



1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2014-CRB-0001-WR (2016-2020) (Web IV)]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges publish final regulations that set the rates and terms for the digital performances of sound recordings by certain public radio stations 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: *Effective:* January 1, 2016.

FOR FURTHER INFORMATION CONTACT: LaKeshia Keys, Program Specialist, 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. (“SoundExchange”), National Public Radio, Inc. (“NPR”) and the Corporation for Public Broadcasting (“CPB”) in which they announced a partial settlement in the above proceeding (“Settlement”) regarding royalty rates and terms for certain internet transmissions by NPR, American Public Media, Public Radio International, and certain public radio stations (“covered entities”). The parties to the agreement requested that the Judges adopt the Settlement as a determination of rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible transmissions by covered entities through their websites and related

ephemeral recordings, as more specifically set forth in the Settlement. The Judges published the proposed Settlement and requested comments from the public. 80 *FR* 15958 (March 26, 2015).

Background

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. 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).

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).

Section 801(b)(7)(A) limits the circumstances under which the Judges may decline to adopt aspects of an agreement; nevertheless it does not preclude the Judges from declining to adopt portions of an agreement that would be contrary to the provisions of the applicable license or otherwise contrary to statutory law. *See Review of Copyright Royalty Judges Determination*, 74 *FR* 4537, 4540 (Jan. 26, 2009).

By its terms, this partial Settlement applies to “covered entities,” which are defined as NPR, American Public Media, Public Radio International, Public Radio Exchange, and up to 530

originating public radio stations as named by CPB. Proposed Regulation 380.31.

Notwithstanding the royalty rates and terms set forth in the partial Settlement, copyright owners and licensees are permitted, consistent with the partial Settlement, to adopt rates and terms that would apply in lieu of those established in the partial Settlement. Proposed Regulation 380.30(c). According to the Joint Motion, “[b]ecause the Settlement applies to only a closed group of licensees, and has a single payor (CPB), the Settlement is being submitted to the Judges for adoption as a statutory rate and terms [sic] only so that it will be binding on all copyright owners and performers, including those that are not members of SoundExchange.” Joint Motion at 3.

The Judges received one comment in response to their request for comments published in the Federal Register. In that comment, Intercollegiate Broadcasting System (“IBS”), a participant in the captioned proceeding, objected to adoption of the Settlement prior to the Judges’ issuance of a determination in the proceeding, arguing that doing so would be premature, given that the proceeding is still pending.¹ IBS contends that if the Judges were to adopt the partial Settlement prior to issuing a final determination in the proceeding, the application of the settled rates and terms could prejudice the other noncommercial webcasters remaining in the proceeding. Comments of IBS at 1. IBS contends that there are “few or no legal, FCC licensing, ownership, and locational differences between IBS members and NPR-CPB-qualified public radio stations and webcasters.” *Id.* at 4. As a result, IBS contends that differences in royalty rates between these two groups should be a function of usage and that entities purportedly represented by IBS would qualify for lower rates than those set by the Settlement. *Id.* at 5.

¹ *Comments of Intercollegiate Broadcasting System Opposing SX-NPR’s Proposed Settlement* (April 16, 2015).

Notwithstanding IBS's objection, the Judges find that the partial Settlement provides a reasonable basis for setting statutory terms and rates and therefore they adopt the partial Settlement, with one exception, discussed below. The IBS position is clearly at odds with the language of Section 801(b)(7)(A), which authorizes adoption of settlements "at any time during the proceeding." Further, the proposed Settlement pertains solely to public broadcasting entities, which are expressly excluded from the definition of "noncommercial educational webcasters" in existing regulations. *See* 37 CFR 380.21. To emphasize the limits of the proposed rates and terms, the settling parties proposed adoption of the Settlement as a separate Subpart, Subpart D, of the existing regulations.

IBS's concern that some unnamed webcasters could be prejudiced by the adoption of the Settlement is speculative, unsupported by evidence, and does not, without more, challenge the validity of the Settlement in establishing a reasonable basis for setting statutory terms or rates. Without evidence to the contrary, the Judges find that the agreement reached voluntarily between the Settling Parties does in fact establish a reasonable basis for setting statutory terms and rates.

The Judges do not adopt at this time, however, the provision in proposed § 380.31, which states: "For the 2016-2020 license period, the collective is SoundExchange, Inc." Designation of the Collective under the statutory license is within the Judges' purview and they will make that designation in the Judges' final determination in the proceeding.² With that exception, therefore,

² *See Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 574 F.3d 748, 771 (D.C. Cir 2009) ("in setting the rates and terms of the statutory license, the Judges will designate a single entity to receive royalty payments," internal quotation marks omitted, emphasis added). *See also Review of Copyright Royalty Judges Determination*, 74 FR 4537, 4540 (Jan. 26, 2009) (the Judges are not compelled to adopt a privately negotiated agreement to the extent it includes provisions that are inconsistent with the applicable statutory license or otherwise contrary to statutory law). The Judges adopted as proposed references to SoundExchange in the *covered entities* definition in proposed § 380.31; those references do not by their terms refer to SoundExchange in its capacity as the Judge-designated Collective. The Judges also left intact provisions referring to SoundExchange in its capacity as the Collective in proposed § 380.33. Those references are expressly limited to Subpart D and are qualified by the clause in proposed § 380.33(b) "[u]ntil such time as a new designation is made." Unrelated to the Collective designation issue, the Judges also corrected a typographical error in the last sentence of proposed § 380.32 (e) by adding the

the Judges adopt the proposed regulations that codify the partial Settlement. In doing so, the Judges make clear that the adoption of the partial Settlement should in no way suggest that they are more or less inclined to adopt the reasoning or proposals of any of the parties remaining in the proceeding.

List of Subjects in 37 CFR Part 380

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

Final Regulation

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 37 CFR part 380 as follows:

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NON-SUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

2. Add subpart D to read as follows:

Subpart D — Certain Transmissions by Public Broadcasting Entities

Sec.

380.30 General.

380.31 Definitions.

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

380.33 Terms for making payment of royalty fees and statements of account.

380.34 Confidential Information.

380.35 Verification of royalty payments.

380.36 Verification of royalty distributions.

words “of the” between the words “remainder Term.” The Judges adopted all other provisions of the Settlement as proposed.

380.37 Unclaimed funds.

Subpart D—Certain Transmissions by Public Broadcasting Entities

§380.30 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions, through Authorized Web Sites, by means of Web Site Performances, by certain Covered Entities as set forth in this subpart in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Covered Entities in accordance with the provisions of 17 U.S.C. 112(e) solely as necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate Web Site Performances, during the period January 1, 2016, through December 31, 2020. The provisions of this subpart shall apply to the Covered Entities in lieu of other rates and terms applicable under 17 U.S.C. 112(e) and 114.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§380.31 Definitions.

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

Aggregate Tuning Hours (ATH) means the total hours of programming that Covered Entities have transmitted during the relevant period to all listeners within the United States from

all Covered Entities that provide audio programming consisting, in whole or in part, of Web Site Performances, less the actual running time of any sound recordings for which the Covered Entity has obtained direct licenses apart from this Agreement. By way of example, if a Covered Entity transmitted one hour of programming to ten (10) simultaneous listeners, the Covered Entity's Aggregate Tuning Hours would equal ten (10). If three (3) minutes of that hour consisted of transmission of a directly licensed recording, the Covered Entity's Aggregate Tuning Hours would equal nine (9) hours and thirty (30) minutes. As an additional example, if one listener listened to a Covered Entity for ten (10) hours (and none of the recordings transmitted during that time was directly licensed), the Covered Entity's Aggregate Tuning Hours would equal 10.

Authorized Web Site is any Web Site operated by or on behalf of any Covered Entity that is accessed by Web Site Users through a Uniform Resource Locator ("URL") owned by such Covered Entity and through which Web Site Performances are made by such Covered Entity.

CPB is the Corporation for Public Broadcasting.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges.

Copyright Owners are Sound Recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Covered Entities are NPR, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by CPB. CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Covered Entities hereunder (subject to the numerical limitations set forth herein). The number of Originating Public Radio Stations treated hereunder as Covered Entities shall not

exceed 530 for a given year without SoundExchange's express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Covered Entities as provided in section 380.32(c).

Ephemeral Phonorecords are Phonorecords of all or any portion of any Sound Recordings; provided that:

(1) Such Phonorecords are limited solely to those necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate Web Site Performances covered by this subpart;

(2) Such Phonorecords are made in strict conformity with the provisions set forth in 17 U.S.C. 112(e)(1)(A)-(D); and

(3) The Covered Entities comply with 17 U.S.C. 112(a) and (e) and all of the terms and conditions of this Agreement.

Music ATH is ATH of Web Site Performances of Sound Recordings of musical works.

NPR is National Public Radio, Inc.

Originating Public Radio Station is a noncommercial terrestrial radio broadcast station that—

(1) Is licensed as such by the Federal Communications Commission;

(2) Originates programming and is not solely a repeater station;

(3) Is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or another public radio station that is qualified to receive funding from CPB pursuant to its criteria;

(4) Qualifies as a “noncommercial webcaster” under 17 U.S.C. 114(f)(5)(E)(i); and

(5) Either—

(i) Offers Web Site Performances only as part of the mission that entitles it to be exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); or

(ii) In the case of a governmental entity (including a Native American Tribal governmental entity), is operated exclusively for public purposes.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the individuals and entities identified in 17 U.S.C. 114(g)(2)(D).

Person is a natural person, a corporation, a limited liability company, a partnership, a trust, a joint venture, any governmental authority or any other entity or organization.

Phonorecords have the meaning set forth in 17 U.S.C. 101.

Qualified Auditor is a Certified Public Accountant, or a person, who by virtue of education or experience, is appropriately qualified to perform an audit to verify royalty payments related to performances of sound recordings.

Side Channel is any Internet-only program available on an Authorized Web Site or an archived program on such Authorized Web Site that, in either case, conforms to all applicable requirements under 17 U.S.C. 114.

Sound Recording has the meaning set forth in 17 U.S.C. 101.

Term is the period January 1, 2016, through December 31, 2020.

Web Site is a site located on the World Wide Web that can be located by a Web Site User through a principal URL.

Web Site Performances are all public performances by means of digital audio transmissions of Sound Recordings, including the transmission of any portion of any Sound Recording, made through an Authorized Web Site in accordance with all requirements of 17 U.S.C. 114, from servers used by a Covered Entity (provided that the Covered Entity controls the

content of all materials transmitted by the server), or by a contractor authorized pursuant to Section 380.32(f), that consist of either the retransmission of a Covered Entity's over-the-air terrestrial radio programming or the digital transmission of nonsubscription Side Channels that are programmed and controlled by the Covered Entity. This term does not include digital audio transmissions made by any other means.

Web Site Users are all those who access or receive Web Site Performances or who access any Authorized Web Site.

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

(a) *Royalty rates.* The total license fee for all Web Site Performances by Covered Entities during the Term, up to a total Music ATH of 285,132,065 per calendar year, and Ephemeral Phonorecords made by Covered Entities solely to facilitate such Web Site Performances, during the Term shall be \$2,800,000 (the "License Fee"), unless additional payments are required as described in paragraph (c) of this section.

(b) *Calculation of License Fee.* It is understood that the License Fee includes:

- (1) An annual minimum fee of \$500 for each Covered Entity for each year during the Term;
- (2) Additional usage fees for certain Covered Entities; and
- (3) A discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

(c) *Increase in Covered Entities.* If the total number of Originating Public Radio Stations that wish to make Web Site Performances in any calendar year exceeds the number of such Originating Public Radio Stations considered Covered Entities in the relevant year, and the

excess Originating Public Radio Stations do not wish to pay royalties for such Web Site Performances apart from this subpart, CPB may elect by written notice to the Collective to increase the number of Originating Public Radio Stations considered Covered Entities in the relevant year effective as of the date of the notice. To the extent of any such elections, CPB shall make an additional payment to the Collective for each calendar year or part thereof it elects to have an additional Originating Public Radio Station considered a Covered Entity, in the amount of \$500 per Originating Public Radio Station per year. Such payment shall accompany the notice electing to have an additional Originating Public Radio Station considered a Covered Entity.

(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.

(e) *Effect of non-performance by any Covered Entity.* In the event that any Covered Entity violates any of the material provisions of 17 U.S.C. 112(e) or 114 or this subpart that it is required to perform, the remedies of the Collective shall be specific to that Covered Entity only, and shall include, without limitation, termination of that Covered Entity's right to be treated as a Covered Entity hereunder upon written notice to CPB. The Collective and Copyright Owners also shall have whatever rights may be available to them against that Covered Entity under applicable law. The Collective's remedies for such a breach or failure by an individual Covered Entity shall not include termination of the rights of other Covered Entities to be treated as Covered Entities hereunder, except that if CPB fails to pay the License Fee or otherwise fails to perform any of the material provisions of this subpart, or such a breach or failure by a Covered

Entity results from CPB's inducement, and CPB does not cure such breach or failure within 30 days after receiving notice thereof from the Collective, then the Collective may terminate the right of all Covered Entities to be treated as Covered Entities hereunder upon written notice to CPB. In such a case, a prorated portion of the License Fee for the remainder of the Term (to the extent paid by CPB) shall, after deduction of any damages payable to the Collective by virtue of the breach or failure, be credited to statutory royalty obligations of Covered Entities to the Collective for the Term as specified by CPB.

(f) *Use of contractors.* The right to rely on this subpart is limited to Covered Entities, except that a Covered Entity may employ the services of a third Person to provide the technical services and equipment necessary to deliver Web Site Performances on behalf of such Covered Entity, but only through an Authorized Web Site. Any agreement between a Covered Entity and any third Person for such services shall:

(1) Obligate such third Person to provide all such services in accordance with all applicable provisions of the statutory licenses and this subpart;

(2) Specify that such third Person shall have no right to make Web Site Performances or any other performances or Phonorecords on its own behalf or on behalf of any Person or entity other than a Covered Entity through the Covered Entity's Authorized Web Site by virtue of its services for the Covered Entity, including in the case of Phonorecords, pre-encoding or otherwise establishing a library of Sound Recordings that it offers to a Covered Entity or others for purposes of making performances, but instead must obtain all necessary licenses from the Collective, the copyright owner or another duly authorized Person, as the case may be;

(3) Specify that such third Person shall have no right to grant any sublicenses under the statutory licenses; and

(4) Provide that the Collective is an intended third-party beneficiary of all such obligations with the right to enforce a breach thereof against such third Person.

§380.33 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* CPB shall pay the License Fee to the Collective in five equal installments of \$560,000 each, which shall be due December 31, 2015, and annually thereafter through December 31, 2019.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments for Covered Entities under this subpart and to distribute such royalty payments to each Copyright Owner and Performer, or their 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 by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Reporting.* CPB and Covered Entities shall submit reports of use and other information concerning Web Site Performances as agreed upon with the Collective.

(d) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the related statement of account are received by the Collective.

(e) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from CPB to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all Web Site Performances by Covered Entities equally based upon the reporting information provided by CPB/NPR.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (e)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §380.37.

(f) *Retention of records.* Books and records of CPB and Covered Entities and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§380.34 Confidential Information.

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge, or documents or information that become publicly known through no fault of the Collective or are known by the Collective when disclosed by CPB/NPR. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto and enforcement of the terms of the statutory licenses.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

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

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's

statement of account pursuant to §380.35 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §380.36;

(3) Copyright Owners and Performers, including their designated agents, whose works have been 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 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 confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts, subject to the provisions of any relevant agreements restricting the activities of CPB, Covered Entities or the Collective in such proceedings.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any 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 person.

§380.35 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by CPB.

(b) *Frequency of verification.* The Collective may conduct a single audit of any Covered Entities, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit CPB and Covered Entities, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on CPB. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* CPB and Covered Entities shall 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. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of CPB in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of CPB reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(f) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in

which case CPB shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§380.36 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall 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. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable

opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(f) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§380.37 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 subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Dated: July 28, 2015

Suzanne M. Barnett,
Chief Copyright Royalty Judge

Approved by:

James H. Billington,
Librarian of Congress.

