

Dated: December 11, 2007.

L.M. Bynum,

*Alternate OSD Federal Register Liaison
Officer, DoD.*

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 382

[Docket No. 2006-1 CRB DSTRA]

Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services

AGENCY: Copyright Royalty Board,
Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges are publishing final regulations setting the royalty rates and terms for the use of sound recordings and the making of ephemeral phonorecords by preexisting subscription services for the period 2008-2012.

DATES: *Effective Date:* January 1, 2008.

Applicability Date: The regulations apply to the license period January 1, 2008, through December 31, 2012.

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 106(6) of the Copyright Act, title 17 of the United States Code, gives a copyright owner of sound recordings an exclusive right to perform the copyrighted works publicly by means of a digital audio transmission. This right is limited by section 114(d), which allows certain non-interactive digital audio services, including preexisting subscription services, to make digital transmissions of a sound recording under a compulsory license, provided the services pay a reasonable royalty fee and comply with the terms of the license. Moreover, these services may make any necessary ephemeral reproductions to facilitate the digital transmission of the sound recording under a second license set forth in section 112(e) of the Copyright Act. The terms and rates for this statutory license have been adjusted periodically by the Librarian of Congress and appear in 37 CFR Part 260. However, the Copyright Royalty and Distribution Reform Act of 2004, Public Law 108-419, transferred

jurisdiction over these rates and terms to the Copyright Royalty Judges ("Judges"). 17 U.S.C. 801(b)(1). The current rates applicable to preexisting subscription services expire on December 31, 2007.

On January 9, 2006, pursuant to 17 U.S.C. 803(b)(1)(A)(i)(V), the Copyright Royalty Judges published a notice in the **Federal Register** announcing the commencement of the proceeding to determine rates and terms of royalty payments under sections 114 and 112 for the activities of preexisting subscription services¹ and requesting interested parties to submit their petitions to participate. 71 FR 1455 (January 9, 2006). Petitions to participate in the proceeding were received from SoundExchange, Inc. and Music Choice.

The Judges set the schedule for the proceeding, including the dates for the filing of written direct statements as well as the dates for oral testimony. Subsequent to the filing of their written direct statements, but prior to the oral presentation of witnesses, SoundExchange and Music Choice informed the Judges that they had reached a full settlement and stated that the settlement agreement would be submitted to the Judges "for approval and adoption pursuant to 17 U.S.C. 801(b)(7)(A)." Notice of Settlement at 1-2 (filed June 12, 2007). The settlement agreement, including the proposed rates and terms, was filed on October 12, 2007.

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

¹ The Notice also commenced and requested Petitions to Participate for the proceeding to determine rates and terms for preexisting satellite digital audio radio services ("SDARS"), as required under section 804(b)(3)(B). Unlike the preexisting subscription services, the SDARS did not reach a settlement regarding rates and terms governing their activities under sections 112 and 114 and proceeded to a full hearing before the Judges. Today's final rule applies only to preexisting subscription services.

(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)(7)(A). Accordingly, on October 31, 2007, the Judges published a Notice of Proposed Rulemaking ("NPRM") requesting comment on the proposed rates and terms, with certain modifications, submitted to the Judges. 72 FR 61585. Comments were due by November 30, 2007. In response to the NPRM, the Judges received only one comment, which was submitted by SoundExchange, supporting the adoption of the proposed regulations.

Having received no objections from a party that would be bound by the proposed rates and terms and that would be willing to participate in further proceedings, the Copyright Royalty Judges, by this notice, are adopting final regulations which set the rates and terms for the activities of preexisting subscription services under sections 114 and 112 for the license period 2008-2012.²

Effective Date

The final regulations adopted today are effective on January 1, 2008, which is less than 30 days from publication of the notice of the final rule. Section 553 of the Administrative Procedure Act, 5 U.S.C., provides that final rules shall not be effective less than 30 days from their publication unless, *inter alia*, the agency finds good cause, a description of which must be published with the rule. 5 U.S.C. 553(d)(3). Good cause exists in this case.

The final rules adopted today are the product of negotiations between representatives of the copyright owners of sound recordings and the preexisting subscription services performing those sound recordings. All interested parties affected by these rates and terms already have had the opportunity to participate in the process, and any additional interested parties were afforded further opportunity to participate when the Copyright Royalty Judges published them as proposed rules in the **Federal**

² As noted in the NPRM, Part 382 will also contain the rates and terms governing the SDARS' activities under sections 112 and 114. See 72 FR 61586 n.1. Consequently, the heading for Part 382 is revised to reflect the inclusion of those rates and terms. In addition, the rates and terms adopted today will appear as Subpart A while the rates and terms for the SDARS will appear in Subpart B. The SDARS' rates and terms will be published in a separate document.

Register on October 31, 2007. 72 FR 61585. The parties who negotiated the final rules have the expectation that they will become effective on January 1, 2008. Even those parties affected by the rules who did not participate in their negotiation are aware that the current rates applicable to preexisting subscription services expire on December 31, 2007, with the next license period to begin on January 1, 2008. See 72 FR 61586 (October 31, 2007).

Although the notice of settlement was filed in June 2007, the settlement, including proposed rates and terms, was not submitted to the Judges for adoption and approval until October. The proposed rates and terms then were published promptly for comment, affording interested parties an appropriate period in which to submit comments and/or objections. Final regulations could not be adopted until after the expiration of the comment deadline, which was November 30.

Because of these circumstances, and because no parties affected by these rules are prejudiced, good cause exists that they become effective less than 30 days from date of publication of this Notice.

List of Subjects in 37 CFR Part 382

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

Final Regulations

■ For the reasons set forth in the preamble, the Copyright Royalty Judges are adding part 382 to Chapter III of title 37 of the Code of Federal Regulations to read as follows:

PART 382—RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

Subpart A—Preexisting Subscription Services

Sec.

382.1 General.

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

382.3 Terms for making payment of royalty fees.

382.4 Confidential information and statements of account.

382.5 Verification of statements of account.

382.6 Verification of royalty payments.

382.7 Unknown copyright owners.

Subpart B—[Reserved]

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

Subpart A—Preexisting Subscription Services

§ 382.1 General.

(a) This subpart establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114(d)(2), and the making of ephemeral phonorecords in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

(d) For the purposes of this subpart, *Licensee* means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

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

(a) Commencing January 1, 2008, and continuing through December 31, 2011, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.25% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(b) Commencing January 1, 2012, and continuing through December 31, 2012, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.5% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(c) Each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114(d)(2) and ephemeral phonorecords pursuant to 17 U.S.C. 112(e) shall make an advance

payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraphs (a) and (b) of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received after the due date. Late fees shall accrue from the due date until payment is received.

(e)(1) For purposes of this section, *gross revenues* shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

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

(ii) 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;

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

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

(v) 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;

(vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received 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;

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

(viii) Bad debts recovered regarding paragraphs (e)(1)(i) through (vii) of this section.

(2) Gross revenues shall include such payments as set forth in paragraphs (e)(1)(i) through (viii) 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. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (e)(1) of this section for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

(f) During any given payment period, the value of each performance of each digital sound recording shall be the same.

§ 382.3 Terms for making payment of royalty fees.

(a) *Payment to the Collective.* All royalty payments shall be made to the Collective designated for the collection and distribution of royalties for the 2008–2012 time period, which shall be SoundExchange.

(b) *Timing of payment.* Payment shall be made on the forty-fifth day after the end of each month for that month, commencing with the month succeeding the month in which the royalty fees are set.

(c) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees 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 the correct recipient. The Collective shall 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 contained in § 370.2 of this chapter.

(2) If the Collective is unable to locate a copyright owner or performer entitled to a distribution of royalties under paragraph (c)(1) of this section within 3 years from the date of payment by a Licensee, 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.

§ 382.4 Confidential information and statements of account.

(a) For purposes of this subpart, confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the nonexempt preexisting subscription service filing the statement. Confidential information shall also include any information so designated in a

confidentiality agreement which has been duly executed between a nonexempt preexisting subscription service and an interested party, or between one or more interested parties; Provided that all such information shall be made available, for the verification proceedings provided for in §§ 382.5 and 382.6.

(b) Nonexempt preexisting subscription services shall submit monthly statements of account on a form provided by the Collective and the monthly royalty payments.

(c) A statement of account shall include only such information as is necessary to verify the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty fees shall not be included on the statement of account.

(d) Access to the confidential information pertaining to the royalty payments shall be limited to:

(1) Those employees, agents, 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 directly related hereto, who are not also employees or officers of a sound recording copyright owner or performing artist, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records; and

(2) An independent and qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist, but is authorized to act on behalf of the interested copyright owners with respect to the verification of the royalty payments.

(3) Copyright owners and performers whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Licensee whose Confidential Information is being supplied, or agents thereof, subject to an appropriate confidentiality agreement, provided that the sole confidential information that may be shared pursuant to this paragraph (d)(3) are the monthly statements of account that accompany royalty payments.

(e) The Collective or any person identified in paragraph (d) of this section shall implement procedures to safeguard all confidential financial and business information, including, but not limited to royalty payments, submitted as part of the statements of account, using a reasonable standard of care, but not less than the same degree of security

used to protect confidential financial and business information or similarly sensitive information belonging to the Collective or such person.

(f) Books and records relating to the payment of the license fees shall be kept in accordance with generally accepted accounting principles for a period of three years. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.

§ 382.5 Verification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by interested parties according to terms promulgated by the Copyright Royalty Board.

(b) *Frequency of verification.* Interested parties may conduct a single audit of a nonexempt preexisting subscription service during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit a particular service with the Copyright Royalty Board, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such notification of intent to audit shall also be served at the same time on the party to be audited.

(d) *Retention of records.* The party requesting the verification procedure shall retain the report of the verification for a period of three 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 auditor, shall serve as an acceptable verification procedure for all parties.

(f) *Costs of the verification procedure.* The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more; in which case, the service which made the underpayment shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17

U.S.C. 114(g), their designated agents, or the Collective.

§ 382.6 Verification of royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by the Copyright Royalty Board.

(b) *Frequency of verification.* Interested parties may conduct a single audit of the Collective during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit the entity making the royalty payment with the Copyright Royalty Board, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such notification of interest shall also be served at the same time on the party to be audited.

(d) *Retention of records.* The interested party requesting the verification procedure shall retain the report of the verification for a period of three 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 auditor, shall serve as an acceptable verification procedure for all interested parties.

(f) *Costs of the verification procedure.* The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more, in which case, the entity which made the underpayment shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those who are entitled to receive royalty payments pursuant to 17 U.S.C. 114(g)(2), or their designated agents.

§ 382.7 Unknown copyright owners.

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.

Subpart B—[Reserved]

Dated: December 14, 2007.
James Scott Sledge,
Chief Copyright Royalty Judge.
 [FR Doc. E7-24625 Filed 12-18-07; 8:45 am]
BILLING CODE 1410-72-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA-HQ-OPP-2007-1057; FRL-8339-2]

Extension of Tolerances for Emergency Exemptions (Multiple Chemicals)

AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule.

SUMMARY: This regulation extends time-limited tolerances for the pesticides listed in Unit II. of the **SUPPLEMENTARY INFORMATION.** These actions are in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of these pesticides. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide

under an emergency exemption granted by EPA.

DATES: This regulation is effective December 19, 2007. Objections and requests for hearings must be received on or before February 19, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2007-1057. To access the electronic docket, go to <http://www.regulations.gov>, select "Advanced Search," then "Docket Search." Insert the docket ID number where indicated and select the "Submit" button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: See the table in this unit for the name of a specific contact person. The following information applies to all contact persons: Emergency Response Team, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001

Pesticide/CFR Citation	Contact Person
Bifenazate, 180.572 Thiabendazole, 180.242 Thiophanate-methyl, 180.371	Andrea Conrath conrath.andrea@epa.gov (703) 308-9356
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