

SUBCHAPTER E -- RATES AND TERMS FOR STATUTORY LICENSES

**PART 380--RATES AND TERMS FOR TRANSMISSIONS BY ELIGIBLE
NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES, AND
THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE
TRANSMISSIONS**

FOREWORD

This Part 380 contains terms and regulations adopted by the Copyright Royalty Judges (Judges) in the context of a rate determination proceeding, *Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web-IV)*, Docket No. 14-CRB-0001-WR (2016-2020). The Judges adopted and published agreed regulations, now codified in Subparts C and D before conducting the hearing to determine the remainder of the terms; consequently, Subparts C and D may contain terms that duplicate or contradict the Regulations of General Application now codified in Subpart A. To the extent there is a conflict between the terms finalized by the Judges' determination and the terms adopted earlier based on the agreements of parties, the agreed terms shall control. At a subsequent rulemaking, or in a subsequent rate determination, the Judges shall, to the extent necessary and possible, conform the provisions of Subparts C and D to the provisions adopted at the conclusion of the adjudicated proceeding.

SUBPART A--REGULATIONS OF GENERAL APPLICATION¹

§ 380.1 Scope and compliance.

(a) Scope. Subparts A and B codify rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the applicable provisions of 17 U.S.C. 114, and for the making of Ephemeral Recordings by those Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2016, through December 31, 2020.

(b) Limited application of terms and definitions. The terms and definitions in Subpart A apply expressly to Subpart B and to Subparts C and D, to the extent not in conflict with the regulations previously published for Subparts C and D.

(c) Legal compliance. Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 must comply with the requirements of this Part 380, and any other applicable regulations.

(d) Voluntary agreements. Notwithstanding the royalty rates and terms established in any Subparts of this Part 380, the rates and terms of any license agreements entered into by Copyright Owners and Licensees may apply in lieu of these rates and terms.

¹ See FOREWORD to Part 380.

§ 380.2 Making payment of royalty fees.

(a) Payment to the Collective. A Licensee must make the royalty payments due under Subpart B to SoundExchange, Inc., which is the Collective designated by the Copyright Royalty Board to collect and distribute royalties under this Part 380.

(b) Monthly payments. A Licensee must make royalty payments on a monthly basis. Payments are due on or before the 45th day after the end of the month in which the Licensee made Eligible Transmissions.

(c) Minimum payments. A Licensee must make any minimum annual payments due under Subpart B by January 31 of the applicable license year. A Licensee that as of January 31 of any year has not made any 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), but that begins making such transmissions after that date must make any payment due by the 45th day after the end of the month in which the Licensee commences making such transmissions.

(d) Late fees. A Licensee must pay a late fee for each payment or Statement of Account that the Collective receives after the due date. The late fee is 1.5% (or the highest lawful rate, whichever is lower) of the late payment amount per month. The late fee for a late Statement of Account is 1.5% of the payment amount associated with the Statement of Account. Late fees accrue from the due date until the date that the Collective receives the late payment or late Statement of Account.

(1) Waiver of late fees. The Collective may waive or lower late fees for immaterial or inadvertent failures of a Licensee to make a timely payment or submit a timely Statement of Account.

(2) Notice regarding noncompliant Statements of Account. If it is reasonably evident to the Collective that a timely-provided Statement of Account is materially noncompliant, the Collective must notify the Licensee within 90 days of discovery of the noncompliance.

(f) 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 Part 380, the Collective must retain the required payment in a segregated trust account for a period of three years from the date of final distribution of all royalties. The Collective must make its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include, but not be limited to, searches in Copyright Office public records and published directories of sound recording copyright owners. No claim to distribution shall be valid after the expiration of the three-year period. After expiration of this period, the Collective must handle unclaimed funds in accordance with applicable federal, state, or common law.

§ 380.3 Delivering statements of account.

(a) Statements of Account. Any payment due under this Part 380 must be accompanied by a corresponding Statement of Account that must 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 (if any) and other contact information of the person to be contacted for information or questions concerning the content of the Statement of Account;
- (3) The signature of:
 - (i) The Licensee or a duly authorized agent Licensee;
 - (ii) A partner or delegate 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) 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;
- (6) A certification of the capacity of the person signing;
- (7) The date of signature; and
- (8) An attestation to the following effect:

I, the undersigned owner/officer/partner/agent of the Licensee have examined this Statement of Account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence and that it fairly presents, in all material respects, the liabilities of the Licensee pursuant to 17 U.S.C. 112(e) and 114 and applicable regulations adopted under those sections.

(i) 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 must 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 method of allocation employed by Licensee was applied in good faith and in accordance with U.S. GAAP.

§ 380.4 Distributing royalties fees.

(a) Distribution of royalties.

(1) The Collective must promptly distribute royalties received from Licensees to Copyright Owners and Performers that are entitled thereto, or to their designated agents. The Collective shall only be responsible for making distributions to those who provide the Collective with information as is necessary to identify and pay the correct recipient. The Collective must 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 pursuant to § 370.4 of this chapter and this Subpart.

(2) The Collective must use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts must include, but not be limited to, searches in Copyright Office public records and published directories of sound recording copyright owners.

(b) Retention of records. Licensees and the Collective shall keep books and records relating to payments and distributions of royalties for a period of not less than the prior three calendar years.

(c) Special payment considerations

(d) Designation of the Collective.

(1) The Judges designate SoundExchange, Inc., as the Collective to receive Statements of Account and royalty payments from Licensees and to distribute royalty payments to each Copyright Owner and Performer (or their respective 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 for the applicable royalty term by a successor Collective according to the following procedure:

(i) The nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the SoundExchange's cessation or dissolution shall vote by a majority to recommend that the Copyright Royalty Judges designate a successor and must file a petition with the Copyright Royalty Judges requesting that the Judges designate the named successor and setting forth the reasons therefor.

(ii) Within 30 days of receiving the petition, the Copyright Royalty Judges must issue an order designating the recommended Collective, unless the Judges find good cause not to make and publish the designation in the *Federal Register*.

§ 380.5 Handling confidential information.

(a) Handling confidential information.

(1) *Definition.* For purposes of this Part 380, “Confidential Information” means the Statements of Account and any information contained therein, including the amount of royalty payments and the number of Performances, and any information pertaining to the Statements of Account reasonably designated as confidential by the party submitting the statement. Confidential Information does not include documents or information that at the time of delivery to the Collective are public knowledge. The party seeking information from the Collective based on a claim that the information sought is a matter of public knowledge shall have the burden of proving to the Collective that the requested information is in the public domain.

(2) *Use of Confidential Information.* The Collective may not use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(3) *Disclosure of Confidential Information.* The Collective shall limit access to Confidential Information to:

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

(ii) A Qualified Auditor, subject to an appropriate written confidentiality agreement, who is authorized to act on behalf of:

(A) the Collective with respect to verification of a Licensee's statement of account pursuant to this part 380; or

(B) a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to this Part 380;

(iii) Copyright Owners and Performers, including their designated agents, whose works a Licensee 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 written 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 written confidentiality agreement, who require access to the Confidential Information to perform their duties during the ordinary course of their work;

(iv) Attorneys and other authorized agents of the parties to the proceedings of the Copyright Royalty Judges, or related proceedings in the courts, acting under an appropriate protection order, in connection with future proceedings under 17 U.S.C. 112 and 114 before the Copyright Royalty Judges or the courts.

(v) *Safeguarding Confidential Information.* The Collective and any person authorized to receive Confidential Information from the Collective must implement procedures

to safeguard against unauthorized access to or dissemination of 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 distributees of the Collective.

380.6 Auditing payments and distributions.

(1) General. This section prescribes procedures by which any entity entitled to receive payment or distribution of royalties may verify payments or distributions by auditing the payor or distributor. The Collective may audit a Licensee's payments of royalties to the Collective, and a Copyright Owner or Performer may audit the Collective's distributions of royalties to the owner or performer. Nothing in this section shall preclude a verifying entity and the payor or distributor from agreeing to verification methods in addition to or different from those set forth in this section.

(2) Frequency of auditing. The verifying entity may conduct an audit only once a year for any or all of the prior three calendar years. A verifying entity may not audit records for any calendar year more than once.

(3) Notice of intent to audit. The verifying entity must file with the Copyright Royalty Judges a notice of intent to audit the payor or distributor, which notice the Judges must publish in the Federal Register within 30 days of the filing of the notice. Simultaneously with the filing of the notice, the verifying entity must deliver a copy to the payor or distributor.

(4) The audit. The audit must be conducted during regular business hours by a Qualified Auditor who is not retained on a contingency fee basis, is identified in the notice, and the designation of whom must be binding on all parties. The auditor shall determine the accuracy of royalty payments or distributions, including whether an underpayment or overpayment of royalties was made. An audit of books and records, including underlying paperwork, performed in the ordinary course of business according to generally accepted auditing standards by a 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.

(5) Access to third-party records for audit purposes. The payor or distributor must 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.

(6) Duty of auditor to consult. The auditor must produce a written report to the verifying entity. Before rendering the report, unless the auditor has a reasonable basis to suspect fraud on the part of the payor or distributor, the disclosure of which would, in the reasonable opinion of the auditor, prejudice any investigation of the suspected fraud, the auditor must review tentative written findings of the audit with the appropriate agent or employee of the payor or distributor in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the payor or distributor reasonably cooperates with the auditor to remedy promptly any factual error[s] or clarify any issues raised by the audit. The auditor

must include in the written report information concerning the cooperation or the lack thereof of the employee or agent.

(7) Audit results; underpayment or overpayment of royalties. If the auditor determines the payor or distributor underpaid royalties, the payor or distributor must remit the amount of any agreed-upon underpayment to the verifying entity, according to mutually agreed terms, which terms may, but need not, include installment payments with interest at the rate specified in § 380.2(d). If the auditor determines the payor or distributor overpaid royalties due, the verifying entity may deduct the amount of the net overpayment plus interest at the rate specified in § 380.2(d) from its next payment(s) until it receives credit for the full amount of the overpayment.

(8) Paying the costs of the audit. The verifying entity must pay the cost of the verification procedure, unless the auditor determines that there was an underpayment of 10% or more, in which case the payor or distributor must bear the reasonable costs of the verification procedure, in addition to paying or distributing the amount of any underpayment.

(9) Retention of audit report. The verifying party must retain the report of the audit for a period of not less than three years from the date of issuance.

§ 380.6 Definitions.

For purposes of Part 380, the following definitions apply:

All definitions in 17 U.S.C. 114(j) including:

- Broadcast transmission
- Digital audio transmission
- Eligible nonsubscription transmission
- New subscription service
- Nonsubscription
- Preexisting satellite digital audio radio service
- Preexisting subscription service
- Retransmission
- Sound recording performance complement
- Transmission

All definitions in 17 U.S.C. 114(f)(5)(E) including:

- Noncommercial webcaster
- Webcaster

The definitions in 17 U.S.C. 112 of:

- Ephemeral recording

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 containing Performances to 10 listeners, the service's ATH would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's ATH 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 ATH would equal 10.

Broadcast Retransmissions means eligible nonsubscription transmissions made by a Broadcaster over the Internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an Internet-only Side Channel.

Broadcaster means a Licensee that:

- (1) Owns and operates one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;
- (2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations thereunder to make Eligible Transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114, and related Ephemeral Recordings;
- (3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and
- (4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcaster Webcasts means eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.

Bundled means a product or service that is combined with another product or service where, by contractual terms, technical design, or other mechanism, such 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.

Collective means the collection and distribution organization that is designated by the Copyright Royalty Judges, and which, for the current rate period, is SoundExchange, Inc.

Commercial Webcaster means a Licensee, other than an Educational Webcaster, a Noncommercial Webcaster, or Public Broadcasting Entities, that makes Ephemeral Recordings and eligible digital audio transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(d)(2).

Copyright Owners means sound recording copyright owners who are entitled to royalty payments made under Part 380 pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Direct License Share means the result of dividing (1) a Licensee's Performances of directly-licensed sound recordings by (2) the total number of Licensee's Performances of all sound recordings during the payment period.

Educational Webcaster means a noncommercial educational broadcast station funded on or after January 1, 1995, under section 396(i) of the Communications Act of 1934 (47 U.S.C. 396(i)), that transmits solely noncommercial educational and cultural radio programs, and that retransmits, whether or not simultaneously, a nonsubscription terrestrial broadcast.

Eligible Transmission means a subscription or nonsubscription transmission made by a Licensee that is subject to licensing under 17 U.S.C. 114(d)(2) and the payment of royalties under 37 C.F.R. Part 380.

Licensee means broadcasters, commercial webcasters, and noncommercial webcasters or any such entity that has obtained a license under Section 112 or 114 to transmit eligible sound recordings.

Noncommercial Webcaster means 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 will 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, exclusively for public purposes.

Performance means each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission, but excludes 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) does not contain an entire sound recording, other than ambient music that is background at a public event, 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 means an independent Certified Public Accountant licensed in the jurisdiction where it seeks to conduct a verification.

Service means 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.

Side Channel means 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.

SUBPART B—COMMERCIAL WEBCASTERS, NONCOMMERCIAL WEBCASTERS, AND BROADCASTERS

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

(a) Royalty fees. For the year 2016, Licensees must pay royalty fees for all eligible transmissions of sound recordings at the following rates:

(i) Commercial Webcasters, including Broadcasters making Eligible Retransmissions: \$0.0022 per performance for subscription services and \$0.0017 per performance for nonsubscription services.

(ii) Noncommercial Webcasters: \$500 per year for each channel or station and \$ 0.0017 per performance for all digital audio transmissions in excess of 159,140 ATH in a month on a channel or station.

(b) Minimum fee. Licensees must pay the Collective a minimum fee of \$500 each year for each channel or station. The Collective must apply the fee to the Licensee's account as credit towards any additional royalty fees that Licensees may incur in the same year. The fee is payable for each individual channel and each individual station maintained or operated by the Licensee and making Eligible Transmissions during each calendar year or part of a calendar year during which it is a Licensee. The maximum aggregate minimum fees in any calendar year that a Commercial Webcaster must pay is \$50,000.. The minimum fee is nonrefundable.

(c) Annual royalty fee adjustment. The Copyright Royalty Judges shall adjust the royalty fees each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index (for all consumers and for all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year. The adjusted rate shall be rounded to the nearest fourth decimal place. The Judges shall publish notice of the adjusted fees in the *Federal Register* at least 25 days before January 1. The adjusted fees shall be effective on January 1.

(d) Ephemeral recordings royalty fees. The fee for all Ephemeral Recordings is part of the total fee payable under this section and constitutes 5% of it. All ephemeral recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions are included in the 5%.

SUBPART C—NONCOMMERCIAL EDUCATIONAL WEBCASTERS²

After a notice and comment period, the Judges published as “Subpart C” final regulations relating to certain Noncommercial Educational Webcasters in September 2015. *See* 80 Fed. Reg. 58201 (September 28, 2015). The adopted regulations were submitted to the Judges pursuant to a settlement agreement between SoundExchange, as the presumed Collective, and College Broadcasters, Inc., on its own behalf and on behalf of its members. To the extent those published regulations conflict with any of the regulations adopted in the captioned rate proceeding, the previously published regulations shall control.

IBS and Harvard were not covered by the terms of the regulations published in September and participated in this adjudicatory proceeding regarding webcasting rates and terms. After consideration of the evidence and arguments of counsel for IBS and Harvard, the Judges conclude that IBS and Harvard, and any other Noncommercial Educational Webcaster Licensee that was previously not included in the published Subpart C regulations shall be bound by the published Subpart C regulations.

² *See* Foreword

Notwithstanding prior publication of Subpart C, when the Judges submit the foregoing Determination for publication by the *Federal Register* they shall amend Subpart C as required to assure correct references and cross-references to other regulations in Part 380.

SUBPART D—PUBLIC BROADCASTERS³

After a notice and comment period, the Judges published as “Subpart D” final regulations relating to certain Public Broadcasters in October 2015. *See* 80 Fed. Reg. 59589 (October 2, 2015). The adopted regulations were submitted to the Judges pursuant to a settlement agreement between SoundExchange, as the presumed Collective, and National Public Radio and the Corporation for Public Broadcasting, on their own behalfs and on behalf American Public Media, Public Radio International, and certain public radio stations. To the extent those published regulations conflict with any of the regulations adopted in the captioned rate proceeding, the previously published regulations shall control.

After consideration of the evidence and arguments presented in the rate proceeding, the Judges conclude that a Public Broadcaster Licensee⁴ that was previously not included in the published Subpart D regulations, if any, shall be bound by the published Subpart D regulations.

Notwithstanding prior publication of Subpart D, when the Judges submit the foregoing Determination for publication by the *Federal Register* they shall amend Subpart D as required to assure correct references and cross-references to other regulations in Part 380.

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

(d) Ephemeral recordings. The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by Covered Entities solely to facilitate Web Site Performances for which royalties are paid pursuant to this Subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

³ *See* Foreword

⁴ No other Public Broadcaster appeared or participated in the proceeding.