

health or risk to safety that may disproportionately affect children.

### Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

### Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

### Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

### Environment

We have analyzed this rule under Department of Homeland Security Management Directive 0023.1 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a

category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing a safety zone around a fireworks display. The fireworks will be launched from a land area, however some fallout may enter the water within a 210 foot radius of the launching site. This zone is designed to protect mariners from the hazards associated with fireworks displays.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T05–0189 to read as follows:

#### § 165.T05–0189 Safety Zone; Norfolk Tides Post-Game Fireworks Display, Elizabeth River, Norfolk, VA.

(a) *Regulated Area.* The following area is a safety zone: Specified waters of the Elizabeth River located within a 210 foot radius of the fireworks launching site located at approximate position 36°50'30" N/76°16'42" W (NAD 1983), directly behind Harbor Park Stadium in the vicinity of Norfolk, VA.

(b) *Definition:* For the purposes of this part, Captain of the Port Representative: means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulations:* (1) In accordance with the general regulations in 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representatives.

(2) The operator of any vessel in the immediate vicinity of this safety zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(ii) Proceed as directed by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Hampton Roads can be reached through the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia at telephone Number (757) 668–5555.

(4) The Coast Guard Representatives enforcing the safety zone can be contacted on VHF–FM marine band radio channel 13 (165.65 Mhz) and channel 16 (156.8 Mhz).

(d) *Enforcement Period:* This regulation will be in enforced on May 16, 2009 from 10 p.m. until 10:30 p.m.

Dated: March 25, 2009.

**Patrick B. Trapp,**

*Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.*

[FR Doc. E9–7884 Filed 4–7–09; 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:** Notice of inquiry.

**SUMMARY:** The Copyright Royalty Judges are seeking written comments from interested parties to questions relating to the costs of census versus sample reporting to assist the Judges in the revision of the interim regulations for filing notices of use and the delivery of records of use of sound recordings under two statutory licenses of the Copyright Act.

**DATES:** Comments are due no later than May 26, 2009. Reply comments are due no later than June 8, 2009.

**ADDRESSES:** Comments and reply comments may be sent electronically to *crb@loc.gov*. In the alternative, send an original, five copies, and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means of transmission. Comments and reply comments may not be delivered by an overnight delivery service other than the U.S. Postal Service Express

Mail. If by mail (including overnight delivery), comments and reply comments must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977. If hand delivered by a private party, comments and reply comments must be brought to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000. If delivered by commercial courier, comments and reply comments must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site located at 2nd and D Street, NE., Washington, DC, and the envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue, SE., Washington, DC 20559-6000.

**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](mailto:crb@loc.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 30, 2008, the Copyright Royalty Judges (“Judges”) published a notice of proposed rulemaking (“NPRM”) setting forth proposed revisions to the interim regulations adopted in October 2006 for filing notice of use and the delivery of sound recordings under sections 114 and 112 of the Copyright Act, title 17 of the United States Code. 73 FR 79727. Specifically, the Judges proposed eliminating obsolete provisions of the interim regulations and 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. *Id.* The more significant revision proposed by the Judges was to expand the reporting period to implement year-round census reporting. Consequently, the Judges proposed eliminating for nonsubscription services the aggregate tuning hours (“ATH”) approach previously available and requiring that such services now report actual total performances. Conversely, the Judges proposed allowing preexisting satellite digital audio radio services, new subscription services and business establishment services to achieve census reporting by using the ATH option if technological impediments existed which thwarted the measurement of actual listenership.

Finally, the Judges also solicited comments on technological developments which may warrant additional revisions to rules governing the method of reporting specific data elements and/or the delivery mechanism employed for reporting.

**Discussion of Comments Received**

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, educational radio broadcasters, a noncommercial religious broadcaster, and an operator of radio and Internet stations featuring Christian programming; (3) an Internet service that simulcasts the over-the-air and Internet-only broadcasts of primarily noncommercial terrestrial radio stations; and (4) software providers of recordkeeping solutions to radio stations and webcasters.

SoundExchange and Frederick Wilhelms III, who works for recording artists and songwriters, support the Judges’ proposal to require census reporting. They contend that the current sample reporting results in underpayments or non-payments to some copyright owners and performers. Comments of SoundExchange at 4; Comments of Wilhelms at 1. According to SoundExchange, requiring all services to provide census reporting would eliminate this shortcoming and allow SoundExchange to “distribute funds on a fully accurate basis to all copyright owners and performers.” Comments of SoundExchange at 3 (footnote omitted). SoundExchange notes that “many services already provide SoundExchange with year-round census reporting.” *Id.* at 5, and estimates that “over 75% of the royalties it receives from licensees are associated with reports of use that are made using year-round census reporting.” *Id.* at 6.

Commenters representing certain educational and commercial radio broadcasters opposed the proposed census reporting requirement. The educational radio broadcasters who filed comments stated that they currently do not pay more than the \$500 minimum fee and do not exceed the minimum ATH threshold. *See, e.g.,* Comments of WONB Radio, Comments of WESS Radio. *See also* Comments of College Broadcasters Inc. These commenters argued that compliance with such requirements would be unduly burdensome, if not impossible, for them because they lack the finances,

the staff, and the technology to do so. Consequently, they conclude that application of the proposed revisions would force many of them to cease their operations due to their inability to comply with the revised regulations. *See* Comments of WPTS, KWSC-FM, and Blaze Radio. Moreover, some commenters note that complying with the proposed provision regarding census reporting would be difficult because many educational radio broadcasters do not have automated playlists but rather their playlists are created manually by disc jockeys as they play the music. *See, e.g.,* Comments of WSOU-FM at 1-2. Consequently, they urge the Judges to exempt from more stringent reporting requirements those educational radio broadcasters currently paying only the \$500 minimum fee and not exceeding the ATH threshold and allow them to continue to report under the current interim regulations.

The National Association of Broadcasters’ (“NAB”) comment echoes the educational radio broadcasters’ contention that the proposed move to census reporting and the elimination of the ATH option would place an undue burden on broadcasters that is not required by the statute. Comments of NAB at 4. NAB argues that there has been no showing that “the sampling methodology currently utilized by SoundExchange is inefficient, or results in significant misallocation of royalty payments.” *Id.* at 3.

With respect to the elimination of the ATH option, NAB contends that this option is “critical” for some broadcasters. *Id.* NAB asserts that payment of royalties on the basis of actual performances is far different from reporting performances of any given recording on an actual performance basis. NAB states that the latter requires the matching of the identity of the song with the number of listeners while the former does not. According to NAB, to accomplish the reporting proposed by the Judges, broadcasters would have to merge internal song identification and automation software. NAB argues that often these systems are incapable of communicating with each other and are not operated by the same entities. *Id.*

Two recordkeeping and reporting vendors also opposed the proposed census reporting requirement, citing concerns about costs and the technological difficulties in calculating actual total performances accurately. Comments of RadioActivity.Fm and Tom Worster/Spintron.

**Request for Additional Information**

The current proposal is intended to fulfill the Judges’ obligations under the

Copyright Act to 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 performing sound recordings. *See, e.g.*, 17 U.S.C. 114(f)(4)(A). The Judges have determined preliminarily that such reasonable notice of use requires the type of census reporting that this proposal mandates. However, the Judges are mindful of the concerns expressed by some commenters that any reporting requirements that the Judges adopt should not unduly burden the services required to file reports of use. Therefore, the Judges seek additional information to gain a fuller understanding of the likely costs and benefits that will be derived if the proposed census reporting provision is adopted and to consider 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.

#### *Consideration of Impact on Small Entities*

Some commenters have stated that the proposed census reporting requirement would adversely impact small entities. The Judges are mindful of any impact that the current proposal may have on small entities. Therefore, the 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 help mitigate possible impact on small entities, the Judges also seek possible alternatives to the proposed census provision. In considering the proposed census reporting requirement, the Judges considered, as possible alternatives, maintaining the current reporting requirement, which requires services to provide the total number of performances of each sound recording during the relevant reporting period, which is currently limited to two periods of seven consecutive days for each calendar quarter of the year. Moreover, with respect to certain services, the proposal includes an ATH alternative to measuring performances to the extent that technological impediments hamper such a service's ability to measure actual listenership. The Judges also considered exempting from the proposed census reporting requirements certain categories of services that might lack the resources or the technological sophistication to comply with the proposed census reporting requirement. Preliminarily, the Judges believe that the alternatives

discussed above could result in an unfair allocation of royalty fees by under-compensating certain copyright owners who were not accurately represented through the current sample reporting and by over-compensating copyright owners whose works are over-represented in the sample period. Nevertheless, the Judges seek comment on the alternatives discussed above, as well as others that the Judges should consider and whether those alternatives would be preferable to the current proposal in terms of accurately representing the actual listenership information and any cost savings that might be realized should the Judges adopt an alternative rather than the current proposed census reporting provision.

In this regard, the Judges seek detailed information from SoundExchange about the way in which the proposed census reporting requirement would enhance its ability to more accurately and efficiently distribute royalties to copyright owners. In particular, the Judges seek information from SoundExchange that discusses the current methodology SoundExchange uses to allocate royalties as well as a discussion about how that methodology would change if the proposed census provision is adopted. Currently, SoundExchange is receiving some reports based on ATH rather than on the measurement of the actual total performances of a sound recording during the reporting period. How is SoundExchange currently allocating payments among the specific songs performed in ATH-based reports? What proportion of the total number of songs performed in the first quarter of 2008 was reported on an "actual total performance basis" as compared to an ATH basis? What proportion of revenues received for songs performed in the first quarter of 2008 have been distributed to date? For the same period, what proportion of the revenues distributed were revenues attributed to song performance as measured by actual total performance as compared to by ATH? What metrics does SoundExchange currently employ to measure its effectiveness in receiving and distributing performance revenues?

We seek estimates from SoundExchange (and others) detailing the cost savings or additional burdens, if any, that copyright owners might expect if the census reporting provision were adopted. As discussed above, SoundExchange has stated that "over 75% of the royalties it receives from licensees are associated with reports of use that are made using year-round census reporting." Comments of

SoundExchange at 6. The Judges seek additional information on how SoundExchange derived this estimate. For example, what percentage of reporting entities currently uses year-round census reporting? What percentage of songs for which SoundExchange is the Collective are reported based on year-round census reporting? What is the nature of those entities that do not currently use year-round census reporting? For example, what percentage of entities that do not use year-round reporting are small entities? <sup>1</sup> What percentage are not-for-profit entities?

If the Judges were to exempt certain classes of entities from the proposed year-round reporting provision, what would be appropriate criteria for such an exemption? In providing your comment, please consider which entities would be least likely to have the resources or technological sophistication to comply with the proposed census provision. For example, would a revenue-based cut-off be the most appropriate method for developing an exemption? If so, what would be an appropriate revenue level to qualify for an exemption? In the alternative, would it be more appropriate to exempt from the proposed census reporting provision those entities that qualify for the minimum \$500 per channel or per station performance royalty set forth in 37 CFR 380.3(a)(2)? If so, should the exemption be limited to noncommercial entities or should commercial entities qualify for the exemption also? Are there other criteria that would be preferable in formulating an exemption (*e.g.*, number of employees, profit versus not-for-profit organizational structure)?

Has SoundExchange considered adding any additional open-source licensed spreadsheet programs to the Microsoft Excel and Corel Quattro Pro spreadsheet programs it currently supports to facilitate the submission of Reports of Use? What are the potential benefits and difficulties associated with adding such programs? (Any costs cited should be specific dollar amounts). Which Services have examined the use of such open source software? How many would adopt it if it were available as an option? What is the specific dollar amount of any cost-savings envisioned by Services specifically attributable to the use of such open-source spreadsheet software?

As discussed above, some commenters state that complying with

<sup>1</sup> Please consider an entity as small if it is independently owned and operated and is not dominant in its field of operation.

the proposed provision regarding census reporting would be difficult because many educational radio broadcasters do not have automated playlists but rather their playlists are created manually by disc jockeys as they play the music. *See, e.g.,* Comments of WSOU-FM at 1–2. The Judges seek comment on the percentage of broadcasters that do not use automated playlists. Assuming playlists are completely automated, is the cost of preparing a Report of Use likely to rise for a Service which moves from the current 2-weeks per quarter sampling period to full census? If so, by how much will such costs rise? What specifically accounts for any such increase?

For those entities that do not use automated playlists, what means do they use for complying with current reporting requirements? Is all programming on college and other educational stations done manually? Do such stations currently have automated playlist capabilities in place? In other words, does manual programming occur simply as a matter of creative choice? Where a college radio station does not currently have an automated playlist capability, what is the cost of obtaining such a capability? What technologies, if any, are currently employed in complying with the current requirements? Which companies offer them and at what cost? What changes, if any, would be required to comply with the proposed census reporting requirement? What are the likely costs that would be required to move from the current reporting methodology to one that would be required under the proposal? Is technology currently available that would permit entities that do not use automated playlists to comply with the proposed census provision? If so, what companies provide such capabilities and at what cost? If such technology is not currently available, what would be the costs of developing it?

Dated: April 3, 2009.

**James Scott Sledge,**

*Chief, U.S. Copyright Royalty Judge.*

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**BILLING CODE 1410–72–P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 26

[Docket No. OST–2009]

RIN 2105–AD75

#### Disadvantaged Business Enterprise Program; Potential Program Improvements

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Advance notice of proposed rulemaking (ANPRM).

**SUMMARY:** This advance notice of proposed rulemaking (ANPRM) provides interested parties with the opportunity to comment on five matters of interest to participants in the Department of Transportation’s disadvantaged business enterprise (DBE) program. The first concerns counting of items obtained by a DBE subcontractor from its prime contractor. The second concerns ways of encouraging “unbundling” of contracts to facilitate participation by small businesses, including DBEs. The third is a request for comments on potential improvements to the DBE application form, and the fourth asks for suggestions related to program oversight. The fifth concerns potential regulatory action to facilitate certification for firms seeking to work as DBEs in more than one state. The sixth concerns additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts.

**DATES:** Comments on this proposed rule must be received by July 7, 2009.

**ADDRESSES:** You may submit comments (identified by the agency name and DOT Docket ID Number OST–2009) by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

*Instructions:* You must include the agency name (Office of the Secretary, DOT) and Docket number (OST–2009)

for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to <http://www.regulations.gov> including any personal information provided and will be available to internet users. You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* For internet access to the docket to read background documents and comments received, go to <http://www.regulations.gov>. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, Room W94–302, 202–366–9310, [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov).

**SUPPLEMENTARY INFORMATION:** The Department is holding a series of stakeholder meetings to bring together prime contractors, DBEs, and state and local government representatives to discuss ways of improving administration of the DBE program. As a result of these discussions, the Department has issued, and will continue to consider, guidance Questions and Answers to help participants better understand and carry out their responsibilities. Addressing other issues raised in the discussions, however, may require changes to the DBE rules themselves (49 CFR Parts 23 and 26). This ANPRM concerns five such issues: (1) Counting of DBE credit for items obtained by DBE subcontractors from other sources, particularly the prime contractor for whom they are working on a given contract; (2) ways of encouraging recipients to break up contracts into smaller pieces that can more easily be performed by small businesses like DBEs, known as “unbundling;” (3) potential ways of improving the DBE application and personal net worth (PNW) forms; (4) potential ways of improving program oversight, and (5) potential ways of reducing burdens on firms seeking certification as DBEs in more than one state.