

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

only content licensed by the Licensee to the Provider.

(b) *Copyright Owner* means a sound recording copyright owner, or a rights owner under 17 U.S.C. 1401(1)(2), who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

(c) *License Period* means the period commencing January 1, 2021, and continuing through December 31, 2025.

(d) *Licensee* is a person that has obtained statutory licenses under 17 U.S.C. 112(e) and 114, and the implementing regulations, to make digital audio transmissions as part of a Service (as defined in paragraph (f) of this section), and ephemeral recordings for use in facilitating such transmissions.

(e) *Provider* means a “multichannel video programming distributor” as that term is defined in 47 CFR 76.1000(e); notwithstanding such definition, for purposes of this part, a Provider shall include only a distributor of programming to televisions, such as a cable or satellite television provider.

(f) A *Service* is a non-interactive (consistent with the definition of “interactive service” in 17 U.S.C. 114(j)(7)) audio-only subscription service (including accompanying information and graphics related to the audio) that is transmitted to residential subscribers of a television service through a Provider which is marketed as and is in fact primarily a video service where

(1) Subscribers do not pay a separate fee for audio channels.

(2) The audio channels are delivered by digital audio transmissions through a technology that is incapable of tracking the individual sound recordings received by any particular consumer.

(3) However, paragraph (f)(2) of this section shall not apply to the Licensee’s current contracts with Providers that are in effect as of the effective date of this part if such Providers become capable in the future of tracking the individual sound recordings received by any particular consumer, provided that the audio channels continued to be delivered to Subscribers by digital audio transmissions and the Licensee remains incapable of tracking the individual sound recordings received by any particular consumer.

(g) *Subscriber* means every residential subscriber to the underlying service of the Provider who receives Licensee’s Service in the United States for all or any part of a month; provided, however, that for any Licensee that is not able to track the number of subscribers on a per-day basis, “Subscribers” shall be calculated based on the average of the number of subscribers on the last day of the preceding month and the last day of the applicable month, unless the Service is paid by the Provider based on end-of-month numbers, in which event “Subscribers” shall be counted based on end-of-month data.

(h) *Stand-Alone Contracts* means contracts between the Licensee and a Provider in which the only content licensed to the Provider is the Service.

[72 FR 72254, Dec. 20, 2007, as amended at 75 FR 14075, Mar. 24, 2010; 80 FR 36928, June 29, 2015; 84 FR 32313, July 8, 2019; 85 FR 9664, Feb. 20, 2020]

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

(a) *Royalty rates.* Royalty rates for the public performance of sound recordings by eligible digital transmissions made over a Service pursuant to 17 U.S.C. 114, and for ephemeral recordings of sound recordings made pursuant to 17 U.S.C. 112(e) to facilitate such transmissions during the License Period, are as follows. Each Licensee will pay, with respect to content covered by the License that is provided via the Service of each such Licensee:

(1) For Stand-Alone Contracts, the following monthly payment per Subscriber to the Service of such Licensee:

- (i) 2021: \$0.0208
- (ii) 2022: \$0.0214
- (iii) 2023: \$0.0221
- (iv) 2024: \$0.0227
- (v) 2025: \$0.0234

(2) For Bundled Contracts, the following monthly payment per Subscriber to the Service of such Licensee:

- (i) 2021: \$0.0346
- (ii) 2022: \$0.0356
- (iii) 2023: \$0.0367
- (iv) 2024: \$0.0378
- (v) 2025: \$0.0390

§ 383.4

(b) *Minimum fee.* Each Licensee will pay an annual, non-refundable minimum fee of one hundred thousand dollars (\$100,000), payable on January 31 of each calendar year in which the Service is provided pursuant to the section 112(e) and 114 statutory licenses. Such fee shall be recoupable and credited against royalties due in the calendar year in which it is paid.

(c) *Allocation between ephemeral recordings fees and performance royalty fees.* The Collective must credit 5% of all royalty payments as royalty payment for Ephemeral Recordings and credit the remaining 95% to section 114 royalties. All Ephemeral Recordings that a Licensee makes which are necessary and commercially reasonable for making noninteractive digital transmissions through a Service are included in the 5%.

[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]

§ 383.4 Terms for making payment of royalty fees.

(a) *Terms in general.* Subject to the provisions of this section, terms governing timing and due dates of royalty payments to the Collective, late fees, statements of account, audit and verification of royalty payments and distributions, cost of audit and verification, record retention requirements, treatment of Licensees' confidential information, distribution of royalties by the Collective, unclaimed funds, designation of the Collective, and any definitions for applicable terms not defined herein and not otherwise inapplicable shall be those adopted by the Copyright Royalty Judges for Digital audio transmission and the reproduction of ephemeral recordings by Commercial Webcasters in 37 CFR part 380, subpart A of this chapter, for the license period 2021–2025. For purposes of this part, the term “Collective” refers to the collection and distribution organization that is designated by the Copyright Royalty Judges. For the License Period through 2020, the sole Collective is SoundExchange, Inc.

(b) *Reporting of performances.* Without prejudice to any applicable notice and recordkeeping provisions, statements

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of account shall not require reports of performances.

(c) *Applicable regulations.* To the extent not inconsistent with this part, all applicable regulations, including part 370 of this chapter, shall apply to activities subject to this part.

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

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

Sec.

- 384.1 General.
- 384.2 Definitions.
- 384.3 Royalty fees for Ephemeral Recordings.
- 384.4 Terms for making payment of royalty fees and statements of account.
- 384.5 Confidential information.
- 384.6 Verification of royalty payments.
- 384.7 Verification of royalty distributions.
- 384.8 Unclaimed funds.

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

SOURCE: 73 FR 16199, Mar. 27, 2008, unless otherwise noted.

§ 384.1 General.

(a) *Scope.* This part 384 establishes rates and terms of royalty payments for the making of Ephemeral Recordings by a Business Establishment Service, as defined in § 384.2, in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2024, through December 31, 2028 (the “License Period”).

(b) *Legal compliance.* Licensees relying upon the statutory license set forth in 17 U.S.C. 112(e) shall comply with the requirements of that section, the rates and terms of this part and any other applicable regulations.

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