-commercial music stations are in the BIA Database as having less than \$7 million in revenue.¹⁰ However, because BIA does not possess actual revenue data for the vast majority of these stations, the Commission has previously held that because noncommercial stations “rely primarily on grants and contributions for their operations, [the Commission] will assume that all of these entities qualify as small businesses.”¹¹

One element of the definition of “small business concern” is that the entity must be independently owned and operated. While the NOI asks about this element, even the Commission has previously recognized that “it is difficult at times to assess these criteria in the context of media entities, and [its] estimates of small businesses to which they apply may be over-inclusive to this extent.”¹² Similarly, NAB does not have sufficient information to determine this element.

However, in the context of determining what is a small entity for the purposes of recordkeeping and reporting requirements under the statutory licenses, this factor should

consultation with the Office of Advocacy of the [SBA] and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes the definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

⁶ 15 U.S.C. § 632.

⁷ U.S. Census Bureau 2008 NAICS Code 515212, *available at* <http://www.census.gov/econ/census02/data/industry/E515112.HTM>.

⁸ “Commercial Radio Stations 2008,” BIA Database, BIAfn, retrieved May 21, 2009.

⁹ 3,803 commercial music stations with less than \$7 million in revenue show \$0 revenue in the database, which means that BIA has no data for those stations. At this time, NAB does not have reliable information on the number of music stations that are streaming, but all stations should be considered in the Judges’ analysis, as they all have the potential to stream, and, thus, are affected by the proposed rules.

¹⁰ “Non-Commercial Radio Stations 2008,” BIA Database, BIAfn, retrieved May 21, 2009.

¹¹ Report and Order, App. B, ¶ 7.

¹² Report and Order, App. C, ¶ 9.

be of lesser importance, since mere ownership of a station may not have any bearing on its technological ability to provide extensive and frequent reports of use. As SoundExchange recognized in its comments, “Individual stations are often self-contained services in their own right, and they are often transferred from one station group to another.”¹³ When acquired by a larger entity, a small station may or may not be altered in conjunction with its new ownership. For example, a broadcast group may purchase a small religious station with no intention of changing its format, staffing, technology, or budget. In such a situation, a station’s switch to corporate ownership has no effect on its ability – or inability – to provide comprehensive reports of use on a monthly basis.¹⁴

In the NOI, the Judges seek comment on other factors that they should take into consideration in their evaluation of the burdensome aspects of recordkeeping and reporting requirements in conjunction with a station’s size, and specifically asked about what number of station employees might be used on which to base an exemption. In that regard, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission regularly seeks comment in its rulemakings on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”¹⁵

The Judges also ask about the percentage of broadcasters that do not use automated playlists. NAB is not aware of any source that possesses that information.

In addition, the Judges ask if manual programming is solely a matter of creative choice among broadcasters. The short answer is – it depends. In some cases, smaller stations – both commercial and noncommercial – may wish to move to automated programming systems but may not be able to afford to do so. In other instances, stations – both large and small – may choose not to use automated systems for some or all of their programming, due to artistic and programming decisions. For example, an urban format station may choose to have DJs play vinyl albums as an artistic choice during some of its programming. Another station may aesthetically distinguish its entire broadcast through the use of physical sound recordings and carefully crafted music programming – “[l]ike traditional winemakers who continue to hand-produce small batches of high quality wine.”¹⁶ Regardless of whether manual programming is ubiquitous to a station or lasts only an hour a week, such broadcasters should not be required to change programming philosophy solely because of technological innovation or cost reductions.

¹³ Comments of SoundExchange, Inc. at 23.

¹⁴ With regard to the remaining element of the definition of a “small business concern,” the Commission has declared itself unable to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. “Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent.” Report and Order, App. C, ¶ 9.

¹⁵ Report and Order, ¶ 44, citing The Small Business Paperwork Relief Act of 2002, Pub. L. No. 107-198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 § U.S.C.); see 44 U.S.C. § 3506(c)(4).

¹⁶ Comments of Harvard Broadcasting Company, page 17.

As NAB stated in its previous comments, 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.¹⁷ Although some outside companies (such as Ando Media¹⁸ and Liquid Compass) can provide limited assistance to those Broadcasters who can afford them and have the necessary systems in place to support such outside services, none have yet discovered the silver bullet for recordkeeping compliance, even for fully automated stations.

II. Response to NPRM Comments

In its comments on the NPRM, SoundExchange makes some suggested changes to the reporting regulations. NAB has no objection to many of those recommendations, such as establishing uniformity for format for reporting dates, use of headers, etc., but it does have comments on several of SoundExchange's proposed changes.

A. File Transfer Protocol

NAB agrees that File Transfer Protocol ("FTP") should continue to be an option for submission of reports of use, along with the option of submission by physical media, such as CDs. Although FTP may work adequately for transmitting the data for one or ten stations, it is difficult for larger stations groups to submit dozens of separate reports of use. Accordingly, some medium and large station groups must submit records of use via CD, since FTP is not efficient for their needs.

In addition, NAB suggests that relying only on FTP may be unnecessarily limiting, and that SoundExchange should also explore additional secure transfer protocols, such as newer, next generation file transfer protocols.

B. Timing

Broadcasters that qualify for exemptions from certain of the proposed reporting and recordkeeping requirements should be permitted to submit any required reports of use on a quarterly basis.

C. Certification

SoundExchange proposes that the regulations be amended so that SoundExchange will craft the language of the certification that accompanies each report of use, including

¹⁷ Comments of the National Association of Broadcasters, page 2.

¹⁸ Ando Media and certain of its larger broadcaster customers are currently being sued for patent infringement for certain technology used in some of its products and services. *Aldav, LLC v. Clear Channel Communications et al.* 09-cv-00170, E.D. Texas (Tyler).

a signature.¹⁹ NAB does not object to SoundExchange designing the certification, so long as broadcasters are consulted and the resulting document is compatible with broadcaster business practices. For example, the current regulations require that the certification must be signed by “the appropriate officer or representative of the service.”²⁰ However, a corporate officer signatory will likely not have personal and direct knowledge of reports processed at a station level. NAB and its member companies are willing to work with SoundExchange to develop a meaningful certification form that can be practicably and truthfully attested to by broadcaster webcasters companies. NAB suggests that this change should not be adopted into the regulations until such a certification form has been satisfactorily developed.

D. Rate Categories

With regard to the modification of rate categories, NAB agrees with the premise underlying the comments of Tom Worster and Spiniron. It makes sense to explicitly obsolete codes A through J, reserving those letters so that they cannot be used accidentally. This would make very clear what has changed since 2006 and that any station previously reporting under one of the obsolete codes must choose another one. Furthermore, it would be clear to SoundExchange that a report of use using an obsolete letter indicates that a broadcaster has not transitioned to the new regulations.

E. Information To Be Submitted

SoundExchange proposes that all services should submit copyright owner information as provided in the copyright notice on retail albums or other products. Specifically, SoundExchange desires that the Judges should “require services to provide track-specific information (artist, track title, album title, marketing label, and copyright owner information) in exactly the same form as it appears in the commercially released product.”²¹ But, as NAB has already made clear in its previous comments, such information is often not in the possession of radio stations.²²

Radio stations that have automated music scheduling systems have inputted that information from the various sources from which the music was obtained. That might have been from vinyl albums or singles, promotional CDs provided by record labels before an album was released, homemade CDs with limited information provided by local bands, MP3s that may not contain any metadata related to the subsequent commercially-released product, or a myriad of other sources. Even when most of the

¹⁹ SoundExchange proposed regulations § 370.4(d)(4).

²⁰ 37 C.F.R. § 370.4(d)(4).

²¹ Comments of SoundExchange, Inc. at 29; SoundExchange proposed regulations § 370.4(d)(2).

²² SoundExchange’s statement that “Every bit of this information is in the possession of the webcaster, and they need only retain it through use of commercially available software in order to provide it” is simply incorrect in the case of broadcasters. Comments of SoundExchange, Inc., page 8.

information that Sound Exchange asks for has been manually inputted into a station's music system, it may not be supported by all the systems that are "downstream."

This lack of consistency is a reality in the broadcasting industry, which began decades ago, when the information was first hand-coded into music scheduling systems, and no one could have anticipated that the mere misplacement of an apostrophe or inversion of a name would cause recordkeeping or reporting difficulties. Centralizing data is a fundamental problem for broadcasters. Even larger broadcasters that might be expected to benefit from economies of scale may not be able to do so, since within the same station group, different automation systems with different capabilities may be used. The cost of stations retrofitting systems with all that information would be astronomical.

NAB suggests that SoundExchange should make available at no cost its database of artist, title, album, etc. information to third-party companies that provide or intend to provide reporting compliance products and services, as well as to broadcasters that do not rely on outside services to compile and submit reports of use.²³ NAB understands that certain broadcasters may have already discussed such a possibility with SoundExchange and how such information could be implemented into reporting software. For example, if personnel at a station level could select among various options of songs or create a new entry, the information would be more likely to be accurate than if the station provides the limited information in its possession, and SoundExchange is then forced to guess as the appropriate choice in its database. As SoundExchange noted, "the services, not SoundExchange, are in the best position to know and monitor what music they choose to play and when."²⁴ Conversely, SoundExchange is in the best position to provide the exact format for how each song's data should be rendered, particularly when broadcasters are not in possession of information as complete as in the SoundExchange database.

F. Late Fees

SoundExchange proposes that licensees should pay a late fee in order "[t]o provide additional incentive for services to provide accurate reports of use on a timely basis." But noncompliant licensees are already subject to claims of copyright infringement and possibly penalties for perjury. Broadcasters that are currently struggling to provide quarterly reports of use for two weeks will face an even greater challenge under the proposed rules. To add a late fee would be excessive and unnecessarily punitive.

Most Broadcasters provide the reporting information that is in their possession, but they cannot provide data that they do not have and which have not been provided to them by the record labels, copyright owners, or artists. Often, stations that do not provide

²³ A requirement to publish a database should not be burdensome on SoundExchange, since they have already built and must be constantly updating this database in order to distribute royalty payments. No proprietary information would need to be disclosed.

²⁴ Comments of SoundExchange, Inc. page 17.

ISRC, album, or label data because it is not in their possession. They should not be penalized for that.

Nor should licensees that make a good faith effort to comply with the regulations be punished for minor mistakes made in the transcription of data. Human error is inevitable. It is unrealistic to ask human beings to be as efficient as computers in processing data, and then penalize them when they are not.

Moreover, licensees have no way to know if their reports of use have been received by SoundExchange, much less are fully compliant in its eyes. SoundExchange currently has no duty to notify licensees if submitted reports of use have been received or if they are compliant with the current regulations. Further, if there is no way for a licensee to fix incorrect information or an omission, what would prevent such late fees from continuing to accrue into infinity? Services should be provided a receipt so they are able to demonstrate that they, in good faith, have submitted the required reports. The receipt should provide enough information to confirm successful delivery and identify the particular reports and station.

In addition, the rules should be flexible enough to deal with the lack of accurate information when it is not practicably available and cannot be reported. For example, if a broadcaster plays a song that was provided to it before an album was released and cannot identify the subsequent album, it should certainly not be penalized. Moreover, the current reporting requirements do not allow for hardware or software technical failures, which could result in data being inadvertently lost. Requiring a constant, full-year census will increase the unreasonable burden of compliance in the event of such technical failures. To punish broadcasters with late fees in such instances will likely cause some to cease to stream altogether, but because of the unreasonable consequences for minor and possibly inevitable noncompliance issues. Reducing the amount of internet streaming and eliminating royalty payments is clearly not in the interest of consumers, broadcasters, webcasters, musicians, song writers, or record labels.

G. Syndicated Programming

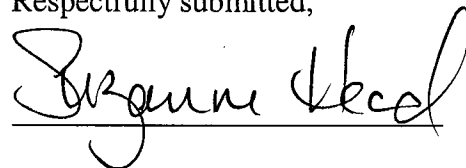
As NAB discussed previously in its comments, syndicated and third-party programs may provide little, if any, detailed information about the pre-recorded music they include. There should be an exemption for this type of programming, for which reporting is not technologically possible to track performance of individual songs at this time.

III. Conclusion

As Harvard Broadcasting Company noted, “Technology moves faster than regulatory bodies can act. While the CRB is to be commended for attempting to parse the highly technical details inherent in large-scale data processing, all parties must agree that the CRB was not constructed to handle technical standards setting... Any attempt to set final regulations will quickly find itself outpaced by technological advancement and incapable of reacting in a flexible manner.”²⁵

Locking in recordkeeping and reporting requirements that are overly ambitious for the current state of the industry hinders the development of this nascent area of the broadcasting industry and would do a disservice to all parties. NAB looks forward to working with the Judges and SoundExchange to develop workable reporting solutions that can both fulfill the Judges’ obligations to establish requirements that provide copyright owners with reasonable notice of the use of their sound recordings, while being able to be practicably implemented by Broadcasters without unreasonable burden.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Suzanne Head", written over a horizontal line.

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²⁵ Comments of Harvard Broadcasting Company, page 4.