**Before the**
**UNITED STATES COPYRIGHT ROYALTY BOARD**
**Library of Congress**

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| **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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January 29, 2009

## INTRODUCTION

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

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

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

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

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

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

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

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

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

In the comments that follow, Broadcasters:

- Discuss the standard for determining reasonable notice and records of use and the burden of proof;

- Provide a description of how radio Broadcasters obtain the sound recordings they perform, the information they receive, and how they manage that information;

- Demonstrate why the Judges should not expand the reporting requirements to census reporting at this time, at least not with regard to radio Broadcasters.

## I. THE NATURE OF THIS PROCEEDING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. RADIO BROADCASTERS' USE AND HANDLING OF SOUND RECORDINGS AND RELATED INFORMATION

### A. Streaming and Its Relation to Broadcasters' Business

Radio stations and the individuals and groups that own them come in a diverse mix of sizes and other characteristics. Despite the wide range of formats and business models followed by radio Broadcasters, they have at least one thing in common: simulcast streaming of their over-the-air broadcast programming is an activity that is ancillary to their primary broadcasting business and is largely offered as a convenience to their audience. To date, Internet streaming has resulted in audiences that are tiny compared to stations' over the air audience. Even the most popular radio station simulcasts garner only a small fraction of their over-the-air listenership on their website streams.

Radio broadcasters' businesses and their business systems have been developed over decades and are geared towards the effective pursuit of their primary business – over-the-air broadcasting – and the mandates of their FCC licenses – serving the needs and the interests of the communities they are licensed to serve. Broadcasters generally view Internet simulcasting as an ancillary means of providing their broadcast audiences with a service audiences want.

Although all Broadcasters view streaming as ancillary to over-the-air broadcasting, Broadcasters do have different business purposes for streaming. Some Broadcasters who stream are focused on merely providing a service to their listening audience, perhaps at a monetary loss. Other Broadcasters hope that streaming will ultimately be a revenue-producing venture, even if it is not today. Still others are looking only to have their streaming initiative make enough money to pay for itself. Broadcasters continue to experiment with streaming models and providers, but the viability of streaming as an industry-wide revenue-making practice has not yet been proven. The additional burden that would be imposed by census recordkeeping requirements threatens to cripple the still-nascent arena of radio station simulcasting. This burden is particularly high because, as discussed below, the wide variety of Broadcaster formats and business models naturally result in a similarly wide variety of music reporting practices.

### B. Broadcasters Have Diverse Systems for Handling Sound Recording Information, Ranging from Entirely Manual to Automated; The Nature of the Broadcasting Industry Is That Its Systems Have Not Been Designed for Reporting Data on Sound Recording Usage

Unfortunately, Broadcasters possess no magical systems that can compile or submit the current data reporting requirements easily or quickly. Many radio stations have older computers and technologies spliced together by a skillful (and sometime even unconventional) engineering and or technical staff. As the broadcast industry has evolved, more and more radio stations have come to use automated systems to both schedule and broadcast various program elements. The different combinations of human

practices, digital automation systems (DAS), and scheduling software that are employed by radio stations across the country are almost as diverse as the resulting broadcasts.

Many radio stations use DAS to manage their broadcasts. The DAS selects songs, inserts commercials, manages the transition between songs, and cues on-air talent to insert live commercials. Still other stations, even within the larger radio groups, do not use DAS at all. Instead, they continue to play their music without the aid of a computer, the old-fashioned way – production staff place a compact disc ("CD") manually into the player, hit the play button, and turn dials to fade out one song and start the next.

Even within one commonly owned group of radio stations, the DAS in use can vary widely, and the systems at one station often cannot communicate or share data with the systems of another. Between DAS and music scheduling programs, there are literally more than a dozen different software packages that radio stations today can use to produce their daily broadcasts, and some of the packages still in use are so old that they are no longer supported by their manufacturers.

DAS play music, but they are not designed to store detailed information about every aspect of that song's production in their databases. Most DAS track the title, artist, and timing information for each song. They may not allow the user to create new data fields to track. Nor do DAS decide the schedule of songs to be played – that function is fulfilled by more robust music scheduling software.

Music scheduling software programs replace the index card scheduling systems radio stations used before the advent of personal computers.[6] Song information has been entered manually into each station's music scheduling system over the past decades. Until recently, the information entered was strictly for internal use. There was no reason to spend a lot of time developing data entry standards since no one but the people on the air would ever see that data. The result is a complete lack of data consistency from station to station.

### C. Sound Recording Data Can Be Difficult to Locate and Process

As Broadcasters have pointed out in the past, some of the information desired by SoundExchange is not available to Broadcasters. *See* Joint Comments of Radio Broadcasters, Docket No. RM 2002-1 (Apr. 5, 2002). The precise nature of the music

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[6] To ensure that songs did not get too much or too little airplay, music directors used to make an index card for each song in their libraries, and group these cards into rotation categories. The heavy rotation category might include 10 songs, while the medium rotation category would contain 30 songs, and so on down the line. Breaking each day into one hour programming blocks, they would schedule songs based upon an hourly "clock," which indicated how many of each category of song to play, and in what order. Once a song was played, it would go to the back of the stack of index cards for that category, and would not be played again until it reached the top of the rotation. Music scheduling software operates on the same basic principle as this index card system, but allows for more sophisticated decision making. The music director categorizes the songs in the library, and creates rules to determine what kinds of songs can be played near each other.

supplied to radio stations varies. Promotional releases, for example, are often sent to radio stations in anticipation of a new album before the retail version is released, so retail information such as album title is not available. The ISRC code is never listed on the packaging of these promotional discs. Occasionally, the labels will send radio stations electronic MP3 files. In those cases, the only relevant information the stations receive is title, artist, and duration of the song. Other times, CD singles are distributed with very little information or documentation (*e.g.*, the name of the label may not be included). Thus, the information received by Broadcasters may vary greatly from song to song.

Despite the fact that SoundExchange must have its own sound recording database, such information is not made available to services.[7] SoundExchange is in a far better position to ascertain this information than Broadcasters, who are forced to deduce or guess at the album title based on commercially available information, and to input title and artist data by hand (in a less than universal manner).[8] At the very least, sharing this information with broadcasters could provide more uniformity and less duplication of efforts. Such a database would be tremendously useful if it had the ability to "sync up" with the services' music information databases – *e.g.*, radio stations' music scheduling software or digital automation systems – in order to download sound recording information from SoundExchange's database into the services' databases in an automated fashion.

As it now stands, Broadcasters struggle to obtain and provide some of the information required by quarterly data reporting – information that record labels themselves do not consider important enough to provide to the services – and year-round reporting would increase that burden unduly.

### D. Broadcasters Receive Limited Information from Third-Party Content Providers (Syndicators)

Almost all radio stations broadcast third-party content at some point during their broadcast day. This programming can come in the form of popular national programs via direct satellite link, pre-recorded programming sent to subscribers via cassette or CD in advance, or even small church groups that purchase airtime to share their ministries.

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[7] Indeed, RIAA itself stated seven years ago that it had created its own sound recording database. *See* Reply of the Copyright Owners and Performers to Petitions Filed by Webcasters and Commercial Broadcasters, Docket No. RM 2002-1, at 83 n.238 (Apr. 1, 2002) (arguing that SoundExchange is a "more efficient distribution agent" due to "the thousands of sound recordings for which data has been obtained and entered into the SoundExchange database" from subscription services' music reports).

[8] It is certainly reasonable that SoundExchange maintain such a database. Indeed, both ASCAP and BMI maintain precisely such music databases, which are freely accessible online. ASCAP, for example, is required to maintain and make available to the public "through on-line computer access (*e.g.*, the Internet)" an electronic list of compositions in its repertory and update that list on a weekly basis. *See United States v. ASCAP*, 2001-2 Trade Cas. (CCH) ¶ 73,474, at 91,963 (§ (B)(2)) (S.D.N.Y. June 11, 2001). Similarly, BMI maintains and daily updates a publicly accessible database of compositions in its repertory, which is searchable, at http://www.bmi.com/search/ (visited January 26, 2009).

These syndicated and third-party programs provide little, if any, detailed information about the pre-recorded music they include. Some provide playlists with title and artist information. However, the smaller program providers, in particular, often fail to provide even that information. Moreover, it is certainly not tagged as to when songs play, which would be necessary to cross reference with the content delivery network that delivers the stream of the over-the-air broadcast. For Broadcasters to be able to accurately track the very detailed data envisioned by the Proposed Rule, it must be supplied at the level where copyright owners license sound recordings to third-party content providers, but the recording industry has not yet made this issue a priority, leaving Broadcasters with no viable option for tracking such information.

If radio stations were compelled to research the information missing from the third-party program providers' reports for an entire year, the research burden on the stations could, itself, be crushing. As with the data for music content mentioned above, Broadcasters currently struggle to obtain and provide this part of the quarterly sound recording data. There is yet no way to automate this task to accommodate year-round census reporting.

### E. Broadcasters' Technology and Their Limitations Therewith, For Reporting Sound Recording Data

As mentioned above, Broadcasters have two basic options for complying with the current quarterly sound recording reporting data requirements. They can invest in a complete new build-out of systems and infrastructure, an option beyond the reach of the vast majority of broadcasters, or they can adapt their current systems to provide the required data.

Because of the diversity of Broadcaster infrastructure, level of automation, and variety of software options, it is difficult to generalize about how Broadcasters obtain and provide the information required for sound recording data reporting. There is one common theme, however: the vast majority of Broadcasters are using technology to try to integrate systems that were never meant to provide sound recording data.[9]

In addition to the music scheduling systems and digital automation systems mentioned above, Broadcasters that stream must also use a content delivery network that keeps track of the number of people listening to each stream at certain times. Each content delivery provider calculates current listeners in different ways because delivery infrastructures vary greatly.

Moreover, the performance or statistics server that measures the number of listeners can be implemented in many ways. The most common is that a streaming encoder application calls a web service with song information as parameters. That web service contacts another web service at the content delivery network to gauge how many people are listening to the stream at that moment. It then inserts a record into the

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[9] Of course, small Broadcasters with no automation system must provide information manually.

database that has a timestamp, title, artist, and the number of people listening when the song started.

Broadcasters begin with less than uniform data, input by hand, and have at least four and sometimes as many as six steps in getting the data from its starting point to the reporting servers. Each of these steps is a different system and for each of these systems there are five to ten potential vendors. Because there is no data standardization between these systems, on each "hop" the data has to be not only transmitted through the network, but parsed and reformatted. Each of these data hops presents another chance for data corruption or data loss. Outside vendors have varying degrees of success with varying parts of this process, but, as of yet, there is no gold standard that can guarantee Broadcasters' perfect compliance.

## III. REASONABLE NOTICE AND RECORDS OF USE CAN BE OBTAINED WITHOUT REQUIRING CENSUS REPORTING AND WITHOUT ELIMINATING THE ATH OPTION

### A. Census Reporting Is Not Reasonably Necessary and Is Unduly Burdensome for Broadcasters

Broadcasters understand that copyright owners need to receive certain information in order reasonably to identify sound recordings transmitted pursuant to the Section 114 statutory license. Broadcasters currently provide two weeks of detailed reporting data each calendar quarter, which is sufficient for copyright owners to receive notice of use of their works and associated royalty payments. So-called perfect census information will not yield a perfect distribution, and the additional transaction costs required to obtain perfection far outweigh the marginal benefits. The sheer amount of data that would be required by census reporting is staggering. Indeed, the volume of data generated would likely render the notice recordkeeping process completely unworkable for SoundExchange and licensees alike. For even small automated stations, it would mean processing millions of individual performances. For stations that are not automated, the task would be impossible.

Moreover, such extensive reporting obligations would practically eliminate the need for a separate entity to collect royalties. Licensees would essentially be co-opted to bear the administrative burden that SoundExchange has agreed to undertake in connection with its task of distributing royalties to copyright owners. SoundExchange was appointed to determine the proper allocation of royalties to copyright owners – and artists – for which it is entitled to deduct reasonable administrative costs and fees. Its responsibilities should not be transferred to licensees. Such a result would be dramatically at odds with the established practices of performing rights organizations that license musical works. ASCAP, BMI and SESAC all undertake the burden of collecting data for distribution purposes and, where they seek data from licensees, often request only a very small sample (*e.g.*, one week per year). The marketplace experience of the performing rights organizations demonstrates that efficient and cost-effective

methodologies can be employed to determine the reasonable and appropriate allocation of royalties without imposing unreasonable burdens on licensees. On a cost-benefit basis alone, the Judges should not adopt the Proposed Rule.[10]

As discussed above, there are a number of significant limitations on Broadcasters' ability to provide census reports of use at this time. Although they have made great strides in the past few years, Broadcasters still struggle to comply with many aspects of the current reporting requirements. Perfect accuracy is an illusory goal and, in many instances, will cause the reporting burden to exceed the value of the license. It will thus cause many local radio stations to cease streaming, which will not serve the interests of the listening public.

### B. Sampling and ATH Are Reasonable and Effective Means by Which To Effectuate Payment to Copyright Owners and Artists

Sample reporting is a longstanding, widespread, and eminently reasonable means of balancing burden and accuracy in the reporting of performances. Reporting based on a reasonable sample has a number of advantages. It greatly reduces the amount of data processing involved in reporting music use, which, in turn simplifies royalty verification and distribution. In lowering both music reporting and royalty administration costs, sampling benefits both owners and users. Indeed, RIAA has previously expressly acknowledged in the initial subscription services proceeding that if it were inundated with music use data from the entire over-the-air radio industry, "the amount of data generated would be of a magnitude that would preclude a collective from being able to process actual, comprehensive use information." RIAA's Reply Comments, Docket No. RM 96-3, at 8 (Aug. 12, 1996).

Although not every radio station streams, the number that potentially do, coupled with the number of Internet-only webcasters, would submit a volume of reports that would bury SoundExchange in data if census reporting were required. SoundExchange should demonstrate that it is prepared to manage or effectively utilize such vast amounts of information. Even when only three services were reporting music use, SoundExchange took more than three years to make a single distribution of any royalty payments they made (and a full year and a half between the last collection and the first payment). *See* Rebuttal Testimony of Barrie Kessler, Docket No. 2000-9 CARP I&2 DTRA, Tr. 11761-62, 11812 (Oct. 18, 2001).

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[10] Courts have not hesitated to reverse, remand, or vacate agency decisions that failed to reasonably assess the costs of the agency's actions. *See, e.g., People of the State of California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990) (reviewing court "must be satisfied that the [agency's] assessment of the various costs and benefits is reasonable in light of the administrative record," and if the agency's "evaluation of any significant element in the cost/benefit analysis lacks record support" then the court "cannot uphold the agency action" under the Administrative Procedure Act); *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (finding that agency's failure to explain how it implemented provisions of the Communications Assistance for Law Enforcement Act in a "cost-effective" manner was "a classic case of arbitrary and capricious agency action").

In the years since then, services still do not know how SoundExchange processes all the data it currently receives or if it can keep up with royalty payments to copyright owners and artists if provided with census data from all services. According to SoundExchange's Annual Reports, it appears that, since 2003, $287,635,533 has been collected from services (minus expenses, $265,132,233), while only $89,580,148 – or 34% -- has been distributed to copyright owners and performers.[11]

Further, sampling is a widely used, well-respected, and accurate means of gauging music use that even RIAA has previously agreed to accept. Although RIAA initially opposed sample reporting in the subscription services rulemaking, RIAA later agreed to accept sample reporting. *See* RIAA Comments, Docket No. RM 96-3A, at 2 (Aug. 25, 1997) (stating that "RIAA proposed a notice of use that consisted of frequency data, an error log, and a one-third subsample of the actual playlist, instead of the detailed notice of use originally proposed").

Music performing rights organizations extensively rely on samples to calculate their member distributions from over-the-air radio station royalties.[12] ASCAP, for example, has long distributed to its members royalties collected from over-the-air radio broadcasts on the basis of sample surveys. Indeed, for over forty years, the consent decree governing ASCAP's operations has permitted ASCAP to distribute royalties to its members on the basis of sample surveys rather than on census data. *United States v. ASCAP,* 1960 Trade Cas. (CCH) ¶ 69,612, at 76,468 (S.D.N.Y. 1960) (allowing ASCAP to conduct a sample survey of performances of its members' compositions for royalty distribution purposes in lieu of a census survey); Second Amended Final Judgment, *United States v. ASCAP,* Civ. Action No. 41-1395, slip op. at 18-19 (June 11, 2001) (ordering ASCAP to distribute royalties to members "primarily on the basis of performances of its members' works...as indicated by objective surveys" and allowing ASCAP to conduct sample, in lieu of census, surveys).

Likewise, BMI also distributes royalties collected from over-the-air radio performances on the basis of sample surveys. *See* http://www.bmi.com/career/entry/C1519. Moreover, while both ASCAP and BMI

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[11] SoundExchange's Annual Reports do not provide any figures regarding amounts that copyright owners and artists have lost to SoundExchange due to forfeiture.

[12] In the Eligible Nonsubscription CARP Proceeding, Mr. Gertz testified that:

> ASCAP, BMI and SESAC have developed various methods for determining the appropriate allocation of royalties collected under licenses to publicly perform their copyrighted musical works. These performing rights organizations distribute royalties based, *inter alia,* on data they have obtained from surveys and other third party sources at their own cost. For example, SESAC and ASCAP regularly purchase radio song detect data from Broadcast Data Systems to determine the appropriate allocation of royalties collected under the broadcaster blanket and per program licenses. ASCAP supplements its own extensive sample listening surveys by purchasing BDS data segments ranging from six hours to four continuous days of song detects.

Written Rebuttal Testimony of Ronald Gertz, ¶ 12, n. 9 (Oct. 4, 2001).