

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)

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) Docket No. 16–CRB–0003–PR (2018–
) 2022)
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PROPOSED RATES AND TERMS OF SPOTIFY USA INC.

Pursuant to 37 C.F.R. § 351.4(b)(3), Spotify USA Inc. (“Spotify”) proposes the following rates and terms for making and distributing phonorecords under the statutory license provided by 17 U.S.C. § 115 during the period January, 1, 2018 through December 31, 2022. Further pursuant to 37 C.F.R. § 351.4(b)(3), Spotify 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.

I. ROYALTY RATES

A. Calculation of Minimum Royalty Rates for All-in Royalty

1. Minimum Royalty Rate

For standalone non-portable subscriptions—streaming only, Spotify requests that the minimum for use as currently set forth in step 1 of 37 C.F.R. § 385.12(b)(1) and 37 C.F.R. § 385.13(a)(1) remain the same.

For standalone portable subscriptions, Spotify requests that the minimum for use as currently set forth in step 1 of § 385.12(b)(1) and 37 C.F.R. § 385.13(a)(3) remain the same.

For free ad-supported users, Spotify requests that the minimum for use as currently set forth in step 1 of § 385.12(b)(1) and 37 C.F.R. § 385.13(a)(5) remain the same.

2. **Applicable Percentage of Service Revenue**

Spotify proposes that the applicable percentage of service revenue as currently set forth in 37 C.F.R. § 385.12(c) remain the same.

B. Subtraction of Performance Royalties

Spotify proposes that the subtraction of royalties for public performance of musical works from the all-in royalty amount (as set forth currently in 37 C.F.R. § 385.12(b)(1)), shall remain as currently set forth in step 2 of 37 C.F.R. § 385.12(b)(2).

C. Subscriber-Based Royalty Floor

For all licensed activity, Spotify requests a removal of the subscriber-based royalty floor as currently set forth in step 3 of 37 C.F.R. § 385.12(b)(3)(ii) and 37 C.F.R. § 385.13(a)(1) & (3) (for standalone non-portable subscription—streaming only and standalone portable subscription service, respectively).

II. TERMS

A. Late Fees

37 C.F.R. § 385, Subpart B (which applies to interactive streaming services like Spotify) does not include a provision instituting a late fee for payments received by copyright owners after the due date. Spotify proposes that the new rates and terms likewise do not incorporate a late fee component for interactive streaming services.

B. Audit Right

Spotify proposes that an audit right for publishers (upon satisfying a minimum aggregated interactive service share of at least 15%, i.e., a “Qualifying Publisher”) be included,

subject to elimination of the current self-audit certification obligations as reflected in 37 C.F.R. § 201.16.

Such an audit right for publishers will be subject to the following standard limitations: (1) such audit must be conducted by a Qualified Auditor (i.e., an independent CPA that is licensed in the jurisdiction in which it conducts the verification and is not an employee of a publisher); (2) a Qualifying Publisher cannot conduct an audit more than once during any 12-month period; (3) the audit would be limited to any or all of the prior 3 calendar years provided that no calendar year will be subject to an audit more than once; and (4) the audit may not be conducted on a contingency fee basis.

C. Definition of Service Revenue

Spotify proposes a revision of the definition of “service revenue” in 37 C.F.R. § 385.11 to include reductions for app store, carrier billing, and credit card transaction fees, but that the definition of “service revenue” otherwise remain the same.

D. Family and Student Plans

Spotify proposes certain discounts for family and student plans. The attached proposed rates and terms provide more detail on the applicable definitions of “Revenue” and computation of subscribers for purposes of determining the minimum, among others. Other than the changes shown below in redline, Spotify proposes that the terms currently set forth in 37 C.F.R. § 385 Subpart B be continued.

37 C.F.R. Part 385

[PROPOSED CHANGES IN REDLINE]

Subpart A – Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones**§ 385.4 Late Payments**

A Licensee [under this Subpart A](#) 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, Other Incidental Digital Phonorecord Deliveries 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 [musical work](#) 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.

[\(d\) 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 \(as defined below\) concerning rights within the scope of 17 U.S.C. § 115, shall apply in lieu of the rates and terms of this subpart to the use of musical works within the scope of such agreements.](#)

[74 FR 4529, Jan. 26, 2009, as amended at 78 FR 67942, Nov. 13, 2013]

§385.11 Definitions.

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

Actual carrier billing cost means the sum of amounts paid by the service provider to the applicable wireless carrier (or retained by such wireless carrier as the case may be) during the applicable month for providing an integrated billing system for a particular customer utilizing such applicable service integrated billing system to access a service during such month. The actual carrier billing cost for any particular customer shall in no event be deemed to exceed 10% of the applicable service retail price.

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.

Applicable consideration means anything of value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether such consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the licensed activity but nevertheless provide consideration for the identified rights to undertake the licensed activity, and including any such value given to an affiliate of a record company for such rights to undertake the licensed activity. For the avoidance of doubt, value given to a copyright owner of musical works that is controlling, controlled by, or under common control with a record company for rights to undertake the licensed activity shall not be considered value given to the record company. Notwithstanding the foregoing, applicable consideration shall not include in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where such in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

Family Plan means a single subscription account that authorizes access to a digital music service for multiple end users for a single discounted fee payable via one form of payment.

GAAP means U.S. Generally Accepted Accounting Principles, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards, as issued by the International Accounting Standards Board, or as accepted by the Securities and Exchange Commission if different from that issued by the International Accounting Standards Board, in lieu of Generally Accepted Accounting Principles, then an entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

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, [licensed pursuant to this Subpart B](#).

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).

Offering means a service provider's offering of licensed activity that is subject to a particular rate set forth in § 385.13(a) (e.g., a particular subscription plan available through the service provider).

Promotional royalty rate means the statutory royalty rate of zero in the case of certain promotional interactive streams and certain promotional limited downloads, as provided in § 385.14.

Record company means a person or entity that

(1) Is a copyright owner of a sound recording of a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the copyright owner of the sound recording.

Relevant page means a page (including a Web page, screen or display) from which licensed activity offered by a service provider is directly available to end users, but only where the offering of licensed activity and content that directly relates to the offering of licensed activity (e.g., an image of the artist or artwork closely associated with such offering, artist or album information, reviews of such offering, credits and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A licensed activity is directly available to end users from a page if sound recordings of musical works can be accessed by end users for licensed activity from such page (in most cases this will be the page where the limited download or interactive stream takes place).

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.

Service revenue. (1) Subject to paragraphs (2) through (5) of the definition of “Service revenue,” and subject to GAAP, *service revenue* shall mean the following:

(i) All revenue recognized by the service provider from end users from the provision of licensed activity;

(ii) All revenue recognized by the service provider by way of sponsorship and commissions as a result of the inclusion of third-party “in-stream” or “in-download” advertising as part of licensed activity (*i.e.*, advertising placed immediately at the start, end or during the actual delivery, by way of interactive streaming or limited downloads, as applicable, of a musical work); and

(iii) All revenue recognized by the service provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a relevant page of the service or on any page that directly follows such relevant page leading up to and including the limited download or interactive streaming, as applicable, of a musical work; provided that, in the case where more than one service is actually available to end users from a relevant page, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of “Service revenue,” such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service provider, or if not recognized by the service provider, by any associate, affiliate, agent or representative of such service provider in lieu of its being recognized by the service provider;

(ii) Include the value of any barter or other nonmonetary consideration; ~~and~~

(iii) ~~Not be reduced by credit card commissions or similar payment process charges;~~ and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than refunds to end users for licensed activity that they were unable to use due to technical faults in the licensed activity or other bona fide refunds or credits issued to end users in the ordinary course of business.

(3) In each of the cases identified in paragraph (1) of the definition of “Service revenue,” such revenue shall, for the avoidance of doubt, exclude:

(i) Revenue derived solely in connection with services and activities other than licensed activity, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of “Service revenue.” By way of example, the following kinds of revenue shall be excluded:

(A) Revenue derived from predominantly non-music voice, content and text services such as, by way of example and not limitation, news, talk, sports, weather, traffic, and comedy programming or podcasts of any of the foregoing;

(B) Revenue derived from other non-music products and services (including ticketing for live events or concerts, search services, sponsored searches and click-through commissions); and

(C) Revenue derived from music or music-related products and services that are not or do not include licensed activity.

(4) For purposes of paragraph (1) of the definition of “Service revenue;”:

(i) Advertising ~~or~~ sponsorship, and subscription revenue shall be reduced by the actual cost (whether internal or paid to a third party) of obtaining such revenue (including credit card commissions, app store commissions, similar payment process charges, and actual carrier billing cost), not to exceed 15%. (5) Where the licensed activity is provided to end users as part of the same transaction with one or more other products or services that are not a music service engaged in licensed activity, then the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of “Service revenue” shall be the revenue recognized from end users for the bundle less the standalone

published price for end users for each of the other component(s) of the bundle; provided that, if there is no such standalone published price for a component of the bundle, then the average standalone published price for end users for the most closely comparable product or service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

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.

[Student account means an individual subscription that meets at least the following criteria: the individual is enrolled in at least one course at a college geographically located in the United States.](#)

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).

[74 FR 4529, Jan. 26, 2009, as amended at 74 FR 6834, Feb. 11, 2009; 78 FR 67942, Nov. 13, 2013]

§385.12 Calculation of royalty payments in general.

(a) *Applicable royalty.* Licensees that make or authorize licensed activity pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the minimum royalties and subscriber-based royalty floors for specific types of services provided in §385.13, except as provided [under §385.10\(d\) and](#) for certain promotional uses in §385.14.

(b) *Rate calculation methodology.* Royalty payments for licensed activity [in subpart B](#) shall be calculated as provided in paragraph (b) of this section. If a service includes different offerings, royalties must be separately calculated with respect to each such offering taking into consideration service revenue and expenses associated with such offering. Uses subject to the promotional royalty rate shall be excluded from the calculation of royalties due, as further described in this section and the following §385.13.

(1) *Step 1:* Calculate the All-In Royalty for the Offering. For each accounting period, the all-in royalty for each offering of the service provider is the greater of

(i) The applicable percentage of service revenue associated with the relevant offering as set forth in paragraph (c) of this section (excluding any service revenue derived solely from licensed activity uses subject to the promotional royalty rate), and

(ii) The minimum specified in §385.13 of the offering involved.

(2) *Step 2:* [Determine the Payable Royalty Pool by Subtracting](#) Applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each offering of the service provider, subtract the total amount of royalties for public performance of musical works that has been or will be expensed pursuant to public performance licenses in connection with uses of musical works through such offering during the accounting period that constitute licensed activity (other than licensed activity subject to the promotional royalty rate). Although this amount may be the total of the service's payments for that offering for the accounting period, it will be less than the total of such public performance payments if the service is also engaging in public performance of musical works that does not constitute licensed activity. In the case where the service is also engaging in the public performance of musical works that does not constitute licensed activity, the amount to be subtracted for public performance payments shall be the amount of such payments allocable to licensed activity uses (other than promotional royalty rate uses) through the relevant offering, ~~as determined~~. [If the payments allocable to licensed activity uses \(other than promotional royalty rate uses\) through the relevant offering are not readily distinguishable from payments for public performances not allocable to licensed activity uses, then the payments allocated to licensed activity uses \(other than promotional royalty uses\) for the accounting period shall be made on the basis of plays of musical works for licensed activity uses \(other than promotional royalty uses\)](#) in relation to all uses of musical works for which the public performance payments are made ~~for the accounting period. Such allocation shall be made on the basis of plays of musical works~~ or, where per-play information is unavailable due to bona fide technical limitations as described in step 3 in paragraph (b)(~~3~~4) of this section, using the same alternative methodology as provided in step 34.

(3) *Step 3:* ~~Determine the Payable Royalty Pool. The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the service provider~~

~~by virtue of its licensed activity for a particular offering during the accounting period. This amount is the greater of~~

~~(i) The result determined in step 2 in paragraph (b)(2) of this section, and~~

~~(ii) The subscriber-based royalty floor resulting from the calculations described in §385.13.~~

~~(4) Step 4:~~ Calculate the Per-Work Royalty Allocation for Each Relevant Work. This is the amount payable for the reproduction and distribution of each musical work used by the service provider by virtue of its licensed activity through a particular offering during the accounting period. To determine this amount, the result determined in step ~~23~~ in paragraph (b)(~~23~~) of this section must be allocated to each musical work used through the offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step ~~23~~ for such offering by the total number of plays of all musical works through such offering during the accounting period (other than promotional royalty rate plays) to yield a per-play allocation, and multiplying that result by the number of plays of each musical work (other than promotional royalty rate plays) through the offering during the accounting period. For purposes of determining the per-work royalty allocation in all calculations under this step ~~34~~ only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each play shall be counted as provided in paragraph (d) of this section. Notwithstanding the foregoing, if the service provider is not capable of tracking play information due to bona fide limitations of the available technology for services of that nature or of devices useable with the service, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the service provider for making royalty payment allocations for the use of individual sound recordings.

(c) *Percentage of service revenue.* The percentage of service revenue applicable under paragraph (b) of this section is 10.5%.

(d) *Overtime adjustment.* For purposes of the calculations in step ~~34~~ in paragraph (b)(~~34~~) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of plays as follows:

(1) 5:01 to 6:00 minutes—Each play = 1.2 plays

(2) 6:01 to 7:00 minutes—Each play = 1.4 plays

(3) 7:01 to 8:00 minutes—Each play = 1.6 plays

(4) 8:01 to 9:00 minutes—Each play = 1.8 plays

(5) 9:01 to 10:00 minutes—Each play = 2.0 plays

(6) For playing times of greater than 10 minutes, continue to add .2 for each additional minute or fraction thereof.

(e) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information and belief of the licensee at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(5) and §201.19 of this title. Without limitation, a licensee's statements of account shall set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a minimum royalty ~~or subscriber-based royalty floor~~ pursuant to §385.13 does or does not apply) and, for each offering reported, also indicate the type of licensed activity involved and the number of plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

[74 FR 4529, Jan. 26, 2009, as amended at 78 FR 67943, Nov. 13, 2013]

§385.13 Minimum royalty rates ~~and subscriber-based royalty floors~~ for specific types of services.

(a) *In general.* The following minimum royalty rates ~~and subscriber-based royalty floors~~ shall apply to the following types of licensed activity:

(1) *Standalone non-portable subscription—streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings only in the form of interactive streams and only from a non-portable device to which such streams are originally transmitted while the device has a live network connection, the minimum for use in step 1 of §385.12(b)(1)(ii) is the lesser of subminimum II as described in paragraph (c) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. ~~The subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 15 cents per subscriber per month.~~

(2) *Standalone non-portable subscription—mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings either in the form of interactive streams or limited downloads but only from a non-portable device to which such streams or downloads are originally transmitted, the minimum for use in step 1 of §385.12(b)(1)(ii) is the lesser of the subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. ~~The subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 30 cents per subscriber per month.~~

(3) *Standalone portable subscription service.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings in the form of interactive streams or limited downloads from a portable device, the minimum for use in step 1 of § 385.12(b)(1)(ii) is the lesser of subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 80 cents per subscriber per month. ~~The subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 50 cents per subscriber per month.~~

(4) *Bundled subscription services.* In the case of a subscription service providing licensed activity that is made available to end users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing licensed activity separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to a subscription service providing licensed activity for a single price), the minimum for use in step 1 of §385.12(b)(1)(ii) is subminimum I as described in paragraph (b) of this section for the accounting period. ~~The subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 25 cents per month for each end user who has made at least one play of a licensed work during such month (each such end user to be considered an “active subscriber”).~~

(5) *Free nonsubscription/ad-supported services.* In the case of a service offering licensed activity free of any charge to the end user, the minimum for use in step 1 of §385.12(b)(1)(ii) is subminimum II described in paragraph (c) of this section for the accounting period. ~~There is no subscriber-based royalty floor for use in step 3 of §385.12(b)(3)(ii).~~

(b) *Computation of subminimum I.* For purposes of paragraphs (a)(2), (3), and (4) of this section, subminimum I for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—

(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service together with the right to reproduce and distribute the musical work embodied therein, 17.36% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 21% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(c) *Computation of subminimum II.* For purposes of paragraphs (a)(1) and (5) of this section, subminimum II for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service provider during the accounting period—

(1) In cases in which the record company is the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams and limited downloads of a sound recording through the third-party service together with the right to reproduce and

distribute the musical work embodied therein, 18% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(2) In cases in which the record company is not the licensee under 17 U.S.C. 115 and the record company has granted the rights to make interactive streams or limited downloads of a sound recording through the third-party service without the right to reproduce and distribute the musical work embodied therein, 22% of the total amount expended by the service provider or any of its affiliates in accordance with GAAP for such rights for the accounting period, which amount shall equal the applicable consideration for such rights at the time such applicable consideration is properly recognized as an expense under GAAP.

(d) *Payments made by third parties.* If a record company providing sound recording rights to the service provider for a licensed activity—

(1) Recognizes revenue (in accordance with GAAP, and including for the avoidance of doubt all applicable consideration with respect to such rights for the accounting period, regardless of the form or timing of payment) from a person or entity other than the service provider providing the licensed activity and its affiliates, and

(2) Such revenue is received, in the context of the transactions involved, as applicable consideration for such rights,

(3) Then such revenue shall be added to the amounts expended by the service provider solely for purposes of paragraphs(b)(1), (b)(2), (c)(1), or (c)(2) of this section, as applicable, if not already included in such expensed amounts. Where the service provider is the licensee, if the service provider provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service provider hereunder as a result of revenue recognized from a person or entity other than the service provider as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service provider to calculate the additional royalties and indemnify the service provider for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

(e) *Computation of subscriber-based royalty rates.* For purposes of paragraph (a) of this section, to determine the minimum ~~or subscriber-based royalty floor, as~~ applicable to any particular offering, the total number of subscriber-months for the accounting period, shall be calculated taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the promotional royalty rate as described in §385.14(b)(2), except that in the case of a bundled subscription service, subscriber-months shall instead be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of

subscriber-months for the accounting period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the minimum or subscriber-based royalty floor, as applicable, for the accounting period. A Family plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family plan end user who subscribed for only part of a calendar month. A Student account shall be treated as 0.50 subscribers per month, prorated in the case of a Student account end user who subscribed for only part of a calendar month.

[74 FR 4529, Jan. 26, 2009, as amended at 78 FR 67943, Nov. 13, 2013]

§385.14 Promotional royalty rate.

(a) *General provisions.* (1) This section establishes a royalty rate of zero in the case of certain promotional interactive streaming activities, and of certain promotional limited downloads offered in the context of a free trial period for a digital music subscription service under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the promotional royalty rate shall apply to a musical work when a record company transmits or authorizes the transmission of interactive streams or limited downloads of a sound recording that embodies such musical work, only if—

(i) The primary purpose of the record company in making or authorizing the interactive streams or limited downloads is to promote the sale or other paid use of sound recordings by the relevant artists, including such sound recording, through established retail channels or the paid use of one or more established retail music services through which the sound recording is available, and not to promote any other good or service;

(ii) Either—

(A) The sound recording (or a different version of the sound recording embodying the same musical work) is being lawfully distributed and offered to consumers through the established retail channels or services described in paragraph (a)(1)(i) of this section; or

(B) In the case of a sound recording of a musical work being prepared for commercial release but not yet released, the record company has a good faith intention of lawfully distributing and offering to consumers the sound recording (or a different version of the sound recording embodying the same musical work) through the established retail channels or services described in paragraph (a)(1)(i) of this section within 90 days after the commencement of the first promotional use authorized under this section (and in fact does so, unless it can demonstrate that notwithstanding its bona fide intention, it unexpectedly did not meet the scheduled release date);

(iii) In connection with authorizing the promotional interactive streams or limited downloads, the record company has obtained from the service provider it authorizes a written representation that—

(A) In the case of a promotional use other than interactive streaming subject to paragraph (d) of this section, the service provider agrees to maintain for a period of no less than 5 years from the conclusion of the promotional activity complete and accurate records of the relevant authorization and dates on which the promotion was conducted, and identifying each sound recording of a musical work made available through the promotion, the licensed activity involved, and the number of plays of such recording;

(B) The service provider is in all material respects operating with appropriate license authority with respect to the musical works it is using for promotional and other purposes; and

(C) The representation is signed by a person authorized to make the representation on behalf of the service provider;

(iv) Upon receipt by the record company of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular service is in a material manner operating without appropriate license authority from such copyright owner, the record company shall within 5 business days withdraw by written notice its authorization of such uses of such copyright owner's musical works under the promotional royalty rate by that service;

(v) The interactive streams or limited downloads are offered free of any charge to the end user and, except in the case of interactive streaming subject to paragraph (d) of this section in the case of a free trial period for a digital music subscription service, no more than 5 sound recordings at a time are streamed in response to any individual request of an end user;

(vi) The interactive streams and limited downloads are offered in a manner such that the user is at the same time (e.g., on the same Web page) presented with a purchase opportunity for the relevant sound recording or an opportunity to subscribe to a paid service offering the sound recording, or a link to such a purchase or subscription opportunity, except—

(A) In the case of interactive streaming of a sound recording being prepared for commercial release but not yet released, certain mobile applications or other circumstances in which the foregoing is impracticable in view of the current state of the relevant technology; and

(B) In the case of a free trial period for a digital music subscription service, if end users are periodically offered an opportunity to subscribe to the service during such free trial period; and

(vii) The interactive streams and limited downloads are not provided in a manner that is likely to cause mistake, to confuse or to deceive, reasonable end users as to the endorsement or association of the author of the musical work with any product, service or activity other than the sale or paid use of sound recordings or paid use of a music service through which sound recordings are available. Without limiting the foregoing, upon receipt of written notice from the copyright owner of a musical work or agent of the copyright owner stating in

good faith that a particular use of such work under this section violates the limitation set forth in this paragraph (a)(1)(vii), the record company shall promptly cease such use of that work, and within 5 business days withdraw by written notice its authorization of such use by all relevant third parties it has authorized under this section.

(2) To rely upon the promotional royalty rate, a record company making or authorizing interactive streams or limited downloads shall keep complete and accurate contemporaneous written records of such uses, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the service or services where each promotion is authorized (including the Internet address if applicable), the beginning and end date of each period of promotional activity authorized, and the representation required by paragraph (a)(1)(iii) of this section; provided that, in the case of trial subscription uses, such records shall instead consist of the contractual terms that bear upon promotional uses by the particular digital music subscription services it authorizes; and further provided that, if the record company itself is conducting the promotion, it shall also maintain any additional records described in paragraph (a)(1)(iii)(A) of this section. The records required by this paragraph (a)(2) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed activity in the ordinary course of business, but in no event for less than 5 years from the conclusion of the promotional activity to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (a)(2) with respect to a specific promotion or relating to a particular sound recording of a musical work, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(1)(iii)(A) of this section, which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the record company shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the record company (but not any third-party service it has authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(3) If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(1)(iii)(A) of this section by a service authorized by a record company with respect to a specific promotion, the service provider shall provide complete and accurate documentation within 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the service provider shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service provider does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the service provider (but not the record company) will be liable for any payment due for such uses;

provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(4) The promotional royalty rate is exclusively for audio-only interactive streaming and limited downloads of musical works subject to licensing under 17 U.S.C. 115. The promotional royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the promotional royalty rate (including without limitation interactive streaming or limited downloads of a musical work beyond the time limitations applicable to the promotional royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101 *et seq.*

(b) *Interactive streaming and limited downloads of full-length musical works through third-party services.* In addition to those of paragraph (a) of this section, the provisions of this paragraph (b) apply to interactive streaming, and limited downloads (in the context of a free trial period for a digital music subscription service), authorized by record companies under the promotional royalty rate through third-party services (including Web sites) that is not subject to paragraphs (c) or (d) of this section. Such interactive streams and limited downloads may be made or authorized by a record company under the promotional royalty rate only if—

(1) No applicable consideration for making or authorizing the relevant interactive streams or limited downloads is received by the record company, any of its affiliates, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration given to a record company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings or the paid use of music services through which sound recordings are available;

(2) In the case of interactive streaming and limited downloads offered in the context of a free trial period for a digital music subscription service, the free trial period does not exceed 30 consecutive days per subscriber per two-year period; and

(3) In contexts other than a free trial period for a digital music subscription service, interactive streaming subject to paragraph (b) of this section of a particular sound recording is authorized by the record company on no more than 60 days total for all services (*i.e.*, interactive streaming under paragraph (b) of this section of a particular sound recording may be authorized on no more than a total of 60 days, which need not be consecutive, and on any one such day, interactive streams may be offered on one or more services); provided, however, that an additional 60 days shall be available each time the sound recording is re-released by the record company in a remastered form or as a part of a compilation with a different set of sound recordings than the original release or any prior compilation including such sound recording.

(4) In the event that a record company authorizes promotional uses in excess of the time limitations of paragraph (b) of this section, the record company, and not the third-party service it has authorized, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved. In the event that a third-party service exceeds the scope of any authorization by a record company, the service provider, and not the record company, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(c) *Interactive streaming of full-length musical works through record company and artist services.* In addition to those of paragraph (a) of this section, the provisions of this paragraph (c) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate through a service (e.g., a Web site) directly owned or operated by the record company, or directly owned or operated by a recording artist under the authorization of the record company, and that is not subject to paragraph (d) of this section. For the avoidance of doubt and without limitation, an artist page or site on a third-party service (e.g., a social networking service) shall not be considered a service operated by the record company or artist. Such interactive streams may be made or authorized by a record company under the promotional royalty rate only if—

(1) The interactive streaming subject to this paragraph (c) of a particular sound recording is offered or authorized by the record company on no more than 90 days total for all services (*i.e.*, interactive streaming under this paragraph (c) of a particular sound recording may be authorized on no more than a total of 90 days, which need not be consecutive, and on any such day, interactive streams may be offered on one or more services operated by the record company or artist, subject to the provisions of paragraph (b)(2) of this section); provided, however, that an additional 90 days shall be available each time the sound recording is re-released by the record company in a remastered form or as part of a compilation with a different set of sound recordings than prior compilations that include that sound recording;

(2) In the case of interactive streaming through a service devoted to one featured artist, the interactive streams subject to this paragraph (c) of this section of a particular sound recording are made or authorized by the record company on no more than one official artist site per artist and are recordings of that artist; and

(3) In the case of interactive streaming through a service that is not limited to a single featured artist, all interactive streaming on such service (whether eligible for the promotional royalty rate or not) is limited to sound recordings of a single record company and its affiliates and the service would not reasonably be considered to be a meaningful substitute for a paid music service.

(d) *Interactive streaming of clips.* In addition to those in paragraph (a) of this section, the provisions of this paragraph (d) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate of segments of sound recordings of musical works with a playing time that does not exceed 90 seconds. Such interactive streams may be made or authorized by a record company under the promotional royalty rate without any of the temporal

limitations set forth in paragraphs (b) and (c) of this section (but subject to the other conditions of paragraphs (b) and (c) of this section, as applicable). For clarity, this paragraph (d) is strictly limited to the uses described herein and shall not be construed as permitting the creation or use of an excerpt of a musical work in violation of 17 U.S.C. 106(2) or 115(a)(2) or any other right of a musical work owner.

[74 FR 4529, Jan. 26, 2009, as amended at 74 FR 6834, Feb. 11, 2009; 78 FR 67944, Nov. 13, 2013]

§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.

37 CFR Part 201

[PROPOSED CHANGES IN REDLINE]

§ 210.12 Definitions.

As used in this subpart:

...

[A Qualified Auditor is an independent CPA that is licensed in the jurisdiction in which it conducts the verification and is not an employee of a Copyright owner.](#)

[A Qualifying Publisher is a Copyright owner who has satisfied a minimum aggregated service provider share of 15%.](#)

§ 210.16 Monthly statements of account.

...

(v) Step 5: Multiply by the statutory royalty rate. The total monthly royalty payment is obtained by multiplying the subtotal from Step 3, as adjusted if necessary by Step 4, by the statutory royalty rate set forth in [§ 385.3](#) or other provisions of part 385 of this title as applicable.

(3) Phonorecords subject to a percentage rate royalty structure. For phonorecords subject to part 385, subparts B or C of this title, or any other applicable royalties computed on a percentage-rate basis, the amount of the royalty payment shall be calculated as provided in [§ 385.12](#), [§ 385.22](#), or other provisions of part 385 of this title as applicable. The calculations shall be made in good faith and on the basis of the best knowledge, information, and belief of the licensee at the time payment is due, and subject to the additional accounting and certification requirements of [17 U.S.C. 115\(c\)\(5\)](#) ~~and this section~~. The following additional provisions shall also apply:

(i) A licensee may, in cases where the final public performance royalty has not yet been determined, compute the public performance royalty component based on the interim public performance royalty rate, if established; or alternatively, on a reasonable estimation of the expected royalties to be paid in accordance with GAAP. Royalty payments based on anticipated payments or interim public performance royalty rates must be reconciled on the Annual Statement of Account, or by ~~*56211~~ complying with § 210.17(d)(2)(iii) governing Amended Annual Statements of Account.

(ii) When calculating the per-work royalty allocation for each work, as described in [§ 385.12\(b\)\(4\)](#), [§ 385.22\(b\)\(3\)](#), or any similar provisions of part 385 of this title as applicable, an actual or constructive per-play allocation is to be calculated to at least the hundredth of a cent (i.e., to at least four decimal places).

(e) Clear statements. The information required by paragraphs (b) and (c) of this section requires intelligible, legible, and unambiguous statements in the Monthly Statements of Account without incorporation of facts or information contained in other documents or records.

~~(f) Certification. (1) Each Monthly Statement of Account shall be accompanied by:~~

~~(i) The printed or typewritten name of the person who is signing and certifying the Monthly Statement of Account.~~

~~(ii) A signature, which in the case of a compulsory licensee that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.~~

~~(iii) The date of signature and certification.~~

~~(iv) If the compulsory licensee is a corporation or partnership, the title or official position held in the partnership or corporation by the person who is signing and certifying the Monthly Statement of Account.~~

~~(v) One of the following statements:~~

~~(A) I certify that (1) I am duly authorized to sign this Monthly Statement of Account on behalf of the compulsory licensee; (2) I have examined this Monthly Statement of Account; and (3) all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith; or~~

~~(B) I certify that (1) I am duly authorized to sign this Monthly Statement of Account on behalf of the compulsory licensee, (2) I have prepared or supervised the preparation of the data used by the compulsory licensee and/or its agent to generate this Monthly Statement of Account, (3) such data is true, complete, and correct to the best of my knowledge, information, and belief, and was prepared in good faith, and (4) this Monthly Statement of Account was prepared by the compulsory licensee and/or its agent using processes and internal controls that were subject to an examination, during the past year, by a licensed Certified Public Accountant in accordance with the attestation standards established by the American Institute of Certified Public Accountants, the opinion of whom was that the processes and internal controls were suitably designed to generate monthly statements that accurately reflect, in all material respects, the compulsory licensee's usage of musical works, the statutory royalties applicable thereto, and any other data that is necessary for the proper calculation of the statutory royalties in accordance with 17 U.S.C. 115 and applicable regulations.~~

~~(2) If the Monthly Statement of Account is served by mail or by reputable courier service, certification of the Monthly Statement of Account by the compulsory licensee shall be made by handwritten signature. If the Monthly Statement of Account is served electronically, certification of the Monthly Statement of Account by the compulsory licensee shall be made by electronic signature as defined in section 7006(5) of title 15 of the United States Code.~~

§ 210.17 Annual statements of account.

~~(f) Certification. (1) Each Annual Statement of Account shall be accompanied by:~~

~~(i) The printed or typewritten name of the person who is signing the Annual Statement of Account on behalf of the compulsory licensee.~~

~~(ii) A signature, which in the case of a compulsory licensee that is a corporation or partnership, shall be the signature of a duly authorized officer of the corporation or of a partner.~~

~~(iii) The date of signature.~~

~~(iv) If the compulsory licensee is a corporation or partnership, the title or official position held in the partnership or corporation by the person signing the Annual Statement of Account.~~

~~(v) The following statement: I am duly authorized to sign this Annual Statement of Account on behalf of the compulsory licensee.~~ **Self audit.** (1) A Qualifying Publisher may conduct one audit during the fiscal year, subject to the following limitations:

(i) The audit must be conducted by a Qualified Auditor;

(ii) The audit is limited to any or all of the prior 3 calendar years provided that no calendar year will be subject to an audit more than once; and

(iii) The Audit may not be conducted on a contingency fee basis.