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(f) *Ephemeral Recording* is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C.112(e).

(g) *Licensee* is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)), or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

(h) *Noncommercial Webcaster* is a Licensee that makes eligible digital audio transmissions and:

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

(i) *Performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transi-

tions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, 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).

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

(k) *Qualified Auditor* is a Certified Public Accountant.

(l) *Side Channel* is a channel on the website of a broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the broadcaster.

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

(a) Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112 are as follows:

(1) *Commercial Webcasters*: (i) The performance fee for 2006–2010: For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Commercial Webcaster will pay a performance royalty of: \$.0008 per performance for 2006, \$.0011 per performance for 2007, \$.0014 per performance for 2008, \$.0018 per performance for 2009, and \$.0019 per performance for 2010. The royalty payable under 17 U.S.C. 112 for any reproduction of a phonorecord made by a Commercial Webcaster during this license period and used solely by the Commercial Webcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments.

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(ii) Optional transitional Aggregate Tuning Hour fee for 2006-2007: The following Aggregate Tuning Hours (ATH) usage rate calculation options, in lieu

of the per-performance fee, are available for the transition period of 2006 and 2007:

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	\$0.0117 per ATH	\$0.0088 per ATH	\$0.000762 per ATH.
2006	\$0.0123 per ATH	\$0.0092 per ATH	\$0.0008 per ATH.
2007	\$0.0169 per ATH	\$0.0127 per ATH	\$0.0011 per ATH.

(iii) “Non-Music Programming” is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; “Broadcast Simulcast Programming” is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and “Other Programming” is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

Webcaster will pay an annual per channel or per station performance royalty of \$500 in 2006, 2007, 2008, 2009 and 2010.

(2) *Noncommercial Webcasters:* (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Noncommercial

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Non-commercial Webcaster will pay a performance royalty of: \$.0008 per performance for 2006, \$.0011 per performance for 2007, \$.0014 per performance for 2008, \$.0018 per performance for 2009, and \$.0019 per performance for 2010.

(iii) The following Aggregate Tuning Hours (ATH) usage rate calculation options, in lieu of the per-performance fee, are available for the transition period of 2006 and 2007:

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	\$0.0117 per ATH	\$0.0088 per ATH	\$0.000762 per ATH.
2006	\$0.0123 per ATH	\$0.0092 per ATH	\$0.0008 per ATH.
2007	\$0.0169 per ATH	\$0.0127 per ATH	\$0.0011 per ATH.

(iv) “Non-Music Programming” is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; “Broadcast Simulcast Programming” is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and “Other Programming” is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

Webcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments.

(v) The royalty payable under 17 U.S.C. 112 for any reproduction of a phonorecord made by a Noncommercial Webcaster during this license period and used solely by the Noncommercial

(b) *Minimum fee*—(1) *Commercial Webcasters.* Each Commercial Webcaster will pay an annual, non-refundable minimum fee of \$500 for each calendar year or part of a calendar year of the period 2006-2010 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial

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Webcasters, provided that a Commercial Webcaster shall not be required to pay more than \$50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). The minimum fee payable under 17 U.S.C. 112 is deemed to be included within the minimum fee payable under 17 U.S.C. 114. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any royalty fees payable in the same calendar year.

(2) *Noncommercial Webcasters.* Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each calendar year or part of a calendar year of the license period during which they are Licensees pursuant to licenses under 17 U.S.C. 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters and is also payable for each individual Side Channel maintained by Broadcasters who are Licensees. The minimum fee payable under 17 U.S.C. 112 is deemed to be included within the minimum fee payable under 17 U.S.C. 114. Upon payment of the minimum fee, the Licensee will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

[72 FR 24110, May 1, 2007, as amended at 72 FR 29886, May 30, 2007; 75 FR 6098, Feb. 8, 2010]

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

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(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 from Licensees due under § 380.3 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 paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board 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 such 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) *Monthly payments.* A Licensee shall make any payments due under § 380.3 by the 45th day after the end of each month for that month, except that payments due under § 380.3 for the period beginning January 1, 2006, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that:

(1) Payment due under § 380.3(b) for 2006 and 2007 shall be due 45 days after the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms.

(2) Payment for a Licensee that has not previously made eligible non-subscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.