

immediately when directed to do so by the Coast Guard Patrol Commander or any Official Patrol.

(ii) Proceed as directed by the Coast Guard Patrol Commander or any Official Patrol.

(d) Enforcement period: This section will be enforced from 6 a.m. until 5 p.m. on June 19, 2010, or in the case of inclement weather, from 6 a.m. to 5 p.m. on June 20, 2010.

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcast on VHF-FM marine band radio announcing specific event date and times.

Dated: March 12, 2010.

Mark P. O'Malley,

Captain, U.S. Coast Guard, Captain of the Port Baltimore, Maryland.

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2009-1 CRB Webcasting III]

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 broadcasters and noncommercial educational webcasters and for the making of ephemeral recordings necessary for the facilitation of such transmissions for the period commencing January 1, 2011, and ending on December 31, 2015.

DATES: Comments and objections, if any, are due no later than April 22, 2010.

ADDRESSES: Comments and objections may be sent electronically to crb@loc.gov. In the alternative, send an original, five copies and an electronic copy on a CD either by mail or hand delivery. Please do not use multiple means of transmission. Comments and objections may not be delivered by an overnight delivery service other than the U.S. Postal Service Express Mail. If by mail (including overnight delivery), comments and objections must be addressed to: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977. If hand delivered by a private

party, comments and objections must be brought to the Copyright Office Public Information Office, Library of Congress, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000, between 8:30 a.m. and 5 p.m. If delivered by a commercial courier, comments and objections must be delivered between 8:30 a.m. and 4 p.m. to the Congressional Courier Acceptance Site located at 2nd and D Street, NE., Washington, DC, and the envelope must be addressed to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue, SE., Washington, DC 20559-6000.

FOR FURTHER INFORMATION CONTACT:

Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 114 of the Copyright Act, title 17 of the United States Code, provides a statutory license which 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 which 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 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, beginning with the license period 2006 through 2010.¹ 17 U.S.C. 801(b)(1), 804(b)(3)(A). The Judges announced their final determination of the rates and terms for the 2006-2010 license period on May 1, 2007. 72 FR 24084 (May 1, 2007), *affirmed in part, remanded in part, Intercollegiate Broadcast System v. Copyright Royalty Board*, 574 F.3d 748 (DC Cir. 2009).

Therefore, the next proceeding to determine reasonable terms and rates of royalty payment for the sections 114 and 112 licenses was to be commenced in January 2009, with such rates and terms to become effective on January 1, 2011. 17 U.S.C. 804(b)(3)(A). Pursuant to section 804(b)(3)(A), the Judges published in the **Federal Register** a notice commencing the rate determination proceeding for the license period 2011-2015 and requesting interested parties to submit their petitions to participate. 74 FR 318 (January 5, 2009). Petitions to Participate were received from: Intercollegiate Broadcast System, Inc./Harvard Radio Broadcasting Co.; Live365, Inc.; LoudCity LLC; AccuRadio, LLC, Digitally Imported, Inc., Got Radio, LLC, IoWorldMedia, Inc., Radio Paradise, Inc., and SomaFM.com LLC, filing jointly; SoundExchange, Inc. ("SoundExchange"); Amazon.com; RealNetworks, Inc.; College Broadcasters, Inc. ("CBI"); David W. Rahn; Royalty Logic, Inc.; Commonwealth Broadcasting Corporation; Sirius XM Radio, Inc.; Clear Channel Communications, Inc.; National Religious Broadcasters Music License Committee; National Religious Broadcasters Noncommercial Music License Committee; Apple, Inc.; Digital Media Association, Inc.; Citadel Broadcasting Corporation, Clarke Broadcasting Corporation, Entercom Communications Corp., Galaxy Communications LP, and Greater Media, Inc., filing jointly; CBS Radio, Inc.; NCE Radio Coalition.; Slacker, Inc.; Catholic Radio Association; Yahoo! Inc.; Spatial Audio Solutions; National Association of Broadcasters ("NAB"); Bonneville International Corporation; Pandora Media, Inc.; mSpot, Inc.; MTV Networks Viacom; and Access2ip.

¹ Prior to the enactment of the Copyright Royalty and Distribution Reform Act of 2004, which established the Copyright Royalty Judges, rates and terms for the sections 114 and 112 statutory licenses were set under the Copyright Arbitration Royalty Panel system, which was administered by the Librarian of Congress.

The Judges set the timetable for the three-month negotiation period, see 17 U.S.C. 803(b)(3), from March 2, 2009, through June 1, 2009. On June 1, 2009, the Judges received a joint motion from SoundExchange and NAB to adopt a partial settlement for certain Internet transmissions by commercial broadcasters. On June 24, 2009, the Judges set September 29, 2009, as the deadline by which participants were to submit their written direct statements. On August 13, 2009, SoundExchange and CBI submitted to the Judges a joint motion to adopt a partial settlement for certain Internet transmissions by college radio stations and other noncommercial educational webcasters.

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 they are submitted to the Copyright Royalty Judges for approval. This section provides that in such event:

(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 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)(1)(7)(A). Rates and terms adopted pursuant to this provision are binding on all copyright owners of sound recordings and commercial broadcasters and college radio stations and other noncommercial educational webcasters performing the sound recordings for the license period 2011–2015.²

²The Judges are proposing to separate the current section 380 into three subparts. Proposed Subpart A contains the rates and terms for commercial webcasters and noncommercial webcasters for the 2006–2010 license period. Rates and terms for the license period 2011–2015 for these services will be determined after a full hearing before the Judges and will be published in a separate document. Proposed Subpart B contains the rates and terms governing the transmissions of broadcasters under sections 114 and 112 for 2011–2015, and proposed Subpart C contains the rates and terms governing the transmissions of noncommercial educational webcasters under the 114 and 112 licenses for 2011–2015.

As part of this notice, the Judges are modifying two aspects of the proposed rates and terms in proposed Subpart B for broadcasters making certain eligible transmissions of sound recordings. First, SoundExchange and NAB have included language in their proposal that states that the rate for ephemeral recordings has no precedential effect in any judicial, administrative, or other proceeding. The Judges decline to include such language within our regulations. Our task, as set forth in section 112 and chapter 8 of the Copyright Act, is to adopt rates and terms for the compulsory license for the making of ephemeral reproductions to facilitate digital audio transmissions. Such language is not relevant to this task. See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Docket No. 2006–3 CRB DPRA, 73 FR 57033, 57034 (October 1, 2008); Noncommercial Educational Broadcasting Statutory License, Docket No. 2006–2 CRB NCBRA, 72 FR 19138, 19139 (April 17, 2007).

The Judges also decline for the same reason to include the language proposed by SoundExchange and NAB regarding the legal effect of the Collective's acceptance of an election, payment or reporting on the compliance of a Broadcaster or Small Broadcaster with the sections 112(e) or 114 licenses or the reservation of right to sue by the Collective or Copyright Owner for noncompliance. Again, such language is not relevant to our task of setting rates and terms under sections 112 and 114 of the Copyright Act.

The Judges are modifying two aspects of the proposed rates and terms in proposed Subpart C for noncommercial educational webcasters. In the settlement proposal submitted to the Judges, SoundExchange and CBI included a provision governing reporting by noncommercial educational webcasters—proposed §§ 380.23(g)(2) and (g)(3) herein—stating that such reporting requirements would be those in the notice and recordkeeping regulations in part 370 as they existed on January 1, 2009, specifically to then §§ 370.3 and 370.3(c)(2)(vi). The Judges amended these regulations on October 11, 2009, see 74 FR 52418, and consequently, sections were renumbered. Proposed §§ 380.23(g)(2) and (g)(3) reflect the current section numbers of part 370, namely, §§ 370.4 and 370.4(d)(2)(vi), respectively, and the references to January 1, 2009, have been deleted. Next, for the reasons stated above in rejecting similar language in the SoundExchange/NAB proposal, the Judges decline to include in our

regulations the language proposed by SoundExchange and CBI regarding what represents compliance with the sections 112(e) and 114 licenses and the reservation of right to sue.

As noted above, 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 April 22, 2010.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

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).

Subpart A—Commercial Webcasters and Noncommercial Webcasters

2. Designate existing § 380.1 through § 380.8 as Subpart A, and add a heading for Subpart A to read as set forth above.

3. Add Subpart B to read as follows:

Subpart B—Broadcasters

Sec.	General.
380.10	General.
380.11	Definitions.
380.12	Royalty fees for the public performance of sound recordings and for ephemeral recordings.
380.13	Terms for making payment of royalty fees and statements of account.
380.14	Confidential information.
380.15	Verification of royalty payments.
380.16	Verification of royalty distributions.
380.17	Unclaimed funds.

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

Subpart B—Broadcasters

§ 380.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Broadcasters 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 not inconsistent with the rates and terms set forth herein.

(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 digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.11 Definitions.

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

Aggregate Tuning Hours means the total hours of programming that the Broadcaster has transmitted during the relevant period to all listeners within the United States from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.

Broadcaster means an entity that

(1) Has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) 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;

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

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcast Webcasts mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.

Broadcast Retransmissions mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an Internet-only side channel.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

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).

Eligible Transmission shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible 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).

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 Broadcaster 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 transitions 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).

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).

Qualified Auditor is a Certified Public Accountant.

Small Broadcaster is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.12(c))

over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria:

(1) During the prior year it made Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; and

(2) During the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; provided that, one time during the period 2011–2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding paragraph (1) of the definition of “Small Broadcaster” if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

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

(a) *Royalty rates.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in § 380.13(g)(3), be payable on a per-performance basis, as follows:

- (1) 2011: \$0.0017;
- (2) 2012: \$0.0020;
- (3) 2013: \$0.0022;
- (4) 2014: \$0.0023;
- (5) 2015: \$0.0025.

(b) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting as set forth in § 380.3.

(c) *Minimum fee.* Each Broadcaster will pay an annual, nonrefundable minimum fee of \$500 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 or part of a calendar year during 2011–2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than \$50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For the purpose of this subpart, 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, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective for the reporting waiver discussed in § 380.13(g)(2).

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

(a) *Payment to the Collective.* A Broadcaster shall make the royalty payments due under § 380.12 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 Broadcasters due under § 380.12 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) and 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 and reporting.* Broadcasters must make monthly payments where required by § 380.12, and provide statements of account and reports of use, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Broadcaster shall make any minimum payment due under § 380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster 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 Broadcaster commences to do so.

(e) *Late fees.* A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(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 handwritten signature of:

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

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

(iii) An officer of the corporation, if the Broadcaster is a corporation.

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

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation 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 owner or agent of the Broadcaster, 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.

(g) *Reporting by Broadcasters in General.* (1) Broadcasters other than electing Small Broadcasters covered by paragraph (g)(2) of this section shall submit reports of use on a performance basis in compliance with the regulations set forth in part 370 of this chapter, except that the following provisions shall apply notwithstanding the provisions of such part 370 of this chapter from time to time in effect:

(i) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in paragraph (g)(3) of this section.

(ii) Broadcasters shall submit reports of use to the Collective on a monthly basis.

(iii) As provided in paragraph (d) of this section, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(iv) Except as provided in paragraph (g)(3) of this section, Broadcasters shall submit reports of use to the Collective on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(v) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis;

(vi) Broadcasters shall transmit each report of use in a file the name of which includes

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the report covers a single station only, the call letters of the station.

(vii) Broadcasters shall submit reports of use with headers, as presently described in § 370.4(e)(7) of this chapter.

(viii) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations. Small Broadcasters that have made an election pursuant to paragraph (h) of this section for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a \$100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to paragraph (g)(1) of this section may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if

(i) Census reporting is not reasonably practical for the programming during those hours, and

(ii) If the total number of hours on a single report of use, provided pursuant to paragraph (g)(1) of this section, for which this type of reporting is used is

below the maximum percentage set forth below for the relevant year:

(A) 2011: 16%;

(B) 2012: 14%;

(C) 2013: 12%;

(D) 2014: 10%;

(E) 2015: 8%.

(iii) To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to paragraph (g)(3) of this section, the Broadcaster shall

(A) Report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour;

(B) Pay royalties (or recoup minimum fees) at the per-performance rates provided in § 380.12 on the basis of paragraph (g)(3)(iii)(A) of this section;

(C) Include Aggregate Tuning Hours in reports of use; and

(D) Include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) *Election of Small Broadcaster Status.* To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.11 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Broadcasters 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 and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in § 370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled

to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Broadcaster, such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(j) *Retention of records.* Books and records of a Broadcaster 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.

§ 380.14 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 Broadcaster 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. 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.

(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 Broadcaster's statement of account pursuant to § 380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.16;

(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(f) by the Broadcaster 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(f) 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.

(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 not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.15 Verification of royalty payments.

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

(b) *Frequency of verification.* The Collective may conduct a single audit of a Broadcaster, 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 Board a notice of intent to audit a particular Broadcaster, 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 Broadcaster to be audited. 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.* The Broadcaster 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) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *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 the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) *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 the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.16 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 Board 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) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *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.

(g) *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.

§ 380.17 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.

4. Add Subpart C to read as follows:

Subpart C—Noncommercial Educational Webcasters

Sec.

380.20 General.

380.21 Definitions.

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

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

380.24 Confidential information.

380.25 Verification of royalty payments.

380.26 Verification of royalty distributions.

380.27 Unclaimed funds.

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

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, 2011, through December 31, 2015.

(b) *Legal compliance.* Noncommercial Educational Webcasters 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 not inconsistent with the rates and terms set forth herein. However, if a Noncommercial Educational Webcaster is also eligible for any other rates and terms for its Eligible Transmissions during the period January 1, 2011, through December 31, 2015, it may, by written notice to the Collective in a form to be provided by the Collective, elect to be subject to such other rates and terms rather than the rates and terms specified in this subpart. If a single educational institution has more than one station making Eligible Transmissions, each such station may determine individually whether it elects to be subject to this subpart.

(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 digital audio

services shall apply in lieu of the rates and terms of this subpart to transmissions within the scope of such agreements.

§ 380.21 Definitions.

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

ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

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).

Eligible Transmission means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible 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).

Noncommercial Educational Webcaster means 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; and

(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.

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 Noncommercial Educational Webcaster 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 transitions 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).

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).

Qualified Auditor is a Certified Public Accountant.

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

(a) *Minimum fee.* Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee for \$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. 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) *Additional usage fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees ("Usage Fees") for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

- (1) 2011: \$0.0017;
- (2) 2012: \$0.0020;
- (3) 2013: \$0.0022;
- (4) 2014: \$0.0023;
- (5) 2015: \$0.0025.

(6) For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided in paragraphs (b)(1) through (5) of this section 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 Usage Fees on a per-channel or -station basis.

(c) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs (b)(1) through (5) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.3.

§ 380.23 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 § 380.22 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 Noncommercial Educational Webcasters due under § 380.22 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) *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. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by the Collective, that the Noncommercial Educational Webcaster.

(1) Qualifies as a Noncommercial Educational Webcaster for the relevant year; and

(2) 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 Usage Fees. 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) *Usage fees.* In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) *Late fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with the applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days

regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.22 shall be accompanied by a corresponding statement of account. 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) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this subpart;

(3) 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;

(4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution;

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

(6) The date of signature;

(7) The title or official position held 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 officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Noncommercial Educational Webcasters in general—(1) Reporting waiver.* In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,000 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 55,000 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

55,000 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 55,000 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 an officer or another duly authorized faculty member or administrator 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.

(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 foregoing, 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.* 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 (i.e., reports of use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by § 370.4 of this chapter), except that, notwithstanding § 370.4(d)(2)(vi), 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.

(h) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters 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 and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in § 370.4 of this chapter and this subpart, except that in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to paragraph (g)(1) of this section, the Collective shall distribute the aggregate royalties paid by electing

Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) *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.

§ 380.24 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 Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster 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. 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.

(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 Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster's statement of account pursuant to § 380.25 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.26;

(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(f) by the Noncommercial Educational Webcaster 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(f) 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.

(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.

§ 380.25 Verification of royalty payments.

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

(b) *Frequency of verification.* The Collective may conduct a single audit of a Noncommercial Educational Webcaster, 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 Board a notice of intent to audit a particular Noncommercial Educational Webcaster, 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 Noncommercial Educational Webcaster to be audited. Any such audit shall be conducted by an independent Qualified Auditor identified in the notice and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Noncommercial Educational Webcaster 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) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *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 the Noncommercial Educational Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Noncommercial Educational Webcaster reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *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 the Noncommercial Educational Webcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.26 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 Board 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 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) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *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.

(g) *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.

§ 380.27 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: March 29, 2010.

James Scott Sledge,
Chief, U.S. Copyright Royalty Judge.

[FR Doc. 2010-7368 Filed 3-31-10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-R04-OAR-2007-1186-201013(b); FRL-9133-2]

Approval and Promulgation of Air Quality Implementation Plan: Kentucky; Approval Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for the Owensboro Area; Limited Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; limited reopening of the comment period.

SUMMARY: EPA is announcing a limited 30-day reopening of the public comment period for the proposed rule entitled "Approval and Promulgation of Air Quality Implementation Plan: Kentucky; Approval Section 110(a)(1) Maintenance Plan for the 1997 8-Hour Ozone Standard for the Owensboro Area," for

the purpose of limited public review and comment on supplemental information that was provided by the Commonwealth of Kentucky on July 15, 2009, in support of the Owensboro Area 110(a)(1) maintenance plan. The Owensboro, Kentucky Area consists of Daviess and a portion of Hancock Counties. The proposed rule was initially published in the **Federal Register** on January 20, 2010. The reason for this limited reopening of the comment period is that EPA has learned that supplemental information relating to projected emissions for the Owensboro Area that was referenced in the proposed rulemaking January 20, 2010 (75 FR 3183) was inadvertently omitted from the electronic docket when that proposed rulemaking was published. EPA has since made that information available in the electronic docket and wants to ensure an opportunity for the public to comment on that information. The July 15, 2009, supplemental information can be viewed online at <http://www.regulations.gov> using docket ID No. EPA-R04-OAR-2007-1186-0043.

Thus, EPA is reopening the comment period for an additional thirty days, for the limited purpose of providing an opportunity for public comment only on the supplemental information added to the docket after publication of the proposed rulemaking.

DATES: The comment period for the proposed rule published on January 20, 2010 (75 FR 3183) is reopened. Comments must be received on or before May 3, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2007-1186, by one of the following methods:

1. <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
2. *E-mail:* benjamin.lynorae@epa.gov.
3. *Fax:* 404-562-9019.
4. *Mail:* "EPA-R04-OAR-2007-1186,"

Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official