

disputes between the decedent's family and the videographer or videography company.

#### **§ 553.46 Penalties.**

Any person or entity that violates the provisions of this regulation may be barred from entering the cemetery, including participating in memorial services and ceremonies within the cemetery, for two (2) years from the date of such violation. Individuals may also be subject to the penalties set out in Title 36 Code of Federal Regulations, Chapter 1, Section 1.5(f).

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## **LIBRARY OF CONGRESS**

### **Copyright Royalty Board**

#### **37 CFR Part 385**

[Docket No. 2006-3 CRB DPRA]

#### **Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding**

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Royalty Judges are publishing for comment proposed regulations that set the rates and terms for the use of musical works in limited downloads, interactive streaming and incidental digital phonorecord deliveries.

**DATES:** Comments and objections, if any, are due no later than October 31, 2008.

**ADDRESSES:** Comments and objections may be sent electronically to [crb@loc.gov](mailto: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. 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](mailto:crb@loc.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Section 115 of the Copyright Act, title 17 of the United States Code, also known as the mechanical compulsory license, requires a copyright owner of a nondramatic musical work to grant a license to any person who wants to make and distribute phonorecords of that work, provided that the copyright owner has allowed phonorecords of the work to be produced and distributed, and that the licensee complies with the statute and regulations.

On November 1, 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), Public Law No. 104-39, 109 Stat. 336, which extended the mechanical license to digital phonorecord deliveries. 17 U.S.C. 115(c)(3). Consequently, the license now covers digital transmissions of phonorecords in addition to the physical copies such as compact discs, vinyl and cassette tapes.

Until it was abolished in 1993, the Copyright Royalty Tribunal ("CRT") had authority to adjust the statutory rates for the making and distributing of physical phonorecords and did so in 1987. See 1987 Adjustment of the Mechanical Royalty Rate, Docket No. CRT 87-3-87 MRA, 52 FR 22637 (June 15, 1987). In 1993, Congress replaced the CRT with a system under which the mechanical royalty rate was determined by Copyright Arbitration Royalty Panels ("CARP") under the supervision of the Librarian of Congress. See Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103-198, 107 Stat. 2304. Unlike the CRT, the CARPs were authorized to adopt terms, in addition to setting the rates, for the mechanical license. The rates and terms for the mechanical license were adjusted periodically under the CARP system and appear in 37 CFR Part 255. However, in the Copyright Royalty and Distribution Reform Act of 2004, Public Law No. 108-419, Congress transferred jurisdiction over these rates and terms

to the Copyright Royalty Judges ("Judges"). 17 U.S.C. 801(b)(1).

On January 9, 2006, pursuant to 17 U.S.C. 803(b)(1)(A)(i)(V), the Judges published a notice in the **Federal Register** announcing the commencement of the proceeding to determine rates and terms for the compulsory license under section 115 and requesting interested parties to submit their petitions to participate. Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords, Docket No. 2006-3 CRB DPRA, 71 FR 1454 (January 9, 2006). Petitions to participate were received from the following entities: Royalty Logic, Inc.; the Songwriters Guild of America; the National Music Publishers' Association, Inc.; the Songwriters Guild of America, and the Nashville Songwriters Association International, jointly (collectively, "Copyright Owners"); Apple Computer, Inc.; America Online, Inc.; RealNetworks, Inc.; Napster, LLC; Sony Connect, Inc.; Digital Media Association ("DiMA"); Yahoo! Inc.; MusicNet, Inc.; MTV Networks, Inc.; and Recording Industry Association of America ("RIAA").

The Judges set the schedule for the proceeding for both the direct and rebuttal phases of the proceeding, including the dates for the filing of written statements and the dates for oral testimony for each phase. During the oral presentation of the rebuttal phase, the parties informed the Judges that they had reached a settlement regarding the rates and terms for "limited downloads and interactive streaming, including all known incidental digital phonorecord deliveries." See Joint Motion to Adopt Procedures for Submission of Partial Settlement at 1 (filed May 15, 2008). The proposed rates and terms codifying the settlement agreement were filed on September 22, 2008.<sup>1</sup>

Section 801(b)(7) of the Copyright Act authorizes the Judges to adopt 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 Judges for approval. This section provides that in such event:

<sup>1</sup> The parties were unable to reach agreement regarding the rates and terms for the use of musical works in the making and distributing of physical phonorecords, permanent digital downloads, and ringtones. Consequently, the rates and terms for these products were the subject of a full hearing before the Judges. The Judges will determine these rates and terms, and those rates and terms also will be contained in proposed Part 385 of title 37 of the Code of Federal Regulations. Today's notice of proposed rulemaking discusses only the proposed regulations regarding limited downloads, interactive streaming and incidental digital phonorecord deliveries.

(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)(7)(A). Rates and terms adopted pursuant to this provision are binding on all copyright owners of musical works and those using such musical works in limited downloads, interactive streaming and incidental digital phonorecord deliveries.

As part of this notice of proposed rulemaking, the Judges are modifying one aspect of the proposed rates and terms. The parties have included language in their proposal that states that such rates have no precedential effect and may not be introduced or relied upon in any governmental or judicial proceeding. The Judges decline to include such language within our regulations. Our task, as set forth in section 115 and chapter 8 of the Copyright Act, is to adopt rates and terms for the compulsory license for the making and distributing of physical and digital phonorecords. It is not our task to offer evaluations, limitations or characterizations of the rates and terms, or make statements about their use or value in proceedings other than this one. See Noncommercial Educational Broadcasting Statutory License, Docket No. 2006-2 CRB NCBRA, 72 FR 19138, 19139 (April 17, 2007).

#### List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

#### Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to add Part 385 to Chapter III of title 37 of the Code of Federal Regulations to read as follows:

### PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS

#### Subpart A—[Reserved]

#### Subpart B—Interactive Streaming, Other Incidental Digital Phonorecord Deliveries and Limited Downloads

Sec.

385.10 General.

385.11 Definitions.

385.12 Calculation of royalty payments in general.

385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.

385.14 Promotional royalty rate.

385.15 Timing of payments.

385.16 Reproduction and distribution rights covered.

385.17 Effect of rates.

**Authority:** 17 U.S.C. 115, 801(b)(1), 804(b)(4).

#### § 385.10 General.

(a) This subpart establishes rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* A licensee that makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services pursuant to 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations.

#### § 385.11 Definitions.

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

*Interactive stream* means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114(d)(2). An interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

*Licensee* means a person that has obtained a compulsory license under 17 U.S.C. 115 and its implementing regulations.

*Licensed activity* means interactive streams or limited downloads of musical works, as applicable.

*Limited download* means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically

identifiable reproduction of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the service, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the service, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

*Offering* means a service's offering of licensed activity that is subject to a particular rate set forth in § 385.13(a) (e.g., a particular subscription plan available through the service).

*Promotional royalty rate* means the statutory royalty rate of zero in the case of certain promotional interactive streams and certain promotional limited downloads, as provided in § 385.14.

*Publication date* means [date regulations adopted as final].

*Record company* means a person or entity that

(1) Is a copyright owner of a sound recording of a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the copyright owner of the sound recording.

*Relevant page* means a page (including a web page, screen or display) from which licensed activity offered by a service is directly available

to end users, but only where the offering of licensed activity and content that directly relates to the offering of licensed activity (e.g., an image of the artist or artwork closely associated with such offering, artist or album information, reviews of such offering, credits and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A licensed activity is directly available to end users from a page if sound recordings of musical works can be accessed by end users for limited downloads or interactive streams from such page (in most cases this will be the page where the limited download or interactive stream takes place).

*Service* means that entity (which may or may not be the licensee) that, with respect to the licensed activity,

(1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users;

(2) Is able to report fully on service revenue from the provision of the licensed activity to the public, and to the extent applicable, verify service revenue through an audit; and

(3) Is able to report fully on usage of musical works by the service, or procure such reporting, and to the extent applicable, verify usage through an audit.

*Service revenue.* (1) Subject to paragraphs (2) through (5) of the definition of "Service revenue," and subject to U.S. Generally Accepted Accounting Principles, *service revenue* shall mean the following:

(i) All revenue recognized by the service from end users from the provision of licensed activity;

(ii) All revenue recognized by the service by way of sponsorship and commissions as a result of the inclusion of third-party "in-stream" or "in-download" advertising as part of licensed activity (i.e., advertising placed immediately at the start, end or during the actual delivery, by way of interactive streaming or limited downloads, as applicable, of a musical work); and

(iii) All revenue recognized by the service, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a relevant page of the service or on any page that directly follows such relevant page leading up to and including the limited download or interactive streaming, as applicable, of a musical work; provided that, in the case where more than one service is actually available to end users from a relevant

page, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of "Service revenue," such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service, or if not recognized by the service, by any associate, affiliate, agent or representative of such service in lieu of its being recognized by the service;

(ii) Include the value of any barter or other nonmonetary consideration;

(iii) Not be reduced by credit card commissions or similar payment process charges; and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than refunds to end users for licensed activity that they were unable to use due to technical faults in the licensed activity or other bona fide refunds or credits issued to end users in the ordinary course of business.

(3) In each of the cases identified in paragraph (1) of the definition of "Service revenue," such revenue shall, for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed activity, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of "Service revenue." By way of example, the following kinds of revenue shall be excluded:

(i) Revenue derived from non-music voice, content and text services;

(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions); and

(iii) Revenue derived from music or music-related products and services that are not or do not include licensed activity.

(4) For purposes of paragraph (1) of the definition of "Service revenue," advertising or sponsorship revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.

(5) Where the licensed activity is provided to end users as part of the same transaction with one or more other products or services that are not a music service engaged in licensed activity, then the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of "Service revenue" shall be the revenue recognized from end users for the bundle less the standalone published

price for end users for each of the other component(s) of the bundle; provided that, if there is no such standalone published price for a component of the bundle, then the average standalone published price for end users for the most closely comparable product or service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used. In connection with such a bundle, if a record company providing sound recording rights to the service

(i) Recognizes revenue (in accordance with U.S. Generally Accepted Accounting Principles, and including for the avoidance of doubt barter or nonmonetary consideration) from a person or entity other than the service providing the licensed activity and;

(ii) Such revenue is received, in the context of the transactions involved, as consideration for the ability to make interactive streams or limited downloads of sound recordings, then such revenue shall be added to the amounts expensed by the service for purposes of § 385.13(b). Where the service is the licensee, if the service provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service hereunder as a result of revenue recognized from a person or entity other than the service as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service to calculate the additional royalties and indemnify the service for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

*Stream* means the digital transmission of a sound recording of a musical work to an end user—

(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and

(3) That is also subject to licensing as a public performance of the musical work.

*Streaming cache reproduction* means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

*Subscription service* means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in § 385.14(b).

### § 385.12 Calculation of royalty payments in general.

(a) *Applicable royalty.* Licensees that make or authorize licensed activity pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the minimum royalties and subscriber-based royalty floors for specific types of services provided in § 385.13, except as provided for certain promotional uses in § 385.14.

(b) *Rate calculation methodology.* Royalty payments for licensed activity shall be calculated as provided in paragraph (b) of this section. If a service includes different offerings, royalties must be separately calculated with respect to each such offering. Uses subject to the promotional royalty rate shall be excluded from the calculation of royalties due, as further described in this section and the following § 385.13.

(1) *Step 1: Calculate the All-In Royalty for the Service.* For each accounting period, the all-in royalty for each offering of the service is the greater of

(i) The applicable percentage of service revenue as set forth in paragraph

(c) of this section (excluding any service revenue derived solely from licensed activity uses subject to the promotional royalty rate), and

(ii) The minimum specified in § 385.13 of the offering involved.

(2) *Step 2: Subtract Applicable Performance Royalties.* From the amount determined in step 1 in paragraph (b)(1) of this section, for each offering of the service, subtract the total amount of royalties for public performance of musical works that has been or will be expensed by the service pursuant to public performance licenses in connection with uses of musical works through such offering during the accounting period that constitute licensed activity (other than licensed activity subject to the promotional royalty rate). While this amount may be the total of the service's payments for that offering for the accounting period under its agreements with performing rights societies as defined in 17 U.S.C. 101, it will be less than the total of such public performance payments if the service is also engaging in public performance of musical works that does not constitute licensed activity. In the latter case, the amount to be subtracted for public performance payments shall be the amount of such payments allocable to licensed activity uses (other than promotional royalty rate uses) through the relevant offering, as determined in relation to all uses of musical works for which the public performance payments are made for the accounting period. Such allocation shall be made on the basis of plays of musical works or, where per-play information is unavailable due to bona fide technical limitations as described in step 4 in paragraph (b)(4) of this section, using the same alternative methodology as provided in step 4.

(3) *Step 3: Determine the Payable Royalty Pool.* This is the amount payable for the reproduction and distribution of all musical works used by the service by virtue of its licensed activity for a particular offering during the accounting period. This amount is the greater of

(i) The result determined in step 2 in paragraph (b)(2) of this section, and

(ii) The subscriber-based royalty floor resulting from the calculations described in § 385.13.

(4) *Step 4: Calculate the Per-Work Royalty Allocation for Each Relevant Work.* This is the amount payable for the reproduction and distribution of each musical work used by the service by virtue of its licensed activity through a particular offering during the accounting period. To determine this amount, the result determined in step 3

in paragraph (b)(3) of this section must be allocated to each musical work used through the offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for such offering by the total number of plays of all musical works through such offering during the accounting period (other than promotional royalty rate plays) to yield a per-play allocation, and multiplying that result by the number of plays of each musical work (other than promotional royalty rate plays) through the offering during the accounting period. For purposes of determining the per-work royalty allocation in all calculations under this step 4 only (i.e., after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each play on or after October 1, 2010 shall be counted as provided in paragraph (d) of this section. Notwithstanding the foregoing, if the service is not capable of tracking play information due to bona fide limitations of the available technology for services of that nature or of devices useable with the service, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the service for making royalty payment allocations for the use of individual sound recordings.

(c) *Percentage of service revenue.* The percentage of service revenue applicable under paragraph (b) of this section is 10.5%, except that such percentage shall be discounted by 2% (i.e., to 8.5%) in the case of licensed activity occurring on or before December 31, 2007.

(d) *Overtime adjustment.* For licensed activity on or after October 1, 2010, for purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of plays as follows:

(1) 5:01 to 6:00 minutes—Each play = 1.2 plays

(2) 6:01 to 7:00 minutes—Each play = 1.4 plays

(3) 7:01 to 8:00 minutes—Each play = 1.6 plays

(4) 8:01 to 9:00 minutes—Each play = 1.8 plays

(5) 9:01 to 10:00 minutes—Each play = 2.0 plays

(6) For playing times of greater than 10 minutes, continue to add .2 for each additional minute or fraction thereof.

(e) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information and belief of the licensee at the time payment is due, and subject to the additional accounting and certification

requirements of 17 U.S.C. 115(c)(5) and § 201.19 of this title. Without limitation, a licensee's statements of account shall set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to § 385.13 does or does not apply) and, for each offering reported, also indicate the type of licensed activity involved and the number of plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

**§ 385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.**

(a) *In general.* The following minimum royalty rates and subscriber-based royalty floors shall apply to the following types of licensed activity:

(1) *Standalone non-portable subscription—streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings only in the form of interactive streams and only from a non-portable device to which such streams are originally transmitted while the device has a live network connection, the minimum for use in step 1 of § 385.12(b)(1) is the lesser of subminimum II as described in paragraph (c) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(1) is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone non-portable subscription—mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings either in the form of interactive streams or limited downloads but only from a non-portable device to which such streams or downloads are originally transmitted, the minimum for use in step 1 of § 385.12(b)(3) is the lesser of the subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone portable subscription service.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings in the form of interactive streams or limited downloads from a portable device, the minimum for use in step 1 of § 385.12(b)(1) is the lesser of subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 80 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled subscription services.* In the case of a subscription service made available to end users with one or more other products or services as part of a single transaction without pricing for the subscription service separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to a subscription service for a single price), the minimum for use in step 1 of § 385.12(b)(1) is subminimum I as described in paragraph (b) of this section for the accounting period. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 25 cents per month for each end user who has made at least one play of a licensed work during such month (each such end user to be considered an "active subscriber").

(5) *Free nonsubscription/ad-supported services.* In the case of a service offering licensed activity free of any charge to the end user, the minimum for use in step 1 of § 385.12(b)(1) is subminimum II described in paragraph (c) of this section for the accounting period. There is no subscriber-based royalty floor for use in step 3 of § 385.12(b)(3).

(b) *Computation of subminimum I.* For purposes of paragraphs (a)(2), (3) and (4) of this section, and with reference to paragraph (5) of the definition of "service revenue" in § 385.11 if applicable, subminimum I for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service during the accounting period—

(1) In cases in which a record company is the licensee under 17 U.S.C. 115 and a third-party service has obtained from the record company the rights to make interactive streams or limited downloads of a sound recording together with the right to reproduce and distribute the musical work embodied therein, 17.36% of the total amount

expensed by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum I for an accounting period shall be 14.53% of the amount expensed by the service for such rights for the accounting period.

(2) In cases in which the relevant service is the licensee under 17 U.S.C. 115 and the relevant service has obtained from a third-party record company the rights to make interactive streams or limited downloads of a sound recording without the right to reproduce and distribute the musical work embodied therein, 21% of the total amount expensed by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such sound recording rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum I for an accounting period shall be 17% of the amount expensed by the service for such sound recording rights for the accounting period.

(c) *Computation of subminimum II.* For purposes of paragraphs (a)(1) and (5) of this section, subminimum II for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used by the relevant service during the accounting period—

(1) In cases in which a record company is the licensee under 17 U.S.C. 115 and a third-party service has obtained from the record company the rights to make interactive streams and limited downloads of a sound recording together with the right to reproduce and distribute the musical work embodied therein, 18% of the total amount expensed by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum II for an accounting period shall be 14.53% of the amount expensed by the service for such rights for the accounting period.

(2) In cases in which the relevant service is the licensee under 17 U.S.C. 115 and the relevant service has

obtained from a third-party record company the rights to make interactive streams or limited downloads of a sound recording without the right to reproduce and distribute the musical work embodied therein, 22% of the total amount expended by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such sound recording rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum II for an accounting period shall be 17% of the amount expended by the service for such sound recording rights for the accounting period.

(d) *Computation of subscriber-based royalty rates.* For purposes of paragraph (a) of this section, to determine the minimum or subscriber-based royalty floor, as applicable to any particular offering, the service shall for the relevant offering calculate its total number of subscriber-months for the accounting period, taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the promotional royalty rate as described in § 385.14(b)(2), except that in the case of a bundled subscription service, subscriber-months shall instead be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the minimum or subscriber-based royalty floor, as applicable, for the accounting period.

**§ 385.14 Promotional royalty rate.**

(a) *General provisions.* (1) This section establishes a royalty rate of zero in the case of certain promotional interactive streaming activities, and of certain promotional limited downloads offered in the context of a free trial period for a digital music subscription service under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the promotional royalty rate shall apply to a musical work when a record company transmits or authorizes the transmission of interactive streams or limited

downloads of a sound recording that embodies such musical work, only if—

(i) The primary purpose of the record company in making or authorizing the interactive streams or limited downloads is to promote the sale or other paid use of sound recordings by the relevant artists, including such sound recording, through established retail channels or the paid use of one or more established retail music services through which the sound recording is available, and not to promote any other good or service;

(ii) Either—

(A) The sound recording (or a different version of the sound recording embodying the same musical work) is being lawfully distributed and offered to consumers through the established retail channels or services described in paragraph (a)(1)(i) of this section; or

(B) In the case of a sound recording of a musical work being prepared for commercial release but not yet released, the record company has a good faith intention of lawfully distributing and offering to consumers the sound recording (or a different version of the sound recording embodying the same musical work) through the established retail channels or services described in paragraph (a)(1)(i) of this section within 90 days after the commencement of the first promotional use authorized under this section (and in fact does so, unless it can demonstrate that notwithstanding its bona fide intention, it unexpectedly did not meet the scheduled release date);

(iii) In connection with authorizing the promotional interactive streams or limited downloads, the record company has obtained from the service it authorizes a written representation that—

(A) In the case of a promotional use commencing on or after October 1, 2010, except interactive streaming subject to paragraph (d) of this section, the service agrees to maintain for a period of no less than 5 years from the conclusion of the promotional activity complete and accurate records of the relevant authorization and dates on which the promotion was conducted, and identifying each sound recording of a musical work made available through the promotion, the licensed activity involved, and the number of plays of such recording;

(B) The service is in all material respects operating with appropriate license authority with respect to the musical works it is using for promotional and other purposes; and

(C) The representation is signed by a person authorized to make the representation on behalf of the service;

(iv) Upon receipt by the record company of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular service is in a material manner operating without appropriate license authority from such copyright owner, the record company shall within 5 business days withdraw by written notice its authorization of such uses of such copyright owner's musical works under the promotional royalty rate by that service;

(v) The interactive streams or limited downloads are offered free of any charge to the end user and, except in the case of interactive streaming subject to paragraph (d) of this section or in the case of a free trial period for a digital music subscription service, no more than 5 sound recordings at a time are streamed in response to any individual request of an end user;

(vi) The interactive streams and limited downloads are offered in a manner such that the user is at the same time (e.g., on the same web page) presented with a purchase opportunity for the relevant sound recording or an opportunity to subscribe to a paid service offering the sound recording, or a link to such a purchase or subscription opportunity, except—

(A) In the case of interactive streaming of a sound recording being prepared for commercial release but not yet released, certain mobile applications or other circumstances in which the foregoing is impracticable in view of the current state of the relevant technology; and

(B) In the case of a free trial period for a digital music subscription service, if end users are periodically offered an opportunity to subscribe to the service during such free trial period; and

(vii) The interactive streams and limited downloads are not provided in a manner that is likely to cause mistake, to confuse or to deceive, reasonable end users as to the endorsement or association of the author of the musical work with any product, service or activity other than the sale or paid use of sound recordings or paid use of a music service through which sound recordings are available. Without limiting the foregoing, upon receipt of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular use of such work under this section violates the limitation set forth in this paragraph (a)(1)(vii), the record company shall promptly cease such use of that work, and within 5 business days withdraw by written notice its authorization of such use by

all relevant third parties it has authorized under this section.

(2) To rely upon the promotional royalty rate, a record company making or authorizing interactive streams or limited downloads shall keep complete and accurate contemporaneous written records of such uses, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the service or services where each promotion is authorized (including the internet address if applicable), the beginning and end date of each period of promotional activity authorized, and the representation required by paragraph (a)(1)(iii) of this section; provided that, in the case of trial subscription uses, such records shall instead consist of the contractual terms that bear upon promotional uses by the particular digital music subscription services it authorizes; and further provided that, if the record company itself is conducting the promotion, it shall also maintain any additional records described in paragraph (a)(1)(iii)(A) of this section. The records required by this paragraph (a)(2) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed activity in the ordinary course of business, but in no event for less than 5 years from the conclusion of the promotional activity to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (a)(2) with respect to a specific promotion or relating to a particular sound recording of a musical work, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(1)(iii)(A) of this section, which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the record company shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the record company (but not any third-party

service it has authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(3) If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(1)(iii)(A) of this section by a service authorized by a record company with respect to a specific promotion, the service shall provide complete and accurate documentation within 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the service shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the service (but not the record company) will be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(4) The promotional royalty rate is exclusively for audio-only interactive streaming and limited downloads of musical works subject to licensing under 17 U.S.C. 115. The promotional royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the promotional royalty rate (including without limitation interactive streaming or limited downloads of a musical work beyond the time limitations applicable to the promotional royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101 *et seq.* For

the avoidance of doubt, however, except as provided in paragraph (a) of this section, statements of account under 17 U.S.C. 115 need not reflect interactive streams or limited downloads subject to the promotional royalty rate.

(b) *Interactive streaming and limited downloads of full-length musical works through third-party services.* In addition to those of paragraph (a) of this section, the provisions of this paragraph (b) apply to interactive streaming, and limited downloads (in the context of a free trial period for a digital music subscription service), authorized by record companies under the promotional royalty rate through third-party services (including Web sites) that is not subject to paragraphs (c) or (d) of this section. Such interactive streams and limited downloads may be made or authorized by a record company under the promotional royalty rate only if—

(1) No cash, other monetary payment, barter or other consideration for making or authorizing the relevant interactive streams or limited downloads is received by the record company, its parent company, any entity owned in whole or in part by or under common ownership with the record company, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration used to promote the sale or paid use of sound recordings or the paid use of music services through which sound recordings are available;

(2) In the case of interactive streaming and limited downloads offered in the context of a free trial period for a digital music subscription service, the free trial period does not exceed 30 consecutive days per subscriber per two-year period; and

(3) In contexts other than a free trial period for a digital music subscription service, interactive streaming subject to paragraph (b) of this section of a particular sound recording is authorized by the record company on no more than 60 days total for all services (i.e., interactive streaming under paragraph (b) of this section of a particular sound recording may be authorized on no more than a total of 60 days, which need not be consecutive, and on any one such day, interactive streams may be offered on one or more services); provided, however, that an additional 60 days shall be available each time the sound recording is re-released by the record company in a remastered form or as a part of a compilation with a different set of sound recordings than the original release or any prior compilation including such sound recording.



(4) In the event that a record company authorizes promotional uses in excess of the time limitations of paragraph (b) of this section, the record company, and not the third-party service it has authorized, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved. In the event that a third-party service exceeds the scope of any authorization by a record company, the service, and not the record company, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(c) *Interactive streaming of full-length musical works through record company and artist services.* In addition to those of paragraph (a) of this section, the provisions of this paragraph (c) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate through a service (e.g., a Web site) directly owned or operated by the record company, or directly owned or operated by a recording artist under the authorization of the record company, and that is not subject to paragraph (d) of this section. For the avoidance of doubt and without limitation, an artist page or site on a third-party service (e.g., a social networking service) shall not be considered a service operated by the record company or artist. Such interactive streams may be made or authorized by a record company under the promotional royalty rate only if—

(1) The interactive streaming subject to this paragraph (c) of a particular sound recording is offered or authorized by the record company on no more than 90 days total for all services (i.e., interactive streaming under this paragraph (c) of a particular sound recording may be authorized on no more than a total of 90 days, which need not be consecutive, and on any such day, interactive streams may be offered on one or more services operated by the record company or artist, subject to the provisions of paragraph (b)(2) of this section); provided, however, that an additional 90 days shall be available each time the sound recording is re-released by the record company in a remastered form or as part of a compilation with a different set of sound recordings than prior compilations that include that sound recording;

(2) In the case of interactive streaming through a service devoted to one featured artist, the interactive streams subject to this paragraph (c) of this

section of a particular sound recording are made or authorized by the record company on no more than one official artist site per artist and are recordings of that artist; and

(3) In the case of interactive streaming through a service that is not limited to a single featured artist, all interactive streaming on such service (whether eligible for the promotional royalty rate or not) is limited to sound recordings of a single record company and its affiliates and the service would not reasonably be considered to be a meaningful substitute for a paid music service.

(d) *Interactive streaming of clips.* In addition to those in paragraph (a) of this section, the provisions of this paragraph (d) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate of segments of sound recordings of musical works with a playing time that does not exceed the greater of

(1) 30 seconds, or

(2) 10% of the playing time of the complete sound recording, but in no event in excess of 60 seconds. Such interactive streams may be made or authorized by a record company under the promotional royalty rate without any of the temporal limitations set forth in paragraphs (b) and (c) of this section (but subject to the other conditions of paragraphs (b) and (c) of this section, as applicable). For clarity, this paragraph (d) is strictly limited to the uses described herein and shall not be construed as permitting the creation or use of an excerpt of a musical work in violation of 17 U.S.C. 106(2) or 115(a)(2) or any other right of a musical work owner.

(e) *Activities prior to the publication date.* Notwithstanding paragraphs (a) through (d) of this section, in the case of licensed activity prior to the publication date, the promotional royalty rate shall apply to promotional interactive streams, and to limited downloads offered in the context of a free trial period for a digital music subscription service, that in either case are authorized by the relevant record company, if the condition set forth in paragraph (a)(1)(i) of this section is satisfied, subject only to the additional condition in paragraph (b)(1) of this section, and provided that a free trial period for a digital music subscription service authorized by the relevant record company shall be considered to be of 30 days' duration. In the event of a dispute concerning the eligibility of licensed activity prior to the publication date for the promotional royalty rate, a service asserting that its licensed

activity is eligible for the promotional royalty rate shall bear the burden of proving that its licensed activity was authorized by the relevant record company and shall certify that the condition in paragraph (b)(1) of this section was satisfied.

#### **§ 385.15 Timing of payments.**

Payment for any accounting period for which payment otherwise would be due more than 180 days after the publication date shall be due as otherwise provided under 17 U.S.C. 115 and its implementing regulations. Payment for any prior accounting period shall be due 180 days after the publication date.

#### **§ 385.16 Reproduction and distribution rights covered.**

A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, solely for the purpose of providing such licensed activity (and no other purpose).

#### **§ 385.17 Effect of rates.**

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.

Dated: September 25, 2008.

**James Scott Sledge,**

*Chief Copyright Royalty Judge.*

[FR Doc. E8-23184 Filed 9-30-08; 8:45 am]

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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 180**

[EPA-HQ-OPP-2008-0647; FRL-8382-4]

#### **Chlorantraniliprole; Proposed Time-Limited Pesticide Tolerance**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to establish time-limited tolerances for residues of chlorantraniliprole in or on cowpeas, forage and hay; field peas, vines and hay; forage, fodder and straw of cereal grains, crop group 16; grass forage, fodder and hay, crop group 17; leaves of root and tuber vegetables, crop group 2, leeks, nongrass animal feeds (forage, fodder, straw and hay), crop group 18; okra; onions, green; onions, Welsh; peanuts, hay; shallots; soybeans, forage and hay; strawberries and sugarcane, sugar under the Federal Food, Drug, and Cosmetic Act (FFDCA). The tolerances expire on April 25, 2010.