

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.**

<i>In re</i>)	
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)	
DETERMINATION OF ROYALTY)	DOCKET NO. 14-CRB-0001-WR
RATES AND TERMS FOR)	(2016-2020)
EPHEMERAL RECORDING AND)	
DIGITAL PERFORMANCE OF SOUND)	
RECORDINGS (<i>WEB IV</i>))	
)	

PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange, Inc. (“SoundExchange”) proposes the rates and terms set forth herein for eligible nonsubscription transmissions and transmissions made by a new subscription service other than a service as defined in 37 C.F.R. § 383.2(h) (collectively, “Webcast Transmissions”), together with the making of ephemeral recordings necessary to facilitate Webcast Transmissions, under the statutory licenses set forth in 17 U.S.C. §§ 112(e) and 114 during the period January 1, 2016 through December 31, 2020.

Pursuant to 37 C.F.R. 351.4(b)(3), SoundExchange reserves the right to revise its proposed rates and terms at any time during the proceeding up to, and including, the filing of its proposed findings of fact and conclusions of law.

I. PROPOSED SETTLEMENT FOR NONCOMMERCIAL EDUCATIONAL WEBCASTERS

On the same day that SoundExchange files these proposed rates and terms with the Copyright Royalty Judges, SoundExchange and College Broadcasters, Inc. (“CBI”) are submitting a Joint Motion to Adopt Partial Settlement requesting that the Copyright Royalty Judges adopt certain rates and terms for eligible nonsubscription transmissions made by

noncommercial educational webcasters over the internet, as more specifically provided therein. SoundExchange respectfully requests prompt adoption by the Copyright Royalty Judges of the proposed regulations appended to the Joint Motion to Adopt Partial Settlement as the statutory rates and terms for the activities addressed therein.

II. OTHER ROYALTY RATES

For all Webcast Transmissions and related ephemeral recordings not covered by its settlement with CBI, SoundExchange requests royalty rates as set forth below.

A. Commercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114 (f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2 of the attached proposed regulations) that are commercial webcasters (defined in the same) pay an annual, nonrefundable minimum fee of \$500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee) subject to an annual cap of \$50,000.00 for a licensee with 100 or more channels or stations. For each licensee, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, a licensee would receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year.

2. Royalty Rates

For Webcast Transmissions and related ephemeral recordings by commercial webcasters as defined in 37 C.F.R. § 380.2, SoundExchange requests commercial webcasters pay royalties equal to the greater of the following (on an annual basis, as provided below):

- (a) 55% of Attributable Revenue from activities in the United States (as defined in 17 U.S.C. § 101).
- (b) A usage-based royalty computed on a per-performances basis, as follows:

YEAR	PER PERFORMANCE
2016	\$0.0025
2017	\$0.0026
2018	\$0.0027
2019	\$0.0028
2020	\$0.0029

True-Up For Greater Of Royalties: In making monthly payments, a commercial webcaster subject to the above greater-of royalties shall, at the time a payment is due, calculate its liability for the year through the end of the applicable month under all relevant subparts of the royalty calculation, and pay the applicable royalty fee for the year through the end of the applicable month, less any amounts previously paid for such year.

Directly-Licensed and Not Licensed Adjustment. Under this proposal, licensees would not be required to pay for royalties attributable to performances that are pursuant to a direct license or that otherwise do not require a license. With respect to the “Attributable Revenue” calculation, the royalty obligations of a licensee would be adjusted based on the percentage of the performances that are made pursuant to the statutory license under 17 U.S.C. § 114, as opposed to performances pursuant to a direct license with the copyright owner or performances that otherwise do not require a license under 17 U.S.C. § 114. The per-performance rate only applies to performances of sound recordings made pursuant to 17 U.S.C. § 114.

B. Noncommercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114 (f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2 of the proposed regulations) that are noncommercial webcasters (as defined in the same) pay an annual, nonrefundable minimum fee of \$500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed settlement with CBI). For each licensee, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, a licensee would receive a credit in the amount of the minimum fee against any royalty payable for the same calendar year.

2. Royalty Rates

For Webcast Transmissions and related ephemeral recordings by noncommercial webcasters as defined in 37 C.F.R. § 380.2, SoundExchange requests that for all Webcast Transmissions totaling not more than 159,140 aggregate tuning hours in a month, a noncommercial webcaster pay an annual per station or per channel performance royalty of \$500 in 2016 through 2020. Also, SoundExchange requests that if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 aggregate tuning hours (as defined in 37 C.F.R. § 380.2) on any individual channel or station, the noncommercial webcaster shall pay per-performance royalty fees for the transmissions it makes on that channel or station in excess of 159,140 aggregated tuning hours at the following rates:

YEAR	PER PERFORMANCE
2016	\$0.0025
2017	\$0.0026
2018	\$0.0027
2019	\$0.0028
2020	\$0.0029

C. Ephemeral Recordings

SoundExchange requests that the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral recordings used by the licensee solely to facilitate transmissions for which it pays royalties as provided above shall be included within, and constitute 5% of, such royalty payments.

III. TERMS

SoundExchange requests that the terms currently set forth in 37 C.F.R. Part 380, Subpart A be continued, subject to the changes described herein.

A. Payment Term Reduced to 30 Days

SoundExchange requests that the current 45-day “monthly payment” requirement reflected in 37 C.F.R. § 380.4(c) be reduced to a 30-day requirement. As described in the testimony of Dr. Lys and Mr. Bender, this change is supported by market evidence and will expedite the royalty distribution process for artists and copyright owners, potentially allowing the distribution of royalties a full month earlier than at present. Notably, if the Judges grant this request, the similar requirements for statements of account and reports of use should also be reduced to 30 days.

B. “Qualified Auditor” Definition

SoundExchange requests a revision of the definition of a “Qualified Auditor” in 37 C.F.R. § 380.2 to permit the use of an auditor who has experience that would be useful in the audit of music streaming services, regardless of whether the auditor is a Certified Public Accountant or not. Notably, SoundExchange’s requested change would not deny the use of a Certified Public Account by a party who elected for the same. Rather, the change would expand the available options of auditors to include those who have demonstrated recent experience in an area that often requires specialized information, as reflected in the testimony of Mr. Wilcox.

C. Acceptable Verification Procedure

SoundExchange requests that the Judges eliminate the acceptable verification procedure requirement currently reflected in 37 C.F.R. § 380.6(e). The current requirement does not distinguish between audits concerning purely financial metrics and audits that analyze the usage and performance metrics that are important in the context of Section 114 licensees. As noted in the testimony of Mr. Wilcox, royalty or performance-based audits of music streaming services are different in nature than financial audits, including financial audits of those same music streaming services.

IV. PROPOSED REGULATIONS

SoundExchange has attached proposed regulations implementing the foregoing requested rates and terms, including certain technical and conforming changes. The proposed regulations are marked to show changes from the regulations currently in 37 C.F.R. Part 380, Subpart A.

SoundExchange is not proposing any separate rates and terms for commercial broadcasters, as distinct from other licensees, and therefore requests that 37 C.F.R. Part 380, Subpart B be stricken in its entirety. SoundExchange proposes that 37 C.F.R. Part 380, Subpart C be continued, but modified as provided in the CBI settlement.

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ATTACHMENT

PROPOSED REGULATIONS

SoundExchange proposes that the provisions of 37 C.F.R. Part 380 Subpart A continue in effect except as modified below. (~~**Bold strikethrough**~~ indicates language to be deleted and **bold underline** indicates language to be added.).

Subpart A—Commercial Webcasters and Noncommercial Webcasters

§ 380.1 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees as set forth in this subpart in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, ~~2011~~2016, through December 31, ~~2015~~2020.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

Broadcaster is a type of Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the ~~2011-2015~~2016-2020 license period, the Collective is SoundExchange, Inc.

Commercial Webcaster is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114, and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter, or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions, but that is not—

~~(1) A Broadcaster as defined in § 380.11; or~~

~~(2) A~~ **a** Noncommercial Educational Webcaster as defined in § 380.21.

Noncommercial Webcaster is a Licensee that makes eligible digital audio transmissions and

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.*, the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.*, a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant, **or a person, who by virtue of education or experience, is appropriately qualified to perform an audit to verify royalty payments related to performances of sound recordings.**

Side Channel is a channel on the Web site of a Broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the Broadcaster.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) are as follows:

(1) *Commercial Webcasters:* For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Commercial Webcaster will pay a royalty of **the greater of the following, on an annual basis: of: ~~\$0.0019 per performance for 2011; \$0.0021 per performance for 2012; \$0.0021 per performance for 2013; \$0.0023 per performance for 2014; and \$0.0023 per performance for 2015.~~**

(i) 55% of Attributable Revenue from activities in the United States (as defined in 17 U.S.C. § 101), subject to the adjustment set forth in § 380.3(d)(2) of this chapter;

(ii) \$0.0025 per performance for 2016; \$0.0026 per performance for 2017; \$0.0027 per performance for 2018; \$0.0028 per performance for 2019; and \$0.0029 per performance for 2020.

(2) *Noncommercial Webcasters*: (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of \$500 ~~in 2011, 2012, 2013, 2014, and 2015.~~

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay a royalty of: ~~\$0.0019 per performance for 2011; \$0.0021 per performance for 2012; \$0.0021 per performance for 2013; \$0.0023 per performance for 2014; and \$0.0023 per performance for 2015~~ \$0.0025 per performance for 2016; \$0.0026 per performance for 2017; \$0.0027 per performance for 2018; \$0.0028 per performance for 2019; and \$0.0029 per performance for 2020.

(b) *Minimum fee*—(1) *Commercial Webcasters*. Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year ~~of the period 2011–2015~~ during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial Webcasters, provided that a Commercial Webcaster shall not be required to pay more than \$50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). For each such Commercial Webcaster, the annual minimum fee described in this paragraph (b)(1) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(2) *Noncommercial Webcasters*. Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year ~~of the period 2011–2015~~ during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Noncommercial Webcasters. For each such Noncommercial Webcaster, the annual minimum fee described in this paragraph (b)(2) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(c) *Ephemeral recordings*. The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(d) The Percentage-of-Revenue Fee

(1) Definitions

(i) Service is a service owned, operated, or controlled by a Licensee, that makes make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter;

(ii) Gross Revenue means all amounts paid, payable, credited, or creditable to Licensee, received or receivable by or on behalf of Licensee, or recognized by Licensee as revenue under United States Generally Accepted Accounting Principles (U.S. GAAP) or Licensee's past practices, from all sources in connection with the provision of a Service in the United States (as defined in 17 U.S.C. § 101), not reduced by bad debt, and including, without limitation, any and all:

(A) Revenue from user fees in connection with the Service, including, without limitation, any access charges, per-stream charges, subscription fees, or other consideration payable to Licensee by or on behalf of users of the Service in connection with the Service;

(B) Revenue from sales of advertising in connection with the Service, including, without limitation, any revenue or fees from banner advertisements, audio advertisements, video advertisements, interstitial advertisements, pre-roll or post-roll advertisements, sponsorships, promotions, referrals, click-through advertisements, or product placements in connection with the Service;

(C) Revenue from sales of products and services offered as part of or through the Service, including revenue from products and services that are Bundled with the Service;

(D) Revenue from any software or other product associated with the Service, including, without limitation, placement fees for such software or other product, revenue from sales of such software or other product, or revenue sharing with the provider of such software or other product.

(E) Fair market value of any non-cash consideration, including, without limitation, any barter arrangement with any customers, vendors or business partners; and

(F) Revenue generated by the use or exploitation of data gathered or generated from the Service.

(iii) Adjusted Revenue means Gross Revenue reduced by the following adjustments:

(A) Solely with respect to revenue from sales of products and services offered as part of or through the Service, the wholesale price of the products and services, returns of the products and services, and shipping, credit card, and other service fees related to such products and services, all as actually paid by Licensee to unrelated third persons;

(B) Sales of sound recording products such as CDs or authorized downloads; and

(C) Sales, excise, or use taxes imposed by operation of law and properly paid or scheduled to be paid to the applicable tax authorities.

(iv) Attributable Revenue means Adjusted Revenue reduced by Non-Attributable Revenue.

(v) Non-Attributable Revenue means:

(A) Where the Service is Bundled with other products or services that do not involve the Service, Non-Attributable Revenue shall mean the portion of Adjusted Revenue attributable to such other products or services that do not involve the Service. Such revenues shall be calculated through a Fair Method of Allocation.

(B) For Licensees that offer terrestrial radio broadcasts, Non-Attributable Revenue shall include the portion of Adjusted Revenue from sales of advertising, sponsorships, promotions, product placements, referrals, and the like that is attributable to terrestrial radio broadcasts. Such revenue shall be calculated through a Fair Method of Allocation.

(vi) Bundled. A product or service is Bundled with another product or service where, by contractual terms, technical design, or other mechanism, one product or service is offered or provided to a person only on the condition that the person purchase, receive, accept, or has access to the other product or service.

(vii) Fair Method of Allocation means a reasonable method, employed in good faith and in accordance with U.S. GAAP, to allocate revenues:

(A) to the products or services that are Bundled with the Service but that do not involve the Service; or

(B) to terrestrial radio broadcasts.

(2) Royalty Adjustment for Directly-Licensed and Non-Licensed Recordings.

The royalty calculated under § 380.3(a)(1)(i) of this chapter shall be adjusted to account for the relative percentage of Performances (as defined in § 380.2) made by a Service. To do so, the total of 55% of Attributable Revenue will be multiplied by the following fraction: with respect to digital audio transmissions, the total Performances on a Service divided by the sum of the Performances on the Service, the performances of sound recordings on the Service that do not require a license (i.e. sound recordings that are not copyrighted under federal law), and the performances of sound recordings on the Service for which the Licensee has previously obtained a license from the Copyright Owner of such recording. For example, if a Service makes 85 Performances, 5 performances that do not require a license, and 10 performances for which the Licensee obtained a license directly from the Copyright Owner, then the royalty calculated under § 380.3(a)(1)(i) would be: 55% x Attributable Revenue x [85/100].

(3) Certification. Licensee's Chief Financial Officer or, if Licensee does not have a Chief Financial Officer, a person authorized to sign statements of account for the Licensee pursuant to § 380.4(f)(3), shall submit a signed certification on an annual basis attesting that Licensee's royalty statements for the prior year represent a true and accurate determination of the royalties due and that any Fair Method of Allocation employed by Licensee was applied in good faith and in accordance with U.S. GAAP.

(4) Records

(i) Licensee shall maintain and keep complete and accurate books and records concerning the Service and all performances and any other transactions, Gross Revenues, Adjusted Revenues, Attributable Revenues, and Non-Attributable Revenues contemplated herein for the prior 3 calendar years.

(ii) To the extent Licensee claims any Non-Attributable Revenues, it shall, for 3 years, maintain sufficient calculations, studies, third party valuation opinions, or internal assumptions used to establish the value of the Non-Attributable Revenues.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* **(1)** A Licensee shall make any payments due under § 380.3 on a monthly basis on or before the **4530**th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(2) In making monthly payments pursuant to § 380.3(a)(1), a Commercial Webcaster will, at the time a payment is due, calculate its liability for the year through the end of the applicable month and pay the applicable royalty fee for the year through the end of the applicable month, less any amounts previously paid for such year.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the **4530**th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the related statement of account are received by the Collective.

(f) *Statements of account.* Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The ~~handwritten~~ signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 380.8.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.5 Confidential Information.

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee’s statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care,

but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

~~(e) **Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.**~~

~~(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.~~

~~(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.~~

§ 380.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that

nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

~~(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.~~

(ef) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(fg) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs

deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.