



This document is scheduled to be published in the Federal Register on 11/05/2014 and available online at <http://federalregister.gov/a/2014-26222>, and on FDsys.gov

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: Proposed rule.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations governing the rates and terms for the digital performances of sound recordings by noncommercial educational webcasters and for the making of ephemeral recordings necessary for the facilitation of such 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 21 DAYS AFTER THE 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 online at <http://www.regulations.gov> or via email to crb@loc.gov. Those who chose not to submit comments electronically should see How to Submit Comments in the Supplementary Information section below for physical addresses and 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:

Background

On October 7, 2014, the Copyright Royalty Judges received a joint motion from SoundExchange, Inc. and College Broadcasters, Inc. to adopt a partial settlement of their interests regarding Web IV rates and terms for 2016-2020.¹ Joint Motion to Adopt Partial Settlement, Docket No. 2014-CRB-0001-WR (2016-2020). Their interests concern the rule setting copyright royalty minimum fees and terms that the Judges will establish for compulsory copyright licenses for certain internet transmissions of sound recordings by college radio stations and other noncommercial educational webcasters for the period from January 1, 2016, through December 31, 2020. SoundExchange, Inc. represents the interests of sound recording copyright owners and performers. College Broadcasters, Inc. represents the interests of users of the copyrighted material which users include college, university and high school radio and television stations and other electronic media organizations. The Judges hereby publish the proposal and request comments from the public.

Section 114 of the Copyright Act, title 17 of the United States Code, provides a statutory license that allows for the public performance of sound recordings by means of a digital audio transmission by, among others, eligible nonsubscription transmission services and new subscription services. 17 U.S.C. 114(f). For purposes of the section 114 license, an “eligible nonsubscription transmission” is a noninteractive digital audio transmission that does not require a subscription for receiving the transmission. The transmission must also be made as part of a service that provides audio programming consisting in whole or in part of performances of sound recordings the purpose of which

¹ Web IV is short for Webcasting IV. This proceeding is the fourth since the compulsory license for webcasting was established.

is to provide audio or other entertainment programming, but not to sell, advertise, or promote particular goods or services. *See* 17 U.S.C. 114(j)(6). A “new subscription service” is a “service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription or preexisting satellite digital audio radio service.” 17 U.S.C. 114(j)(8).

Services using the section 114 license may need to make one or more temporary or “ephemeral” copies of a sound recording in order to facilitate the transmission of that recording. The section 112 statutory license allows for the making of these ephemeral reproductions. 17 U.S.C. 112(e).

Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (“Judges”) to conduct proceedings every five years to determine the rates and terms for the sections 114 and 112 statutory licenses. 17 U.S.C. 801(b)(1), 804(b)(3)(A). The current proceeding commenced in January 2014 for rates and terms that will become effective on January 1, 2016, and end on December 31, 2020. Pursuant to section 804(b)(3)(A), the Judges published in the **Federal Register** a notice commencing the proceeding and requesting that interested parties submit their petitions to participate. 79 FR 412 (January 3, 2014). The following parties submitted Petitions to Participate: 8tracks, Inc.; AccuRadio, LLC; Amazon.com, Inc.; Apple Inc; Beats Music, LLC; Clear Channel; CMN, Inc.; College Broadcasters, Inc. (CBI); CustomChannels.net, LLC; Digital Media Association (DiMA); Digitally Imported, Inc.; Educational Media Foundation; Feed Media, Inc.; Geo Music Group; Harvard Radio Broadcasting Inc. (WHRB); idobi Network; Intercollegiate Broadcasting System, Inc. (IBS); Music Reports Inc.; National Association of Broadcasters (NAB); National Music Publishers Association (NMPA);

National Public Radio (NPR); National Religious Broadcasters Noncommercial Music License Committee (NRBNMLC); Pandora Media Inc.; Rhapsody International, Inc.; Sirius XM Radio Inc.; SomaFM.com LLC; SoundExchange, Inc. (SX); Spotify USA Inc.; and Triton.²

The Judges set the timetable for the three-month negotiation period for February 21, 2014, through May 22, 2014. *See* 17 U.S.C. 803(b)(3). The Judges set December 22, 2014, as the deadline by which participants were to submit amended written direct statements. On October 7, 2014, SoundExchange and CBI submitted to the Judges a joint motion to adopt a partial settlement of their interests in the proceeding. The parties requested that the Judges make their decision on the motion by approximately December 1, 2014, in order to allow the parties time to prepare for litigation should the Judges decline to adopt their proposed partial settlement.

Statutory Timing of Adoption of Rates and Terms

Section 801(b)(7)(A) allows for the adoption of rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided the parties submit the negotiated rates and terms to the Copyright Royalty Judges for approval. This section provides:

- (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

² The following ten parties have withdrawn their Petitions to Participate: 8tracks, Inc.; Amazon.com, Inc.; CMN, Inc.; CustomChannels.net, LLC; Digitally Imported, Inc.; Feed Media, Inc.; idobi Network; Rhapsody International, Inc.; SomaFM.com LLC; Spotify USA Inc. Two parties, Music Reports Inc. and Triton Digital, Inc., have been dismissed from the proceeding.

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.

17 U.S.C. 801(b)(7)(A). Rates and terms adopted pursuant to this provision are binding on all copyright owners of sound recordings, college radio stations, and other noncommercial educational webcasters performing the sound recordings for the license period 2016-2020.

Proposed Adjustments to Rates and Terms

In the settlement proposal, SoundExchange and CBI request that the Judges adjust the details of 37 CFR part 380 Subpart C by “(1) more strictly limiting eligibility for the rates set forth herein to services that remain below 159,140 aggregate tuning hours per channel or station per month; and (2) somewhat increasing the listenership cap for services electing the proxy reporting option.” Joint Motion to Adopt Partial Settlement at 2. The proposed adjustments would affect §§ 380.20 (general), 380.21 (definitions), 380.22 (fees), and 380.23 (terms) and are reflected in the Proposed Regulations below.

The public may comment and object to any or all of the proposed regulations contained in this notice. Such comments and objections must be submitted no later than [INSERT DATE 21 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 380

Copyright, Sound recordings, Webcasters.

Proposed Regulations

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

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION 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. Amend § 380.20 by revising paragraph (a) to read as follows:

Subpart C – Noncommercial Educational Webcasters

§ 380.20 General.

(a) *Scope.* This subpart establishes rates and terms, including requirements for royalty payments, recordkeeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2016, through December 31, 2020.

* * * * *

3. Amend § 380.21 by revising the definitions for “Collective” and “Noncommercial Educational Webcaster” to read as follows:

§ 380.21 Definitions.

* * * * *

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2016-2020 license period, the Collective is SoundExchange, Inc.

* * * * *

Noncommercial Educational Webcaster means a Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution;

(4) Is not a “public broadcasting entity” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396; and

(5) Takes affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month, if in any previous calendar year it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month.

* * * * *

4. Revise § 380.22 to read as follows:

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

(a) *Minimum fee for eligible Noncommercial Educational Webcasters.* Each Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately

preceding calendar year and does not expect to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year shall pay an annual, nonrefundable minimum fee of \$500 (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. The Minimum Fee shall constitute the annual per channel or per station royalty for all Eligible Transmissions totaling not more than 159,140 Aggregate Tuning Hours in a month on any individual channel or station, and for Ephemeral Recordings to enable such Eligible Transmissions. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective.

(b) *Consequences of unexpectedly exceeding ATH cap.* In the case of a Noncommercial Educational Webcaster eligible to pay royalties under paragraph (a) that unexpectedly makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year:

(1) The Noncommercial Educational Webcaster shall, for such month and the remainder of the calendar year in which such month occurs, pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subpart A applicable to noncommercial webcasters;

(2) The Minimum Fee paid by the Noncommercial Educational Webcaster for such calendar year will be credited to the amounts payable under the provisions of Part 380 Subpart A applicable to noncommercial webcasters; and

(3) The Noncommercial Educational Webcaster shall, within 45 days after the end of such month, notify the Collective that it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on a channel or station in a month; pay the Collective any amounts for such month due under the provisions of Part 380 Subpart A applicable to noncommercial webcasters; and provide the Collective a statement of account pursuant to Part 380 Subpart A.

(c) *Royalties for other Noncommercial Educational Webcasters.* A Noncommercial Educational Webcaster that is not eligible to pay royalties under paragraph (a) shall pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subpart A applicable to noncommercial webcasters.

(d) *Estimation of performances.* In the case of a Noncommercial Educational Webcaster that is required to pay royalties under paragraph (b) or (c) on a per-performance basis, that is unable to calculate actual total performances, and that is not required to report actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its applicable royalties on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay such royalties at the applicable per-performance rates based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a

Noncommercial Educational Webcaster offering more than one channel or station shall pay per-performance royalties on a per-channel or -station basis.

(e) *Ephemeral royalty*. The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster is deemed to be included within the royalty payments set forth in paragraphs (a) through (c) of this section and to equal 5% of the total royalties payable under such paragraphs.

5. Amend § 380.23 by revising paragraphs (c), (d), intro paragraph (f), (f)(2), (f)(4), (f)(9), (g)(1), and (g)(3) to read as follows:

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

* * * * *

(c) *Minimum fee*. Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) [Reserved]

* * * * *

(f) *Statements of account.* Any payment due under § 380.22(a) shall be accompanied by a corresponding statement of account on a form provided by the Collective. A statement of account shall contain the following information:

* * *

(2) [Reserved]

* * *

(4) The signature of a duly authorized representative of the applicable educational institution;

* * *

(9) A statement to the following effect:

I, the undersigned duly authorized representative of the applicable educational institution, have examined this statement of account; hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence; and further certify that the licensee entity named herein qualifies as a Noncommercial Educational Webcaster for the relevant year, and did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required additional royalties.

(g) ***

(1) *Reporting waiver.* In light of the unique business and operational circumstances with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 80,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 80,000 total ATH for any individual channel or station for any calendar month during the

applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of \$100 in lieu of providing reports of use for the calendar year pursuant to the regulations § 370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 80,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in paragraph (g)(1) of this section during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 80,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by a duly authorized representative of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

* * *

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to paragraph (g)(3) of this section:

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section.

A Noncommercial Educational Webcaster required to report pursuant to paragraph (g)(3) of this section shall provide reports of use to the Collective quarterly on a census reporting basis in accordance with § 370.4 of this chapter, except that, notwithstanding § 370.4(d)(2), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with paragraph (g)(3) of this section. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with paragraph (g)(3) of this section for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under paragraph (g)(3) of this section shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

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Dated: October 29, 2014.

Jesse M. Feder,
Copyright Royalty Judge.

[BILLING CODE:1410-72-P]

[FR Doc. 2014-26222 Filed 11/04/2014 at 8:45 am; Publication Date: 11/05/2014]