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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 19-CRB-0005-WR (2021 – 2025)]

Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V)

AGENCY: Copyright Royalty Board (CRB), Library of Congress.

ACTION: Proposed rule related to noncommercial educational webcasters.

SUMMARY: The Copyright Royalty Judges are publishing for comment proposed regulations governing the rates and terms for the digital performance 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, 2021, and ending on December 31, 2025.

DATES: Comments and objections, if any, are due no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments and proposals, identified by docket number 19-CRB-0005-WR (2021-2025), by any of the following methods:

CRB's electronic filing application: Submit comments and proposals online in eCRB at <https://app.crb.gov/>.

U.S. mail: Copyright Royalty Board, P.O. 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.

Instructions: Parties unable to use eCRB must submit an original, two paper copies, and an electronic version on a CD. All submissions must include the Copyright Royalty Board name and docket number (19-CRB-0005-WR (2021-2025)), as well as the *Federal Register* citation for this proposed rule. All submissions received will be posted without change on eCRB at <https://app.crb.gov/> including any personal information provided.

Docket: For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board’s electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 19-CRB-0005-WR (2021-2025).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION: On September 23, 2019, the Copyright Royalty Judges (Judges) received a joint motion from SoundExchange, Inc., (“SoundExchange”) and College Broadcasters, Inc., (“CBI”) to adopt a partial settlement of their interests regarding Web V rates and terms for 2021-2025.¹ Joint Motion to Adopt Partial Settlement, Docket No. 19-CRB-0005-WR (2021-2025). Their interests concern

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

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, 2021, through December 31, 2025. SoundExchange represents the interests of sound recording copyright owners and performers. CBI 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 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 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 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 2019 for rates and terms that will become effective on January 1, 2021, and end on December 31, 2025. 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. 84 FR 359 (Jan. 24, 2019). CBI and SoundExchange each filed Petitions to Participate, as did others.

On September 23, 2019, SoundExchange and CBI submitted to the Judges a joint motion to adopt a partial settlement of their interests in the proceeding. SoundExchange and CBI requested that the Judges “endeavor to determine before the deadline for the filing of written rebuttal statements in this Proceeding (January 10, 2020) whether or not they will adopt the Settlement.” Joint Motion at 1.

Statutory Timing of Adoption of Rates and Terms

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt royalty rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided they are submitted to the Judges for approval. The Judges must provide “an opportunity to comment on the agreement” to participants and non-participants in the rate proceeding who “would be bound by the terms, rates, or other determination set by any agreement....” 17 U.S.C. 801(b)(7)(A)(i). Participants in the

proceeding may also “object to [the agreement’s] adoption as a basis for statutory terms and rates.” *Id.*

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 [in 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).

Any rates and terms adopted pursuant to this provision would be binding on all copyright owners of sound recordings, college radio stations, and other noncommercial educational webcasters performing the sound recordings for the license period 2021-2025.

Proposed Adjustments to Rates and Terms

According to SoundExchange and CBI, the agreement generally continues in effect the current provisions of 37 CFR part 380, subpart C, which were themselves adopted pursuant to 17 U.S.C. 801(b)(7)(A) as part of the Webcasting IV proceeding, with two primary changes: (1) the minimum fee applicable to noncommercial educational webcasters will increase by \$50 per year throughout the rate period; and (2) consistent with the preferences previously expressed by the Judges, the generally applicable provisions in subpart A will apply to noncommercial educational webcasters to the extent consistent with subpart C, and the corresponding provisions have been removed from subpart C. Joint Motion at 2.

The public may comment and object to any or all of the proposed regulations contained in this document. Such comments and objections must be submitted no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings, Webcasters.

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 TRANSMISSIONS BY ELIGIBLE NONSUBSCRIPTION SERVICES AND NEW SUBSCRIPTION SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

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. Revise subpart C to read as follows:

Subpart C—Noncommercial Educational Webcasters

Sec.

380.20 Definitions.

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

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

§ 380.20 Definitions.

For purposes of this subpart, the following definitions apply:

Educational Transmission means an eligible nonsubscription transmission (as defined in 17 U.S.C. 114(j)(6)) made by a Noncommercial Educational Webcaster over the Internet.

Noncommercial Educational Webcaster means a noncommercial webcaster (as defined in 17 U.S.C. 114(f)(4)(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 Educational Transmissions and related Ephemeral Recordings;

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

(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(f)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to its criteria; and

(5) Takes affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours (ATH) 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 ATH on any individual channel or station in any month.

§ 380.21 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 ATH on any individual channel or station in any calendar month during the applicable calendar year shall pay an annual, nonrefundable minimum fee in the amount set forth in paragraphs (a)(1) through (5) of this section (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 Educational Transmissions, for each calendar year it makes Educational 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 Fee. The Minimum Fee shall constitute the annual per channel or per station royalty for all Educational Transmissions totaling not more than 159,140 ATH in a month on any individual channel or station, and for Ephemeral Recordings to enable such Educational Transmissions. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.22(d)(1) shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective (for purposes of this subpart, the term “Collective” refers to SoundExchange, Inc.). The Minimum Fee for each year of the royalty period is:

- (1) 2021: \$550;
- (2) 2022: \$600;
- (3) 2023: \$650;
- (4) 2024: \$700; and

(5) 2025: \$750.

(b) *Consequences of unexpectedly exceeding ATH cap.* In the case of a Noncommercial Educational Webcaster eligible to pay royalties under paragraph (a) of this section that unexpectedly makes total transmissions in excess of 159,140 ATH 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 subpart B of this part 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 subpart B of this part applicable to Noncommercial Webcasters; and

(3) The Noncommercial Educational Webcaster shall, within 45 days after the end of each month, notify the Collective if it has made total transmissions in excess of 159,140 ATH on a channel or station during that month; pay the Collective any amounts due under the provisions of subpart B of this part applicable to Noncommercial Webcasters; and provide the Collective a statement of account pursuant to subpart A of this part.

(c) *Royalties for other Noncommercial Educational Webcasters.* A Noncommercial Educational Webcaster that is not eligible to pay royalties under paragraph (a) of this section shall pay royalties in accordance, and otherwise comply, with the provisions of subpart B of this part 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) of this section on a per-Performance basis, that is unable to calculate actual total performances, and that is not required to report actual total performances under § 380.22(d)(3), the Noncommercial Educational Webcaster may pay its applicable royalties on an ATH basis, provided that the Noncommercial Educational Webcaster shall calculate 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) *Allocation between ephemeral recordings and performance royalty fees.* The Collective must credit 5% of all royalty payments as payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making Educational Transmissions are included in the 5%.

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

(a) *Payment to the Collective.* A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.21 to the Collective.

(b) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable (see paragraph (d) of this section), 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 Educational Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of January 31st of each calendar year 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 Educational Transmissions and identify which of the reporting options set forth in paragraph (d) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(c) *Statements of account.* Any payment due under paragraph (a) of this section 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:

(1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;

(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 a duly authorized representative of the applicable educational institution;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) The title or official position held by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) 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.

(d) *Reporting by Noncommercial Educational Webcasters in general—(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 at § 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 this paragraph (d)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Educational 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 the reporting waiver in this paragraph (d)(1), including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (b) 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 Educational Transmissions in the future.

(2) *Sample-basis reports.* A 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 that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at § 370.4 of this chapter, except that, notwithstanding § 370.4(d)(2)(vi), such an electing 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. Notwithstanding the preceding sentence, a Noncommercial Educational Webcaster that is

able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) *Census-basis reports.* (i) If any of the conditions in paragraphs (d)(3)(i)(A) through (C) of this section is satisfied, a Noncommercial Educational Webcaster must report pursuant to paragraph (d)(3) of this section:

(A) 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;

(B) 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

(C) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraph (d)(1) or (2) of this section.

(ii) A Noncommercial Educational Webcaster required to report pursuant to paragraph (d)(3)(i) 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 (d)(3) of this section. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with paragraph (d)(3)(i) 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 (d)(3)(i) of this section shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(e) *Server logs.* Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

(f) *Terms in general.* Subject to the provisions of this subpart, terms governing late fees, distribution of royalties by the Collective, unclaimed funds, record retention requirements, treatment of Licensees' confidential information, audit of royalty payments and distributions, and any definitions for applicable terms not defined in this subpart shall be those set forth in subpart A of this part.

Dated: October 23, 2019.

Jesse M. Feder,
Chief Copyright Royalty Judge.
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