

Draft Regulations Implementing the Copyright Owners' Proposed Rates and Terms

Add the following to Chapter III of Title 37, Code of Federal Regulations (tentatively numbered part 390 for purposes of reference):

PART 390—RATES AND TERMS FOR ROYALTY PAYABLE UNDER
COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

Sec.

390.1 General

390.2 Definitions

390.3 Royalty Rates for Making and Distributing Phonorecords

390.4 Terms for Making and Distributing Phonorecords

390.5 Royalty Rates for Interactive Streams and Limited Downloads [**To be provided to the Court on or after September 15, 2008.**]

§ 390.1 General

(a) *Scope.* This part 390 establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of digital phonorecord deliveries other than interactive streams and limited downloads, in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* Licensees relying upon the compulsory license set forth in 17 U.S.C. 115 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 to use of musical works within the scope of such agreements.

§ 390.2 Definitions

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

(a) *Consumer Price Index* (“CPI”) means the “Consumer Price Index-Urban Wage Earners and Clerical Workers” (U.S. Bureau of Labor Statistics Series CWSR0000SA0).

(b) *Licensed Product* means a ringtone of a sound recording embodying all or a portion of a musical work.

(c) *Licensed Service* means any digital music service that provides ringtones, whether or not on a subscription basis.

(d) *Licensor* means (1) the copyright owner or grantor of sound recording and/or mechanical rights to a User to exploit a Licensed Service or Licensed Product, or person or entity acting on their behalf; (2) any entity owned or controlled by, under common control with or affiliated with the Licensor; and (3) any person or entity that is receiving consideration for the Licensed Service or Licensed Product on behalf of or in lieu of the Licensor.

(e) *Revenue* means all monies and any other consideration paid or payable to, or received, earned, accrued or derived by, a User by or from any party in connection with a Licensed Service or a Licensed Product, including the fair market value of non-cash or in-kind consideration, including:

- (1) All consideration payable for a Licensed Service (including all subscription fees, access charges and any other consideration paid for access to and/or use of all or a portion of the Licensed Service);
- (2) All consideration payable for a Licensed Product (including purchase fees);
- (3) All consideration from advertising of any kind on the same web page as, in proximity to or on pages leading up to, or used to access, the Licensed Service or Licensed Product (including audio and visual advertising, advertising; sponsor “hot links,” the provision of promotional time, space or services, and all banners, “in-stream,” pre-roll, post-roll, and key-word targeted advertisements);
- (4) All consideration from or in the form of promotions and/or sponsorships;
- (5) All consideration from e-commerce bounties or click-through royalties, or referral or affiliate program fees or similar such arrangements;
- (6) All other consideration paid for services, devices, software or privileges used to access or use the Licensed Service or Licensed Product;
- (7) Any revenue share, equity, security or other financial or economic interest transferred or pledged as consideration for a Licensed Service or Licensed Product;
- (8) In the case of a Licensed Service or Licensed Product that is sold or distributed in bundled form with another service or product, that proportion of consideration received for the bundle that is represented by the standalone published price of such Licensed Service or Licensed Product in relation to the standalone published price(s) of the other component(s) of the bundle (if there is no standalone published price, then the average standalone price for the most

closely comparable service or product in the U.S., or, if more than one such comparable exists, the average of standalone prices for such comparables, shall be used); and

(9) Any other consideration received or receivable arising in relation to the provision of a Licensed Service or Licensed Product.

(f) *Total Content Costs* means each and all of the types of consideration comprising Revenue that are paid or payable to the Licensor of sound recording rights and/or the Licensor of mechanical rights in connection with a Licensed Service or Licensed Product.

(g) *User* means (1) any person or entity that is offering or providing a Licensed Service or Licensed Product directly to consumers as the retailer, whether or not the licensee; (2) any entity owned or controlled by, under common control with or affiliated with the User; and (3) any person or entity that is receiving consideration for the Licensed Service or Licensed Product on behalf of or in lieu of the User.

§ 390.3 Royalty Rates for Making and Distributing Phonorecords

Royalty rates and fees for the use of a musical work in a sound recording made pursuant to 17 U.S.C. 115 are as follows:

(a) *Physical Phonorecords*. A penny rate equal to the greater of 12.5 cents per song or 2.40 cents per minute of playing time or fraction thereof, subject to periodic adjustments for inflation, as measured by the CPI.

(b) *Permanent Downloads*. A penny rate equal to the greater of 15 cents per track or 2.90 cents per minute of playing time or fraction thereof, subject to periodic adjustments for inflation as measured by the CPI.

(c) *Ringtones*. A rate equal to the greatest of:

(1) 15 percent of revenue;

(2) 15 cents per ringtone, subject to periodic adjustments for inflation as measured by the CPI; or

(3) one-third of the total content costs paid for mechanical rights to musical compositions and rights to sound recordings.

§ 390.4 Terms for Making and Distributing Phonorecords

(a) *Late payments*. Without affecting any right to terminate a license for failure to report or pay royalties as provided in § 115(c)(6), late fees shall be assessed at 1.5% per month (or the highest lawful rate, whichever is lower) from the date payment should have been made (the twentieth day of the calendar month following the month of distribution) to the date payment is actually received by the Copyright Owner.

(b) *Pass-through licensing assessment.* For pass-through arrangements, there shall be an automatic 3% assessment on all royalty payments by the licensee to address the fact that the Copyright Owners would receive payment sooner if the retailer were paying the Copyright Owners directly (such assessment to be augmented by additional late fees at 1.5% per month if payment by the licensee is otherwise late).

(c) *Reasonable attorneys' fees.* A Copyright Owner shall be entitled to recover from the licensee reasonable attorneys' fees expended to collect past due royalties and late fees.

(d) *Applicability of rates.* The statutory rate to be applied is the rate in effect as of the date of distribution.

(e) *Specific licensing and reporting.* Licenses are to be taken by specific configuration (e.g., CD, cassette, permanent download, limited download, interactive stream, etc.). In addition to any other applicable requirements, reporting must be broken down by specific configuration (i.e., must detail how many units distributed of a particular configuration, and the applicable rate and royalties due for that configuration) and, in the case of pass-through arrangements, must be further broken down to indicate the retail outlet through which the distribution was made to the end user.

§ 390.5 Royalty Rates for Interactive Streams and Limited Downloads

Proposed regulations concerning interactive streams and limited downloads are contained within the settlement agreement announced to the Court on May 15, 2008. The parties will provide the proposed regulations to the Court on or after September 15, 2008.