



1410-72-P

**LIBRARY OF CONGRESS**

**Copyright Royalty Board**

**37 CFR Part 383**

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

**Determination of Terms and Royalty Rates for Ephemeral Reproductions and Public Performance of Sound Recordings by a New Subscription Service**

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Final rule.

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**SUMMARY:** The Copyright Royalty Judges publish final regulations that set the rates and terms for the use of sound recordings via digital transmissions made by new subscription services and for the making of ephemeral recordings to facilitate those transmissions during the period commencing January 1, 2016, and ending on December 31, 2020.

**DATES:** *Effective:* January 1, 2016.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Whittle, Attorney Advisor, by telephone at (202) 707-7658, or by e-mail at [crb@loc.gov](mailto:crb@loc.gov).

**SUPPLEMENTARY INFORMATION:** On December 12, 2014, the Copyright Royalty Judges (Judges) received a joint motion from SoundExchange, Inc. (“SoundExchange”) and Sirius XM Radio, Inc. (“Sirius XM”) to adopt a settlement of royalty rates and terms under Sections 112(e) and 114 of the Copyright Act (“the Act”) for 2016-2020 for new subscription services of the type at issue in the captioned proceeding (*i.e.*, music services provided to residential subscribers as part of a cable or satellite television bundle). *See* Joint Motion to Adopt Settlement at 1 and 37 CFR 383.2(h). Sirius XM creates music and nonmusic

programming and transmits it through its satellite digital audio radio service and other outlets. According to Sirius XM, it relies on the royalty rates and terms in 37 CFR Part 383 for music programming it provides through the DiSH satellite television service. Joint Motion at 2. SoundExchange is a nonprofit organization that is jointly controlled by representatives of sound recording copyright owners and performers. *Id.* The Judges published the proposed settlement and requested comments from the public. *See* 80 *Federal Register* 2065 (January 15, 2015).

## **Background**

Section 801(b)(1) of the Act, among other things, authorizes the Judges to make determinations and adjustments of reasonable terms and rates of royalty payments as provided in Section 112(e) and 114 of the Act. Section 114(f)(2)(A) of the Act provides, among other things, that, proceedings under chapter 8 of the Act shall determine reasonable rates and terms of royalty payments for public performances of sound recordings by means of new subscription services. Section 112(e)(3) of the Act provides that proceedings under chapter 8 of the Act shall determine reasonable rates and terms of royalty payments for activities specified in Section 112(e)(1) of the Act (i.e., the making of no more than one phonorecord of a sound recording by a transmitting organization entitled to transmit to the public a performance of a sound recording under a statutory license in accordance with Section 114(f) of the Act). The Judges have commenced two prior proceedings for five-year rate periods pursuant to these two provisions, both of which ended when the participants reached an agreement of the applicable rates and terms. *See* 72 FR 72253 (December 20, 2007) and 75 FR 14074 (March 24, 2010). The current rate period expires 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 a rate determination proceeding for the 2016-2020 rate

period and requesting interested parties to submit Petitions to Participate. *See* 79 FR 410 (January 3, 2014). The Judges received Petitions to Participate from Music Reports, Inc. (“Music Reports”), National Music Publishers Association (“NMPA”), Sirius XM, Spotify USA, Inc., and SoundExchange. The Judges subsequently dismissed the petitions to participate of NMPA and Music Reports. *See* Order Dismissing Petition to Participate (Music Reports) (May 30, 2014) and Order Granting SoundExchange Motion to Deny the Petition to Participate of National Music Publishers’ Association (April 30, 2014). On September 26, 2014, Spotify withdrew from the proceeding. *See* Notice of Withdrawal of Petition to Participate. As a result, Sirius XM and SoundExchange are the only remaining participants in this proceeding. Joint Motion at 2.

Section 801(b)(7)(A) of the Copyright Act 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. That provision directs the Judges to provide those who would be bound by the negotiated rates and terms an opportunity to comment on the agreement. The Judges will adopt the negotiated rates and terms unless a participant in a proceeding objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory rates or terms, the Judges adopt the negotiated rates and terms. 17 U.S.C. 801(b)(7)(A).

Rates and terms the Judges adopt pursuant to this provision are binding on all owners of copyright in sound recordings and on all new subscription services performing the copyrighted 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 Judges “may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,” only “if any participant [to the proceeding] objects to the agreement and the [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.” 17 U.S.C. 801(b)(7)(A)(ii). The Judges received no comments or objections in response to their request for comments published in the Federal Register.

The Judges, therefore, by this notice, adopt as final regulations for the period commencing January 1, 2016, and ending on December 31, 2020, the rates and terms agreed to by Sirius XM and SoundExchange for digital transmission of sound recordings by new subscription services and the making of ephemeral reproductions necessary to facilitate those transmissions.

### **List of Subjects in 37 CFR Part 383**

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

### **Final Regulation**

For the reasons set forth in the preamble, the Copyright Royalty Board amends 37 CFR part 383 as follows:

### **PART 383 – RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY CERTAIN 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).

2. The heading for part 383 is revised to read as set forth above.

**§ 383.1 [Amended]**

3. Amend § 383.1 as follows:

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

b. In paragraph (c), by adding “voluntary” before “license agreements”.

**§ 383.2 [Amended]**

4. Amend § 383.2 as follows:

a. By removing paragraph (a);

b. By redesignating paragraphs (b) through (f) as paragraphs (a) through (e);

c. In newly redesignated paragraph (b), by adding “made under this part pursuant to the statutory licenses” before “under 17 U.S.C.”, by removing “or” and adding in its place “and”, and by removing “(g)”;

d. In newly redesignated paragraph (c), by removing “from the inception of the Licensees’ Services” and adding in its place “January 1, 2016,” and by removing “2015” and adding in its place “2020”;

e. In newly redesignated paragraph (d), by removing “(h)” and adding in its place “(f)”;

f. By removing paragraph (g);

g. By redesignating paragraphs (h) through (j) as paragraphs (f) through (h); and

h. In newly redesignated paragraph (f)(3), by removing “(h)” and adding in its place “(f)”.

5. Amend § 383.3 as follows:

- a. In paragraph (a) introductory text, by removing “License” and adding in its place “statutory licenses”;
- b. By revising paragraphs (a)(1) and (2); and
- c. In paragraph (b), by removing “, but payable pursuant to the applicable regulations for all years 2007 and earlier”.

The revisions read as follows:

**§ 383.3 Royalty fees for public performances of sound recordings and the making of ephemeral recordings.**

(a) \* \* \*

(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;

(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;

\* \* \* \* \*

**§ 383.4 [Amended]**

6. Amend §383.4 in paragraph (a), by removing “2007-2013” and adding in its place “2013-2017” and by removing “2015” and adding in its place “2020”.

Dated: March 24\_, 2015

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Suzanne M. Barnett,  
Chief Copyright Royalty Judge

Approved by:

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James H. Billington,  
Librarian of Congress.

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