

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 023-01 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 that 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 the establishment of a temporary safety zone to protect the public from dangers associated with fireworks display. 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 amends 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, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

- 2. A new temporary zone § 165.T11-431 to read as follows:

#### § 165.T11-431; Safety zone; San Diego POPS Fireworks, San Diego, CA.

(a) *Location.* The limits of the safety zone will be a 400-foot radius around the anchored firing barge in approximate position 32°42.13' N, 117°10.01' W.

(b) *Enforcement Period.* This section will be enforced from 9 p.m. to 10 p.m. on the following dates: July 1-3, July 8-9, July 15-16, July 22-23, July 29-30, August 5-6, August 12-13, August 19-20, August 26-27, and September 2-4, 2011.

(c) *Definitions.* The following definition applies to this section: *designated representative* means any

commissioned, warrant, or petty officer of the Coast Guard on board a Coast Guard, Coast Guard Auxiliary, or local, state, or federal law enforcement vessel who has been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative on scene.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Sector San Diego Command Center. The Command Center may be contacted on VHF-FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(4) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: June 27, 2011.

T.H. Farris,

*Captain, U.S. Coast Guard, Captain of the Port San Diego.*

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#### LIBRARY OF CONGRESS

#### Copyright Royalty Board

#### 37 CFR Parts 370 and 382

[Docket No. RM 2011-5]

#### Notice and Recordkeeping for Use of Sound Recordings Under Statutory License

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Final rule.

**SUMMARY:** The Copyright Royalty Judges are amending their regulations to authorize the use of proxy reports of use to permit distribution of royalties collected for the period April 1, 2004, through December 31, 2009, for the public performance of sound recordings by means of digital audio transmissions pursuant to statutory license. Proxy reports of use will be used for those services for which no reports of use were submitted or for which the reports of use were unusable.

**DATES:** *Effective Date:* August 31, 2011.

#### 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

Sections 112 and 114 of the Copyright Act, title 17 of the United States Code, are the statutory licenses governing the public performance of sound recordings by certain types of eligible services<sup>1</sup> by means of a digital audio transmission. 17 U.S.C. 112(e), 114. Services operating under these licenses are required to, among other things, pay royalty fees and report to copyright owners of sound recordings on the use of their works. *Id.* The Copyright Act directs the Copyright Royalty Judges ("Judges") to determine the royalty rates to be paid, 17 U.S.C. 114(f)(1)(A), (f)(2)(A) and 17 U.S.C. 112(e)(3), and to establish regulations to give copyright owners reasonable notice of the use of their works and create and maintain records of use for delivery to copyright owners. 17 U.S.C. 114(f)(4)(A) and 17 U.S.C. 112(e)(4). The purpose of the notice and recordkeeping requirement is to ensure that the royalties collected under the statutory licenses are distributed by a central source—a Collective—or other agents designated to receive royalties from the Collective to the correct recipients. The Judges promulgated final notice and recordkeeping regulations on October 13, 2009.<sup>2</sup> See 74 FR 52418.

On March 24, 2011, SoundExchange, Inc., the entity designated by the Judges as the Collective, petitioned the Judges to commence a rulemaking proceeding to consider adopting regulations to authorize SoundExchange "to use proxy reporting data to distribute to copyright owners and performers certain sound recording royalties for periods before 2010 that are otherwise undistributable due to licensees' failure to provide reports of use" or their provision of "reports of use that are so deficient as to be unusable." Petition of SoundExchange, Inc., for a Rulemaking to Authorize Use of a Proxy to Distribute Certain Pre-2010 Sound Recordings at 1 and 2 (March 24, 2011). The proxy proposed by SoundExchange uses "available data for services of the same license type, for the same year." *Id.* at 9. SoundExchange stated that the proxy would be used to distribute \$28 million in royalties, which represents 4.5% of all the royalties collected for the relevant timeframe—April 1, 2004, through December 31, 2009. *Id.* at 2. In

<sup>1</sup> The types of eligible services consist of subscription, nonsubscription, satellite digital audio radio services, and business establishment services.

<sup>2</sup> Until that time, interim regulations were in effect. See 71 FR 59010 (October 6, 2006).

support of its request, SoundExchange noted that a proxy had been utilized once before when the lack of reports of use rendered the reasonable distribution of royalties difficult if not impossible. *Id.* at 3. In that instance, reporting data did not exist for the period from when the statutory licenses first became available for services other than preexisting subscription services (October 1998) to the promulgation of interim notice and recordkeeping regulations (March 2004).<sup>3</sup> See *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, Docket No. RM 2002–1G, Final rule, 69 FR 58241. There the proxy data was used to distribute 100% of the royalties collected for that time period. *Id.*

On April 19, 2011, the Judges published a notice of proposed rulemaking (“NPRM”) seeking comment on SoundExchange’s proposal. 76 FR 21833. In addition to soliciting comments on the proposal, the Judges invited comment on, among other things, the reasonableness, fairness and appropriateness of the use of the proposed proxy and sought comment on possible alternatives to the proposed proxy. *Id.* at 21834–35 (April 19, 2011). Comments were due May 19, 2011.

The Judges received a single comment from SoundExchange in response to the NPRM. SoundExchange noted that since the filing of its petition, additional reports of use had been provided allowing a further distribution of royalties, thereby reducing the amount of undistributable royalties to \$19.4 million, or about 3% of the total royalties collected for the April 1, 2004, to December 31, 2009, period. Comments of SoundExchange, Inc. at 1. In response to the questions posed in the NPRM, SoundExchange reiterated that the proposed proxy would be applied to a much smaller percentage of royalties than the one the Copyright Office approved for the October 1998 to March 2004 period. See e.g., *id.* at 4, 5. SoundExchange also recounted its efforts in arriving at the proposed proxy and noted that it “has not devised any alternative that would be demonstrably more fair.” *Id.* at 5.

Given that the proxy will be applied to a small percentage of royalties for the relevant time period and that no viable alternatives have been provided, the Judges are adopting as final the proposed regulations as set forth in the

NPRM allowing for the use of the proxy proposed by SoundExchange for the distribution of royalties for the period of April 1, 2004, through December 31, 2009. Adoption of the proposed regulations, especially in the absence of opposition to the proposed proxy, will promote the expeditious distribution of the affected royalties.

The Judges also are adopting as final the technical corrections to part 382 proposed by SoundExchange as set forth in the NPRM reflecting the renumbering of certain sections in part 370 resulting from the Judges’ adoption of final notice and recordkeeping regulations in October 2009.

#### List of Subjects

##### 37 CFR Part 370

Copyright, Sound recordings.

##### 37 CFR Part 382

Copyright, Digital audio transmissions, Performance right, Sound recordings.

#### Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 37 CFR parts 370 and 382 as follows:

#### PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

- 1. The authority citation for part 370 continues to read as follows:

**Authority:** 17 U.S.C. 112(e)(4), 114(f)(4)(A).

- 2. Section 370.3 is amended by adding new paragraph (i) to read as follows:

##### § 370.3 Reports of use of sound recordings under statutory license for preexisting subscription services.

\* \* \* \* \*

(i) In any case in which a preexisting subscription service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2010, reports of use for the corresponding calendar year filed by other preexisting subscription services shall serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

- 3. Section 370.4 is amended by adding new paragraph (f) to read as follows:

##### § 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

\* \* \* \* \*

(f) In any case in which a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service, or business establishment service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2010, reports of use for the corresponding calendar year filed by other services of the same type shall serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

#### PART 382—RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

- 4. The authority citation of part 382 continues to read as follows:

**Authority:** 17 U.S.C. 112(e), 114, and 801(b)(1).

##### § 382.3 [Amended]

- 5. Section 382.3(c)(1) is amended by removing “§ 370.2” and adding “§ 370.3” in its place.

##### § 382.13 [Amended]

- 6. Section 382.13(f)(1) is amended by removing “§ 370.3” and adding “§ 370.4” in its place.

Dated: July 14, 2011.

**James Scott Sledge,**

*Chief U.S. Copyright Royalty Judge.*

Approved by:

**James H. Billington,**

*Librarian of Congress.*

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<sup>3</sup> Prior to May 31, 2005, the statutory licenses were administered by the Copyright Office under the Copyright Arbitration Royalty Panel (“CARP”) system. The Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, 118 Stat. 234, replaced the CARP system with the Copyright Royalty Judges.