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Copyright Royalty Board

37 CFR Part 383

[Docket No. 14-CRB-0002-NSR (2016-2020)]

Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations that would set the royalty rates and terms for the digital transmission of sound recordings by new subscription services and for the making of ephemeral recordings necessary to facilitate those transmissions for the period commencing January 1, 2016, and ending on December 31, 2020.

DATES: Comments and objections, if any, are due no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The proposed rule is posted on the agency's website (www.loc.gov/crb). Submit electronic comments via email to crb@loc.gov or online at <http://www.regulations.gov>. Those who chose not to submit comments electronically should see How to Submit Comments in the **SUPPLEMENTARY INFORMATION** section below for further instructions.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Kimberly Whittle, Attorney Advisor, by telephone at (202) 707-7658, or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

The Copyright Royalty Judges ("Judges") received a joint motion from SoundExchange, Inc. and Sirius XM Radio Inc. to adopt a settlement of their interests regarding royalty rates and terms for

2016-2020 applicable to music services available on cable and satellite television. Sirius XM Radio is a creator of music programming for DiSH satellite television. SoundExchange, Inc. represents the interests of sound recording copyright owners. SoundExchange and Sirius XM Radio propose regulatory language that, in part, simplifies the existing rate structure found in 37 CFR part 383. The Judges hereby publish the proposed revision to the regulation and request comments from the public.

Background

Section 114(f)(2)(A) of the Copyright Act, title 17 of the United States Code, provides that, prior to the expiration of a rate term, the Judges shall commence a proceeding to determine reasonable royalty terms and rates for a new subscription service (*i.e.*, a subscription service that was established after July 1, 1998, or is using a different transmission medium from what it used prior to July 1, 1998) on which sound recordings are performed. 17 U.S.C. 114(f)(2)(A). Section 112(e)(3) provides for proceedings to be commenced to determine rates and terms for licenses to make ephemeral reproductions to facilitate certain digital audio transmissions including those made by new subscription services. 17 U.S.C. 112(e)(3). The Judges have conducted two prior proceedings for five-year rate terms pursuant to these provisions. *See* 72 FR 72253 (December 20, 2007) and 75 FR 14074 (March 24, 2010). The current rate term ends December 31, 2015.

Pursuant to section 803(b)(1)(A)(i)(III) of the Copyright Act, the Judges published in the Federal Register a notice commencing the rate determination proceeding for the license period 2016-2020 for the new subscription services defined in 37 CFR 383.2(h) and requesting interested parties to submit petitions to participate. *See* 79 FR 410 (January 3, 2014). Petitions to Participate in this proceeding were received from Music Reports, Inc., National Music

Publishers Association, Sirius XM Radio Inc. (“Sirius XM”), Spotify USA Inc., and SoundExchange, Inc.

The Judges announced the three-month negotiation period, *see* 17 U.S.C. 803(b)(3), and directed the participants to submit their written direct statements no later than December 1, 2014. On December 1, 2014, the remaining participants¹ filed a motion asking the Judges to stay the filing of written direct statements in light of the parties’ impending settlement. The Judges granted the motion and extended the deadline for filing written direct statements to December 12, 2014. *See* Order Granting Extension of Time for Filing Written Direct Statements, Docket No. 14-CRB-0002-NSR (2016-2020). On December 12, 2014, SoundExchange and Sirius XM filed the settlement that is the subject of this notice.

Section 801(b)(7)(A) authorizes the Judges to adopt rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided the settling parties submit the negotiated rates and terms to the Judges for approval. This section provides that in such event:

(i) the Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates; and

(ii) the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i) objects to the agreement and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

¹ The Judges struck the petitions of two of the other parties, and another party withdrew its petition. Joint Motion to Adopt Settlement at 2.

17 U.S.C. 801(b)(7)(A).

Rates and terms the Judges adopt pursuant to this provision are binding on all sound recording copyright owners and all new subscription services performing the licensed sound recordings on digital audio channels transmitted by a cable or satellite television distribution service to residential customers, bundled with television channels as part of a “basic” service subscription package and not available separately for a separate fee. *See* 37 CFR 383.2(h).

The public may comment and object to any or all of the proposed regulations contained in this notice.. Comments and objections must be submitted no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

How to Submit Comments

Interested members of the public must submit comments to only one of the following addresses. If not commenting by email or online, commenters must submit an original of their comments, five paper copies, and an electronic version on a CD.

Email: crb@loc.gov; or

Online: <http://www.regulations.gov>; or

U.S. mail: Copyright Royalty Board, PO Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE, Washington, DC 20559-6000. Deliver to: Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101
Independence Avenue SE, Washington, DC 20559-6000.

List of Subjects in 37 CFR Part 383

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

Proposed Regulation

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend
37 CFR part 383 as follows:

PART 383 – RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY NEW SUBSCRIPTION SERVICES

1. The authority citation for part 383 continues to read as follows:

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

Title [Amended]

2. Amend the title as follows:

Add the word “CERTAIN” before “NEW SUBSCRIPTION SERVICES”.

§ 383.1 [Amended]

3. Amend § 383.1 as follows:

- a. In paragraph (a), remove “from the inception of the Licensees’ Services” and add in its place “January 1, 2016,” and remove “2015” and add in its place “2020”; and

- b. In paragraph (c), add “voluntary” before “license agreements”.

§ 383.2 [Amended]

4. Amend § 383.2 as follows:

- a. Remove paragraph (a);

- b. Redesignate paragraphs (b) through (f) as paragraphs (a) through (e);
- c. In paragraph (b), add “made under this part pursuant to the statutory licenses” before “under 17 U.S.C.”; remove “or” and add in its place “and”; and remove “(g)”;
- d. In paragraph (c), remove “from the inception of the Licensees’ Services” and add in its place “January 1, 2016”; and remove “2015” and add in its place “2020”;
- e. In paragraph (d), remove “(h)” and add in its place “(f)”;
- f. Remove paragraph (g);
- g. Redesignate paragraphs (h) through (j) as paragraphs (f) through (h); and
- h. In paragraph (f)(3), remove “(h)” and add in its place “(f)”.

§ 383.3 [Amended]

5. Amend § 383.3 as follows:

- a. In paragraph (a), remove “License” and add in its place “statutory licenses”;
- b. Revise paragraph (a)(1) to read as follows:
 - (1) For Stand-Alone Contracts, the following monthly payment per Subscriber to the Service of such Licensee:
 - (i) 2016: \$0.0179;
 - (ii) 2017: \$0.0185;
 - (iii) 2018: \$0.0190;
 - (iv) 2019: \$0.0196;
 - (v) 2020: \$0.0202;
- c. Revise paragraph (a)(2) to read as follows:
 - (2) For Bundled Contracts, the following monthly payment per Subscriber to the Service of such Licensee:

- (i) 2016: \$0.0299;
- (ii) 2017: \$0.0308;
- (iii) 2018: \$0.0317;
- (iv) 2019: \$0.0326;
- (v) 2020: \$0.0336; and

d. In paragraph (2)(b), Remove “, but payable pursuant to the applicable regulations for all years 2007 and earlier”;

§ 383.4 [Amended]

6. Amend §383.4 as follows:

In paragraph (a), Remove “2007-2013” and add in its place “2013-2017” and remove “2015” and add in its place “2020”.

Dated: January 6, 2015.

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

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