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Copyright Royalty Board

37 CFR Part 384

[Docket No. 21-CRB-0013-BER (2024-2028)]

Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (Business Establishments IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges publish final regulations setting rates and terms for the making of ephemeral copies of sound recordings to facilitate digital audio transmissions of those sound recordings to business establishments for the period from January 1, 2024, through December 31, 2028.

DATES: *Effective date:* January 1, 2024.

ADDRESSES: For access to the docket to read submitted background documents go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/>, and search for docket number 21-CRB-0013-BER (2024-2028).

FOR FURTHER INFORMATION CONTACT: Anita Brown, CRB Program Specialist, (202) 707-7658, crb@loc.gov.

SUPPLEMENTARY INFORMATION: The Copyright Act provides that the Copyright Royalty Judges (Judges) commence a proceeding every fifth year to determine royalty rates and terms for the recording of ephemeral copies of sound recordings pursuant to the statutory license in 17 U.S.C. 112(e)(1) to facilitate digital audio transmissions of those sound recordings to business establishments pursuant to the

limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv). *See* 17 U.S.C. 804(b)(2).

In accordance with section 804(b)(2), the Judges commenced the proceeding to set rates and terms for the period 2024-2028 on January 5, 2022 (87 FR 490). In the Federal Register notice, the Judges requested that interested parties submit petitions to participate. Petitions to Participate were received from: Mood Media Corp., Music Choice, Rockbot, Inc., Sirius XM Radio Inc. and Its Wholly Owned Subsidiaries, SoundExchange, Inc., Soundtrack Your Brand Sweden AB, and Stingray Music USA Inc. The Judges initiated the three-month negotiation period and directed the participants to submit written direct statements no later than September 19, 2022. *See* 17 U.S.C. 803(b)(3).

On September 19, 2022, the Judges received a Motion to Adopt Settlement stating that all participants¹ had reached a settlement obviating the need for written direct statements or a hearing.

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 both 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.* Accordingly, on October 4, 2023 the Judges published a notice requesting comment on the proposed rates and terms (88 FR 68527). The Judges received no timely comments or objections in response to the October 4, 2023 notice.

Having received no opposition to the agreement and finding that the agreement

¹ Soundtrack Your Brand Sweden AB had withdrawn its Petition to Participate on April 5, 2022.

among the moving parties provides a reasonable basis for setting statutory rates and terms, the Judges, by this notice, adopt as final regulations the rates and terms for the making of an ephemeral recording of a sound recording by a business establishment service for the period January 1, 2024, through December 31, 2028.

List of Subjects in 37 CFR Part 384

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

Final Regulations:

For the reasons set forth in the preamble, the Copyright Royalty Judges amend part 384 of chapter III of title 37 of the Code of Federal Regulations as follows:

PART 384—RATES AND TERMS FOR THE MAKING OF EPHEMERAL RECORDINGS BY BUSINESS ESTABLISHMENT SERVICES

1. The authority citation for part 384 continues to read as follows:

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

§ 384.1 [Amended]

2. In § 384.1(a), remove the phrase “January 1, 2019, through December 31, 2023” and add in its place “January 1, 2024, through December 31, 2028”.

3. In § 384.3, revise paragraphs (a) and (b) to read as follows:

§ 384.3 Royalty fees for ephemeral recordings.

(a) *Basic royalty rate.* (1) For the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service, a Licensee shall pay a royalty equal to the following percentages of such Licensee's “Gross Proceeds” derived from the use in such service of musical programs that are attributable to recordings subject to protection under title 17, United States Code:

Table 1 to Paragraph (a)(1)

Year	Rate
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2024	14.0%
2025	14.5%
2026	14.75%
2027	15.0%
2028	15.0%

(2) Gross Proceeds as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of sound recordings subject to protection under title 17, United States Code, during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv).

(3) Subject to paragraph (a)(4) of this section, the royalty specified in paragraph (a)(1) of this section for a particular Business Establishment Service offering may be reduced by a percentage corresponding to the “Direct License Share” for such Business Establishment Service offering, as follows:

(i) If the transmissions of the Business Establishment Service offering are entirely made over the internet or the Licensee otherwise is able to count all of its Performances to business subscribers, the Direct License Share for such Business Establishment Service offering is its Performances of directly licensed sound recordings and sound recordings for which no license is required (e.g., sound recordings in which the copyrights are owned by the Licensee) (collectively, “Excluded Recordings”) divided by its total Performances.

(ii) If the transmissions of the Business Establishment Service offering are made to 10% or more of the bona fide subscriber locations of the Business Establishment Service offering over the internet, or the Licensee otherwise is able to count its

Performances to 10% or more of bona fide subscriber locations of the Business Establishment Service offering, and the Business Establishment Service offering provides transmissions of a substantially similar set of channels (fairly represented by the countable channels) to other subscriber locations by means that do not allow the Licensee to count Performances (e.g., by satellite with no usage feedback), the Direct License Share for such Business Establishment Service offering is its Performances of Excluded Recordings to the locations where the Licensee is able to count its Performances divided by its total Performances to the locations where the Licensee is able to count its Performances. When reporting under § 370.4(d)(2)(vii) of this chapter, such total countable Performances of sound recordings that are not Excluded Recordings shall be treated and reported as the “actual total performances” of the Business Establishment Service if the Direct License Share is calculated pursuant to this paragraph (a)(3)(ii).

(iii) If paragraphs (a)(3)(i) and (ii) of this section do not apply, but the Licensee transmits a set of webcast channels substantially similar to and representative of the Business Establishment Service offering to consumers over the internet or by other means that allow the Licensee to count Performances on those channels (“Reference Channels”), the Direct License Share for such Business Establishment Service offering is its Performances of Excluded Recordings on the Reference Channels divided by its total Performances on the Reference Channels.

(iv) Otherwise, the Direct License Share for such Business Establishment Service offering is a fraction calculated on a subscriber location-by-subscriber location basis, or if that is impracticable, on a uniform basis for all subscriber locations, where:

(A) The numerator is the play frequency (as defined in § 370.4(b) of this chapter) of Excluded Recordings for the Business Establishment Service offering during a period of time each day as follows:

(1) If the Direct License Share is calculated on a subscriber location-by subscriber location basis, during a continuous 12-hour period to be selected by the Licensee for each location for the month for which the payment is made, provided that each such location's hours of operation fall entirely within the selected 12-hour period, or if such location is in operation for more than 12 hours per day, the selected 12-hour period consists of hours the location is in operation, including its main hours of operation; or

(2) If the Direct License Share is calculated on a uniform basis for all locations, during the hours of 9 a.m. to 9 p.m. local time; and

(B) The denominator is the total play frequency (as defined in § 370.4(b) of this chapter) for the Business Establishment Service offering between the same hours as used in the numerator.

(4) The Direct License Share reduction in paragraph (a)(3) of this section is available to a Licensee only if the Licensee provides the Collective, by no later than the due date for the relevant payment under § 384.4(c), a list of each Copyright Owner from which the Licensee claims to have a direct license of rights to Excluded Recordings that is in effect for the month for which the payment is made and of each sound recording for which the Licensee takes the reduction, identified by featured artist name, sound recording title, and International Standard Recording Code (ISRC) number or, if the ISRC is not available and feasible, album title and copyright owner name.

Notwithstanding § 384.5, the Collective may disclose such information as reasonably necessary for it to confirm whether a claimed direct license exists and claimed sound recordings are properly excludable.

(5) For purposes of paragraph (a)(3) of this section, *Performance* means:

(i) Except as discussed in paragraph (a)(5)(ii) of this section, a Performance is an instance in which any portion of a sound recording is publicly performed to a Business

Establishment Service subscriber location within the United States (e.g., the delivery of any portion of a single track from a compact disc to one subscriber location).

(ii) An instance in which a portion of a sound recording is publicly performed to a Business Establishment Service subscriber location within the United States is not a Performance if it both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief use during news, talk and sports programming, brief background use during disk jockey announcements, brief use during commercials of sixty seconds or less in duration, or brief use during sporting or other public events; and

(B) Does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song), except for ambient music that is background at a public event.

(b) *Minimum fee.* Each Licensee shall pay a minimum fee of \$25,000 for each calendar year of the License Period in which it makes Ephemeral Recordings for use to facilitate transmissions under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), whether or not it does so for all or any part of the year. These minimum fees shall be nonrefundable, but shall be fully creditable to royalty payments due under paragraph (a) of this section for the same calendar year (but not any subsequent calendar year).

* * * * *

4. Amend § 384.4 as follows:

- a. Redesignate paragraphs (g) and (h) as paragraphs (i) and (j);
- b. Revise paragraph (f);
- c. Add new paragraphs (g) and (h);
- d. Revise newly redesignated paragraph (i)(1).

e. In newly redesignated paragraph (i)(2), remove “(g)(1)” and add “(i)(1)” in its place.

The additions and revisions read as follows:

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

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(f) *Use of account numbers.* If the Collective notifies a Licensee of an account number to be used to identify its royalty payments for a particular Business Establishment Service offering, the Licensee must include that account number on its check or check stub for any payment for that Business Establishment Service offering made by check, in the identifying information for any payment for that Business Establishment Service offering made by electronic transfer, in its statements of account for that Business Establishment Service offering under paragraph (g) of this section, and in the transmittal of its Reports of Use for that Business Establishment Service offering under § 370.4 of this chapter.

(g) *Statements of account.* For any part of the License Period during which a Licensee operates a Business Establishment Service, at the time when a minimum payment is due under paragraph (d) of this section, and by 45 days after the end of each month during the period, the Licensee shall deliver to the Collective a statement of account containing the information set forth in this paragraph (g) on a form prepared, and made available to Licensees, by the Collective. In the case of a minimum payment, or if a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall contain only the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The account number assigned to the Licensee by the Collective for the relevant Business Establishment Service offering (if the Licensee has been notified of such account number by the Collective);

(4) The signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation;

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

(6) The date of signature;

(7) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

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

(9) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.

(h) *International Standard Recording Codes*. Notwithstanding § 370.4(d)(2)(v) of this chapter, the Licensee must use International Standard Recording Codes (ISRCs) in its Reports of Use, where available and feasible.

(i) * * *

(1) However, in any case in which a Licensee has not provided a compliant Report of Use, whether for the License Period or otherwise, and the board of directors of the Collective determines that further efforts to seek the missing Report of Use from the Licensee would not be warranted, the Collective may determine that it will distribute the royalties associated with the Licensee's missing Report of Use on the basis of a proxy data set approved by the board of directors of the Collective.

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Dated: October 25, 2023.

David P. Shaw,
Chief Copyright Royalty Judge.

David R. Strickler,
Copyright Royalty Judge.

Steve Ruwe,
Copyright Royalty Judge.

Approved by:

Carla D. Hayden,
Librarian of Congress.

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