

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In the Matter of

**DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)**

Docket No. 16–CRB–0003–PR (2018–2022)

APPLE INC. PROPOSED RATES AND TERMS

Pursuant to 37 CFR § 351.4(b)(3), Apple Inc. (“Apple”) submits its requested rate for the making and distribution of phonorecords under the compulsory license provided by 17 U.S.C. § 115 for the period January 1, 2018, through December 31, 2022. Apple reserves the right to revise its rate proposal at any time during the proceeding, up to, and including, the filing of the proposed findings of fact and conclusions of law.

The following is a summary of Apple’s rate proposal. In addition, a proposed draft of the rates and regulations Apple is proposing is attached as Appendix A.

I. SUBPART A–PHYSICAL PHONORECORDS DELIVERIES, PERMANENT DIGITAL DOWNLOADS AND RINGTONES, 37 C.F.R. §§ 385.1–385.4

Apple proposes no changes to 37 C.F.R. §§ 385.1–385.4.

II. SUBPART B–INTERACTIVE STREAMING AND LIMITED DOWNLOADS, 37 C.F.R. §§ 385.10–385.17

Apple proposes the following changes to 37 C.F.R. §§ 385.10–385.17.

First, Apple proposes that the terms in 37 C.F.R. §§ 385.12–385.14 be deleted and replaced with a single section title “Royalty rates” with the following terms:

Licensees that make or authorize licensed activity pursuant to 17 U.S.C. 115 shall pay a mechanical royalty rate of \$0.00091 per interactive stream or play of a limited download (the “all-in” rate for the use of the musical work in connection with the licensed activity), minus the per stream royalty for the public performance of the musical work that the licensee owes for the licensed activity pursuant to a public performance license for the musical work, for all non-fraudulent interactive streams or limited download plays that are 30 seconds or longer. Fraudulent interactive streams or limited download plays and interactive streams or limited download plays less than 30 seconds shall have a mechanical royalty rate of zero.

Second, Apple proposes that all definitions in 37 C.F.R. § 385.11 other than the definitions of “interactive stream,” “licensee,” “licensed activity,” “limited download,” “stream,” “streaming cache reproduction,” and “subscription service” be deleted as, under Apple’s proposal, no other defined terms are referenced. In addition, Apple proposes adding the following two defined terms to 37 C.F.R. § 385.11:

Fraudulent stream means a stream that has not been initiated or requested by a human user. If a single user plays the same song more than 50 straight times, all plays after play 50 shall be deemed fraudulent.

Non-fraudulent streams means all streams other than fraudulent streams.

Apple proposes no changes to 37 C.F.R. §§ 385.10, 385.15–385.17.

III. SUBPART C–LIMITED OFFERINGS, MIXED SERVICE BUNDLES, MUSIC BUNDLES, PAID LOCKER SERVICES AND PURCHASED CONTENT LOCKER SERVICES, 37 C.F.R. §§ 385.20–385.26

Apple proposes the following changes to 37 C.F.R. §§ 385.20–385.26.

First, Apple proposes changing the heading for this section to “Subpart C–Paid Locker Services and Purchased Content Locker Services, 37 C.F.R. §§ 385.20–385.26.”

Second, Apple proposes that the terms in 37 C.F.R. §§ 385.22–385.24 be deleted and replaced with a single section title “Royalty rates” with the following terms:

Licensees that make or authorize licensed subpart C activity, as defined in §385.21, pursuant to 17 U.S.C. 115 shall pay a monthly mechanical royalty rate of \$0.17 per subscriber (the “all-in” rate for the use of the musical work in connection with the licensed subpart C activity), minus the per subscriber royalty for the public performance of the musical work that the licensee owes for the licensed subpart C activity pursuant to a public performance license for the musical work, for paid locker services and a royalty rate of zero for purchased content locker services.

Third, Apple proposes that 37 C.F.R. § 385.21, “Definitions,” be revised as follows:

1. All definitions other than the definitions of “affiliate,” “interactive stream,” “licensee,” “licensed subpart C activity,” “limited download,” “locker service,” “paid locker service,” “permanent digital download,” “purchased content locker service,” “restricted download,” “ringtone,” “service provider,” and “subscription service” be deleted as, under Apple’s proposal, no other defined terms are referenced.
2. The definition of “licensed subpart C activity” be revised as follows to refer only to locker services:

Licensed subpart C activity means, referring to subpart C of this part,

~~(1) In the case of a limited offering, the applicable interactive streams or limited downloads;~~

~~(2) in the case of a locker service, the applicable interactive streams, permanent digital downloads, restricted downloads or ringtones~~

~~(3) In the case of a music bundle, the applicable reproduction or distribution of a physical phonorecord, permanent digital download or ringtone; and~~

~~(4) In the case of a mixed service bundle, the applicable—~~

~~(i) Permanent digital downloads;~~

(ii) ~~Ringtones;~~

(iii) ~~To the extent a limited offering is included in a mixed service bundle, interactive streams or limited downloads; or~~

(iv) ~~To the extent a locker service is included in a mixed service bundle, interactive streams, permanent digital downloads, restricted downloads or ringtones.~~

3. The definition of “service provider” be revised as follows to reflect that fact that “service revenue” is irrelevant under Apple’s proposal:

Service provider shall have the meaning given in §385.11, except that for purposes of this subpart references in the definition of “Service provider” in §385.11 to licensed activity ~~and service revenue~~ shall mean licensed subpart C activity, as defined in this section, ~~and subpart C service revenue, as defined in this section,~~ respectively.

Fourth, Apple proposes revising 37 CFR § 385.20(a)–(b) as shown below to eliminate references to limited offerings, mixed service bundles, and music bundles.

(a) *Scope*. This subpart establishes rates and terms of royalty payments for certain reproductions or distributions of musical works through ~~limited offerings, mixed service bundles, music bundles,~~ paid locker services and purchased content locker services provided in accordance with the provisions of 17 U.S.C. 115. For the avoidance of doubt, to the extent that product configurations for which rates are specified in subpart A of this part are included within licensed subpart C activity, as defined in §385.21, the rates specified in subpart A of this part shall not apply, ~~except that in the case of a music bundle the compulsory licensee may elect to pay royalties for the music bundle pursuant to subpart C of this part or for the components of the bundle pursuant to subpart A of this part.~~

(b) *Legal compliance*. A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes reproduction or distribution of musical works in ~~limited offerings, mixed service bundles, music bundles,~~ paid locker services or purchased content locker services shall comply with the requirements of that section, the rates and terms of this

subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

Apple proposed no other changes to 37 C.F.R. §§ 385.20–385.26 .

Dated: November 1, 2016

Respectfully submitted,



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Appendix A

Subpart A—Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones

§385.1 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of digital phonorecord deliveries, in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* Licensees relying upon the compulsory license set forth in 17 U.S.C. 115 shall comply with the requirements of that section, 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 use of musical works within the scope of such agreements.

§385.2 Definitions.

For purposes of this subpart, the following definitions apply:

Copyright owners are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license under 17 U.S.C. 115.

Digital phonorecord delivery means a digital phonorecord delivery as defined in 17 U.S.C. 115(d).

Licensee is a person or entity that has obtained a compulsory license under 17 U.S.C. 115, and the implementing regulations, to make and distribute phonorecords of a nondramatic musical work, including by means of a digital phonorecord delivery.

Permanent digital download means a digital phonorecord delivery that is distributed in the form of a download that may be retained and played on a permanent basis.

Ringtone means a phonorecord of a partial musical work distributed as a digital phonorecord delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

§385.3 Royalty rates for making and distributing phonorecords.

(a) *Physical phonorecord deliveries and permanent digital downloads.* For every physical phonorecord and permanent digital download made and distributed, the royalty rate payable for each work embodied in such phonorecord shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones.* For every ringtone made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

§385.4 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in §201.19(e)(7)(i) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.

Subpart B—Interactive Streaming and Limited Downloads

§385.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.

§385.11 Definitions.

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

Fraudulent stream means a stream that has not been initiated or requested by a human user. If a single user plays the same song more than 50 straight times, all plays after play 50 shall be deemed fraudulent.

Interactive stream means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Licensee means a person that has obtained a compulsory license under 17 U.S.C. 115 and its implementing regulations.

Licensed activity means interactive streams or limited downloads of musical works, as applicable.

Limited download means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the service provider, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the service provider, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

Non-fraudulent streams means all streams other than fraudulent streams.

Service provider means that entity (which may or may not be the licensee) that, with respect to the licensed activity,

- (1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users;
- (2) Is able to report fully on service revenue from the provision of the licensed activity to the public, and to the extent applicable, verify service revenue through an audit; and
- (3) Is able to report fully on usage of musical works by the service, or procure such reporting, and to the extent applicable, verify usage through an audit.

Stream means the digital transmission of a sound recording of a musical work to an end user—

- (1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction;
- (2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and
- (3) That is also subject to licensing as a public performance of the musical work.

Streaming cache reproduction means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Subscription service means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in §385.14(b).

§385.12 Royalty rates.

Licensees that make or authorize licensed activity pursuant to 17 U.S.C. 115 shall pay a mechanical royalty rate of \$0.00091 per interactive stream or play of a limited download (the

“all-in” rate for the use of the musical work in connection with the licensed activity), minus the per stream royalty for the public performance of the musical work that the licensee owes for the licensed activity pursuant to a public performance license for the musical work, for all non-fraudulent interactive streams or limited download plays that are 30 seconds or longer. Fraudulent interactive streams or limited download plays and interactive streams or limited download plays less than 30 seconds shall have a mechanical royalty rate of zero.

§385.13 [Reserved]

§385.14 [Reserved]

§385.15 [Reserved]

§385.16 Reproduction and distribution rights covered.

A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, solely for the purpose of providing such licensed activity (and no other purpose).

§385.17 Effect of rates.

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.

Subpart C—Paid Locker Services and Purchased Content Locker Services

§385.20 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for certain reproductions or distributions of musical works through paid locker services and purchased content locker services provided in accordance with the provisions of 17 U.S.C. 115. For the avoidance of doubt, to the extent that product configurations for which rates are specified in subpart A of this part are included within licensed subpart C activity, as defined in §385.21, the rates specified in subpart A of this part shall not apply.

(b) *Legal compliance.* A licensee that, pursuant to 17 U.S.C. 115, makes or authorizes reproduction or distribution of musical works in paid locker services or purchased content locker services shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations, with respect to such musical works and uses licensed pursuant to 17 U.S.C. 115.

(c) *Interpretation.* This subpart is intended only to set rates and terms for situations in which the exclusive rights of a copyright owner are implicated and a compulsory license pursuant to 17

U.S.C. 115 is obtained. Neither this subpart nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which any of the exclusive rights of a copyright owner are implicated or a license, including a compulsory license pursuant to 17 U.S.C. 115, must be obtained.

§385.21 Definitions.

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

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a record company shall not include a copyright owner of musical works to the extent it is engaging in business as to musical works.

Interactive stream shall have the meaning given in §385.11.

Licensee shall have the meaning given in §385.11.

Licensed subpart C activity means, referring to subpart C of this part, in the case of a locker service, the applicable interactive streams, permanent digital downloads, restricted downloads or ringtones.

Limited download shall have the meaning given in §385.11.

Locker service means a service providing access to sound recordings of musical works in the form of interactive streams, permanent digital downloads, restricted downloads or ringtones, where the service has reasonably determined that phonorecords of the applicable sound recordings have been purchased by the end user or are otherwise in the possession of the end user prior to the end user's first request to access such sound recordings by means of the service. The term locker service does not extend to any part of a service otherwise meeting this definition as to which a license is not obtained for the applicable reproductions and distributions of musical works.

Paid locker service means a locker service that is a subscription service.

Permanent digital download shall have the meaning given in §385.2.

Purchased content locker service means a locker service made available to end-user purchasers of permanent digital downloads, ringtones or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the permanent digital downloads, ringtones or physical phonorecords, with respect to the sound recordings embodied in permanent digital downloads or ringtones or physical phonorecords purchased from a qualifying seller as described in paragraph (1) of this definition of "Purchased content locker service," whereby the locker

service enables the purchaser to engage in one or both of the qualifying activities identified in paragraph (2) of this definition of “Purchased content locker service.” In addition, in the case of a locker service made available to end-user purchasers of physical phonorecords, the seller must permanently part with possession of the physical phonorecords.

(1) A qualifying seller for purposes of this definition of “purchased content locker service” is the same entity operating such locker service, one of its affiliates or predecessors, or—

(i) In the case of permanent digital downloads or ringtones, a seller having another legitimate connection to the locker service provider set forth in one or more written agreements (including that the locker service and permanent digital downloads or ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords, a seller having an agreement with—

(A) The locker service provider whereby such parties establish an integrated offer that creates a consumer experience commensurate with having the same service both sell the physical phonorecord and offer the locker service; or

(B) A service provider that also has an agreement with the entity offering the locker service, where pursuant to those agreements the service provider has established an integrated offer that creates a consumer experience commensurate with having the same service both sell the physical phonorecord and offer the locker service.

(2) Qualifying activity for purposes of this definition of “purchased content locker service” is enabling the purchaser to—

(i) Receive one or more additional phonorecords of such purchased sound recordings of musical works in the form of permanent digital downloads or ringtones at the time of purchase, or

(ii) Subsequently access such purchased sound recordings of musical works in the form of interactive streams, additional permanent digital downloads, restricted downloads or ringtones.

Restricted download means a digital phonorecord delivery distributed in the form of a download that may not be retained and played on a permanent basis. The term restricted download includes a limited download.

Ringtone shall have the meaning given in §385.2.

Service provider shall have the meaning given in §385.11, except that for purposes of this subpart references in the definition of “Service provider” in §385.11 to licensed activity shall mean licensed subpart C activity, as defined in this section.

Subscription service means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in §385.24.

§385.22 Calculation of royalty payments in general.

Licensees that make or authorize licensed subpart C activity, as defined in §385.21, pursuant to 17 U.S.C. 115 shall pay a monthly mechanical royalty rate of \$0.17 per subscriber (the “all-in” rate for the use of the musical work in connection with the licensed subpart C activity), minus the per subscriber royalty for the public performance of the musical work that the licensee owes for the licensed subpart C activity pursuant to a public performance license for the musical work, for paid locker services and a royalty rate of zero for purchased content locker services.

§385.23 [Reserved]

§385.24 [Reserved]

§385.25 Reproduction and distribution rights covered.

A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed subpart C activity, as defined in §385.21, solely for the purpose of providing such licensed subpart C activity, as defined in §385.21 (and no other purpose).

§385.26 Effect of rates.

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.