

PART 382—RATES AND TERMS FOR TRANSMISSIONS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES AND FOR THE MAKING OF EPHEMERAL REPRODUCTIONS TO FACILITATE THOSE TRANSMISSIONS

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AUTHORITY: 17 U.S.C. 112(e), 114 and 801(b)(1).

SOURCE: 83 FR 65265, Dec. 19, 2018, unless otherwise noted.

Subpart A—Regulations of General Application

§ 382.1 Definitions.

In this subpart:

Collective means the collection and distribution organization that is designated by the Copyright Royalty Judges.

Copyright Owners means sound recording copyright owners, and rights owners under 17 U.S.C. 1401(1)(2), who are entitled to royalty payments made under this part pursuant to the statu-

tory licenses under 17 U.S.C. 112(e) and 114.

Digital Audio Transmission has the same meaning as in 17 U.S.C. 114(j)(5).

Eligible Transmission means a Digital Audio Transmission made by a Licensee that is subject to licensing under 17 U.S.C. 114(d)(2) and the payment of royalties under 37 CFR part 382.

Ephemeral Recording has the same meaning as in 17 U.S.C. 112.

GAAP means generally accepted accounting principles in effect in the United States on the date payment is due.

Licensee means the provider of an Satellite Digital Audio Radio Service (SDARS) or Preexisting Subscription Service (PSS) that has obtained a license under 17 U.S.C. 114 to make eligible transmissions and a license under 17 U.S.C. 112(e) to make Ephemeral Recordings to facilitate those Eligible Transmissions.

Payor means the entity required to make royalty payments to the Collective or the entity required to distribute royalty fees collected, depending on context. The Payor is:

(1) A Licensee, in relation to the Collective; and

(2) The Collective in relation to a Copyright Owner or Performer.

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).

Preexisting Subscription Service (PSS) has the same meaning as in 17 U.S.C. 114(j)(11). A service's offering on the internet that is available to a subscriber outside the subscriber's residence is not a Preexisting Subscription Service for purposes of this part.

Qualified Auditor means a Certified Public Accountant independent within the meaning of the American Institute Certified Public Accountants Code of Professional Conduct.

Satellite Digital Audio Radio Service (SDARS) means the preexisting satellite digital audio radio services as defined in 17 U.S.C. 114(j)(10).

Transmission has the same meaning as in 17 U.S.C. 114(j)(15).

Verifying Entity means the party requesting an audit and giving notice of intent to audit. For audits of SDARS

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and PSS, the Verifying Entity is SoundExchange, Inc. For audits of SoundExchange, Inc. the Verifying Entity is any Copyright Owner or its authorized representative.

[83 FR 65265, Dec. 19, 2018, as amended at 84 FR 32313, July 8, 2019]

§ 382.2 Scope and compliance.

(a) *Scope.* This part codifies rates and terms of royalty payments for the public performance of sound recordings in certain Digital Audio Transmissions by certain Licensees in accordance with applicable provisions of 17 U.S.C. 114 and for the making of Ephemeral Recordings by those Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2018, through December 31, 2027.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 must comply with the requirements of 17 U.S.C. 112(e) and 114, this part and any other applicable regulations.

(c) *Voluntary agreements.* Notwithstanding the royalty rates and terms established in any subparts of this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees may apply in lieu of these rates and terms.

§ 382.3 Making payment of royalty fees.

(a) *Payment to the Collective.* A Licensee must make the royalty payments due under subparts B and C of this part to SoundExchange, Inc., which is the Collective designated by the Copyright Royalty Board to collect and distribute royalties under this part. If any payment due date is a weekend or a federal holiday, then the payment is due on the first business day thereafter.

(b) *Advance payment.* Licensees must pay the Collective an annual advance payment of \$100,000 by January 31 of each year. The Collective must credit 5% of the advance payment as payment of the minimum fee for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. The funds are nonrefundable. Any uncredited portion of the funds shall not carry over into a subsequent year.

(c) *Minimum payments.* A Licensee must make any minimum annual payment due under subpart B or C of this part by January 31 of the applicable license year.

(d) *Monthly payments.* A Licensee must make royalty payments on a monthly basis. Payments are due on or before the 45th day after the end of the month in which the Licensee made Eligible Transmissions.

(e) *Late fees.* A Licensee must pay a late fee for each payment and each Statement of Account that the Collective receives after the due date. The late fee is 1.5% (or the highest lawful rate, whichever is lower) of the late payment amount per month. The late fee for a late Statement of Account is 1.5% of the payment amount associated with the Statement of Account. Late fees accrue from the due date until the date that the Collective receives the late payment or late Statement of Account.

(1) *Waiver of late fees.* The Collective may waive or lower late fees for immaterial or inadvertent failures of a Licensee to make a timely payment or submit a timely Statement of Account.

(2) Notice regarding noncompliant Statements of Account. If it is reasonably evident to the Collective that a timely-provided Statement of Account is materially noncompliant, the Collective must notify the Licensee within 90 days of discovery of the noncompliance.

§ 382.4 Delivering statements of account.

(a) *Statements of Account.* Any payment due under this part must be accompanied by a corresponding Statement of Account that must contain the following information:

(1) 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 signature of:

(i) The Licensee or a duly authorized agent of the Licensee;

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

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

(4) The printed or typewritten name of the person signing the Statement of Account;

(5) 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;

(6) A certification of the capacity of the person signing;

(7) The date of signature; and

(8) An attestation to the following effect:

I, the undersigned owner/officer/partner/agent of the Licensee have examined this Statement of Account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence and that it fairly presents, in all material respects, the liabilities of the Licensee pursuant to 17 U.S.C. 112(e) and 114 and applicable regulations adopted under those sections.

(b) *Certification.* Licensee's Chief Financial Officer or, if Licensee does not have a Chief Financial Officer, a person authorized to sign Statements of Account for the Licensee, must submit a signed certification on an annual basis attesting that Licensee's royalty statements for the prior year represent a true and accurate determination of the royalties due and that any method of allocation employed by Licensee was applied in good faith and in accordance with U.S. GAAP.

§ 382.5 Distributing royalty fees.

(a) *Distribution of royalties.* (1) The Collective must promptly distribute royalties received from Licensees to Copyright Owners and Performers that are entitled thereto, or to their designated agents. The Collective shall only be responsible for making distributions to those who provide the Collective with information necessary to identify and pay the correct recipient. The Collective must distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the Reports of Use requirements for Licensees pursuant to § 370.3 or § 370.4 of

this chapter, as applicable, and pursuant to this part.

(2) *Identification of Copyright Owners.* The Collective must use its best efforts to identify and locate copyright owners and featured artists to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts must include, but are not limited to, searches in Copyright Office public records and published directories of sound recording copyright owners when consulting those records and directories is likely to be helpful.

(b) *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 part, the Collective must retain the required payment in a segregated trust account for a period of three years from the date of the first distribution of royalties from the relevant payment by a Licensee. No claim to distribution shall be valid after the expiration of the three-year period. After expiration of this period, the Collective must handle unclaimed funds in accordance with applicable federal, state, or common law.

(c) *Retention of records.* Licensees and the Collective shall keep books and records relating to payments and distributions of royalties for a period of not less than the prior three calendar years.

(d) *Designation of the Collective.* (1) The Judges designate SoundExchange, Inc., as the Collective to receive Statements of Account and royalty payments from Licensees and to distribute royalty payments to each Copyright Owner and Performer (or their respective 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, it shall be replaced for the applicable royalty period by a successor Collective according to the following procedure:

(i) The nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding

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SoundExchange's cessation or dissolution shall vote by a majority to recommend that the Copyright Royalty Judges designate a successor and must file a petition with the Copyright Royalty Judges requesting that the Judges designate the named successor and setting forth the reasons therefor.

(ii) Within 30 days of receiving the petition, the Copyright Royalty Judges must issue an order designating the recommended Collective, unless the Judges find good cause not to make and publish the designation in the FEDERAL REGISTER.

§ 382.6 Handling Confidential Information.

(a) *Definition.* For purposes of this part, "Confidential Information" means 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 party submitting the statement. Confidential Information does not include documents or information that at the time of delivery to the Collective is public knowledge. The party seeking information from the Collective based on a claim that the information sought is a matter of public knowledge shall have the burden of proving to the Collective that the requested information is in the public domain.

(b) *Use of Confidential Information.* The Collective may not use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(c) *Disclosure of Confidential Information.* The Collective shall limit access to Confidential Information to:

(1) Employees, agents, consultants, and independent contractors of the Collective, subject to an appropriate written confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto who require access to the Confidential Information for the purpose of performing their duties during the ordinary course of their work;

(2) A Qualified Auditor or outside counsel who is authorized to act on behalf of:

(i) The Collective with respect to verification of a Licensee's statement of account pursuant to this part; or

(ii) A Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to this part;

(3) Copyright Owners and Performers, including their designated agents, whose works a Licensee used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate written confidentiality agreement, and including those employees, agents, consultants, and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate written confidentiality agreement, who require access to the Confidential Information to perform their duties during the ordinary course of their work;

(4) Attorneys and other authorized agents of parties to proceedings under 17 U.S.C. 112 or 114, acting under an appropriate protective order.

(d) *Safeguarding Confidential Information.* The Collective and any person authorized to receive Confidential Information from the Collective must implement procedures to safeguard against unauthorized access to or dissemination of Confidential Information using a reasonable standard of care, but no less than the same degree of security that the recipient uses to protect its own Confidential Information or similarly sensitive information.

§ 382.7 Auditing payments and distributions.

(a) *General.* This section prescribes procedures by which any entity entitled to receive payment or distribution of royalties may verify those payments or distributions with an independent audit. The Collective may audit a Licensee's payments of royalties to the Collective and a Copyright Owner or Performer may audit the Collective's distributions of royalties to the Copyright Owners or Performers. Nothing in this section shall preclude a Verifying Entity and the Payor under audit from

agreeing to verification methods in addition to or different from those set forth in this section.

(b) *Frequency of auditing.* A Verifying Entity may conduct an audit of each Payor only once a year and the audit may cover any or all of the prior three calendar years. A Verifying Entity may not audit records for any calendar year more than once.

(c) *Notice of intent to audit.* The Verifying Entity must file with the Copyright Royalty Judges a notice of intent to audit the Payor, which notice the Judges must publish in the FEDERAL REGISTER within 30 days of the filing of the notice. Simultaneously with the filing of the notice, the Verifying Entity must send a copy to the Payor.

(d) *The audit.* The audit must be conducted during regular business hours by a Qualified Auditor who is not retained on a contingency fee basis and is identified in the notice. The auditor shall determine the accuracy of royalty payments or distributions, including whether the Payor made an underpayment or overpayment of royalties. An audit of books and records, including underlying paperwork, performed in the ordinary course of business according to generally accepted auditing standards by a 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.

(e) *Access to third-party records for audit purposes.* The Payor under audit must 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.

(f) *Duty of auditor to consult.* The auditor must produce a written report to the Verifying Entity. Before issuing the report, unless the auditor has a reasonable basis to suspect fraud on the part of the Payor, the disclosure of which would, in the reasonable opinion of the auditor, prejudice any investigation of the suspected fraud. The auditor must review tentative written findings of the audit with the appropriate agent or employee of the Payor in order to remedy any factual errors and clarify any issues relating to the audit;

provided that an appropriate agent or employee of the Payor reasonably cooperates with the auditor to remedy promptly any factual error[s] or clarify any issue raised by the audit. The auditor must include in the written report information concerning the cooperation or the lack thereof of the employee or agent.

(g) *Audit results; underpayment or overpayment of royalties.* If the auditor determines the Payor underpaid royalties, the Payor shall remit the amount of any underpayment determined by the auditor to the Verifying Entity, together with interest at the post-judgment rate specified in 28 U.S.C. 1961, accrued from and after the date the payment was originally due. In the absence of mutually-agreed payment terms, which may, but need not, include installment payments, the Payor shall remit promptly to the Verifying Entity the entire amount of the underpayment determined by the auditor. If the auditor determines the Payor overpaid royalties, however, the Verifying Entity shall not be required to remit the amount of any overpayment to the Payor, and the Payor shall not seek by any means to recoup, offset, or take a credit for the overpayment, unless the Payor and the Verifying Entity have agreed otherwise.

(h) *Paying the costs of the audit.* The Verifying Entity must pay the cost of the audit, unless the auditor determines that there was an underpayment of 10% or more, in which case the Payor must bear the reasonable costs of the audit, in addition to paying or distributing the amount of any underpayment.

(i) *Retention of audit report.* The Verifying Entity must retain the report of the audit for a period of not less than three years from the date of issuance.

**Subpart B—Preexisting
Subscription Services (PSS)**

§ 382.10 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.

(a) *Royalty fees.* Commencing January 1, 2018, and continuing through December 31, 2027, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the rate of 7.5 percent of Gross Revenues.

(b) *Ephemeral recordings royalty fee.* (1) The fee for all Ephemeral Recordings is part of the total fee payable under this section and constitutes 5% of it. All Ephemeral Recordings that a Licensee makes that are necessary and commercially reasonable for making noninteractive Digital Audio Transmission as a PSS are included in the 5%.

(2) The minimum fee is \$5,000 per year.

§ 382.11 Calculation of gross revenues for PSS.

(a) Gross revenues are monies derived from the operation of the programming service of the Licensee and are comprised of the following:

(1) Monies received by Licensee from Licensee’s carriers and directly from residential U.S. subscribers for Licensee’s programming service;

(2) Licensee’s advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;

(3) Monies received for the provision of time on the programming service to any third party;

(4) Monies received from the sale of time to providers of paid programming such as infomercials;

(5) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee’s programming service, the fair market value thereof or Licensee’s prevailing published rate, whichever is less;

(6) Monies or other consideration received by Licensee from Licensee’s carriers, but not including monies re-

ceived by Licensee’s carriers from others and not accounted for by Licensee’s carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(7) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(8) Bad debts recovered regarding paragraphs (a)(1) through (7) of this section.

(9) Revenues described in paragraphs (a)(1) through (8) of this section to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee’s carriers for the programming service.

(b) Gross Revenues exclude affiliate revenue returned during the reporting period and bad debts actually written off during reporting period.

Subpart C—Preexisting Satellite Digital Audio Radio Services (SDARS)

§ 382.20 Definitions.

In this subpart:

Directly-Licensed Recording means a sound recording for which the Licensee has previously obtained a license of all relevant rights from the sound recording Copyright Owner.

Reference Channels means internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee’s SDARS that are capable of being received on all models of Sirius radio, all models of XM radio or both, and on which the programming consists primarily of music.

[83 FR 65265, Dec. 19, 2018, as amended at 84 FR 32313, July 8, 2019]

§ 382.21 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings by SDARS.

(a) *Royalty fees.* Commencing January 1, 2018, and continuing through December 31, 2027, Licensees must pay royalty fees for all Eligible Transmissions of sound recordings at the rate of 15.5% of Gross Revenues.

(b) *Ephemeral recordings royalty fees.*

(1) The fee for all Ephemeral Recordings is part of the total fee payable under this section and constitutes 5% of it. All Ephemeral Recordings that a Licensee makes that are necessary and commercially reasonable for making noninteractive Digital Audio Transmissions as an SDARS are included in the 5%.

(2) The minimum fee is \$5,000 per year.

§ 382.22 Calculation of Gross Revenues for SDARS.

(a) Gross Revenues are:

(1) Revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS and comprised of the following:

(i) Subscription revenue recognized by Licensee directly from U.S. subscribers for licensee's SDARS; and

(ii) Licensee's advertising revenues, or other monies received from sponsors, if any, attributable to advertising on channels other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions.

(2) Revenues set forth above to which Licensee is entitled but which are paid to a parent, wholly-owned subsidiary, or division of Licensee.

(b) Gross Revenues exclude:

(1) Monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, sales of devices that receive the Licensee's SDARS and any shipping and handling fees therefor;

(2) Royalties paid to Licensee for intellectual property rights;

(3) Monies or other consideration received by Licensee from the sale of phonorecords and digital phonorecord deliveries;

(4) Sales and use taxes;

(5) Credit card, invoice, activation, swap and early termination fees charged to subscribers and reasonably related to the Licensee's expenses to which they pertain;

(6) Bad debt expense; and

(7) Revenues recognized by Licensee (or otherwise received by Licensee if no GAAP "recognition" principles are applicable) for the provision of:

(i) Current and future data services offered for a separate charge (*e.g.*, weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time);

(ii) Channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings;

(iii) Channels, programming, products and/or other services provided outside of the United States; and

(iv) Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of Ephemeral Recordings is exempt from any license requirement or is separately licensed, including by a statutory license and, for the avoidance of doubt, webcasting, audio services bundled with television programming, interactive services, and transmissions to business establishments.

§ 382.23 Adjustments to royalty fee.

(a) *Reduction for Direct License Share.* The royalty fee specified in §382.21(a) may be reduced by the percentage of Eligible Transmissions comprising the Direct License Share.

(1) The Direct License Share reduction is available to a Licensee only if—

(i) The Reference Channels constitute a large majority of and are generally representative of the music channels offered on the Licensee's SDARS; and

(ii) The Licensee provides the Collective, by no later than the due date for the relevant payment under §382.3(d), a list of each Copyright Owner from which the Licensee claims to have a direct license of rights to Directly-Licensed 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, alternatively to the ISRC, album title and copyright owner name. Notwithstanding §382.6, 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.

(2) To arrive at the percentage allocable to the Direct License Share for each month, the Licensee shall divide the internet Performances of Directly-Licensed Recordings on the Reference Channels by the total number of internet Performances of all sound recordings on the Reference Channels. In no event shall the Direct License Share be an amount greater than the result of dividing the number of plays of Directly-Licensed Recordings on the SDARS by the total number of plays of all sound recordings on the SDARS.

(b) *Definition of Performance.* For purposes of this section, Performance means:

(1) Except as discussed in paragraph (c)(2) of this section, a Performance is an instance in which any portion of a sound recording is publicly performed to a listener within the United States 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).

(2) An instance in which a portion of a sound recording is publicly performed to a listener within the United States by means of a Digital Audio Transmission is not a Performance if it 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 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

(ii) 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.

[83 FR 65265, Dec. 19, 2018, as amended at 84 FR 32313, July 8, 2019]

PART 383—RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY CERTAIN NEW SUBSCRIPTION SERVICES

Sec.

383.1 General.

383.2 Definitions.

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

383.4 Terms for making payment of royalty fees.

AUTHORITY: 17 U.S.C. 112(e), 114, and 801(b)(1).

SOURCE: 72 FR 72254, Dec. 20, 2007, unless otherwise noted.

§ 383.1 General.

(a) *Scope.* This part 383 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of certain ephemeral recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period commencing January 1, 2021, and continuing through December 31, 2025.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections and the rates and terms of this part.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any voluntary license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to transmissions with the scope of such agreements.

[72 FR 72254, Dec. 20, 2007, as amended at 75 FR 14075, Mar. 24, 2010; 80 FR 36928, June 29, 2015; 85 FR 9664, Feb. 20, 2020]

§ 383.2 Definitions.

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

(a) *Bundled Contracts* means contracts between the Licensee and a Provider in which the Service is not the