

Rates and Terms

PART 26 -- RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY NEW BUNDLED SUBSCRIPTION SERVICES

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§ 26_.1 General.

(a) Scope. This part 26_ establishes rates and terms of royalty payments for the public performance of sound recordings and the reproduction of multiple ephemeral recordings by new digital audio services offered by a television programming services in accordance with the provisions of 17 U.S.C. §§ 112(e) and 114 for the period from November 1, 2005, through December 31, 2012.

(b) 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 transmissions within the scope of such agreements.

§ 26_.2 Definitions.

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

(a) "Copyright Owner" is a sound recording copyright owner who is entitled to receive royalty payments under 17 U.S.C. § 112(e) or 114(g).

(b) A "Designated Agent" is any agent designated by the Librarian of Congress for the receipt and distribution of royalty payments made pursuant to this part.

(c) "Licensee" means an owner or operator of a digital audio service that is offered by a television service provider, and includes the Licensee's parent, subsidiaries and divisions.

(d) "Term" means the period commencing November 1, 2005, and continuing through December 31, 2012.

§ 26_.3 Royalty fees for public performances of sound recordings and the making of ephemeral recordings.

(a) Royalty. Commencing with the first calendar quarter following the setting of the rate and continuing through December 31, 2012, the quarterly royalty fee to be paid by a Licensee 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 calculated as 0.1235 cents (\$0.001235) per month per subscriber times the average number of monthly United States subscribers of the television service who receive Licensee's audio service.

(b) Payments. Payments made by a Licensee shall be due 60 days after the close of each calendar quarter for which the payment is being made.

(c) Late Fee. If a Licensee fails to make any payment under this part when due and following ten days after receipt of written notice from a Designated Agent, the Licensee shall pay a late fee on any overdue amount of 0.50% per month, or the highest lawful rate, whichever is lower, from the date of receipt of written notice until the date full payment is received by a Designated Agent.

(d) Weekends and Holidays. In the event the deadline for any payment due under this part falls on a day which is not a business day, payment shall be due on the next business day.

(e) Revenue Adjustment. Beginning in January 2009, the Attributable Monthly Subscriber Revenue shall be adjusted annually according to the Bureau of Labor Statistics Producer Price Index for Cable Networks, in comparison to January 2008.

(f) Past Payment. Payments for the license period prior to the first calendar quarter following the setting of the rate shall be made along with the first payment following the setting of the rate.

§ 26_.4 Administrative provisions.

(a) Audit.

(i) A Designated Agent may audit compliance by the Licensee with the royalty payment provisions of these regulations. If there is more than one Designated Agent, all Designated Agents shall mutually retain a single auditor to perform a single audit on a Licensee.

(ii) An audit pursuant to this section may be conducted no more than once every three (3) years, and no more than once in any given year. An audit of any year in the Term may be conducted only once. Audits shall be conducted during regular business hours, at a mutually agreeable time; provided that an audit shall commence no later than 90 days following a written request for audit.

(iii) Audits shall be performed by an independent auditor according to generally accepted auditing standards.

(iv) If as a result of the audit the parties agree or, in the absence of such agreement there is a final determination, that a Licensee has underpaid royalties by 10 or more percent, within 60 days of such determination the Licensee shall pay the amount of the underpayment with interest at the rate provided in 28 U.S.C. § 1961, plus reasonable out-of-pocket costs incurred by the auditor.

(v) If as a result of the audit the auditor determines that a Licensee has overpaid royalties, the Licensee may credit against future royalty payments the amount of such overpayment plus interest accrued at the rate provided in 28 U.S.C. § 1961, and shall pay the Licensee's reasonable out-of-pocket costs incurred from the audit.

§ 26_.5 Confidential information and statements of account.

(a) For purposes of this part, confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the Licensee filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a Licensee 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 §§2__.4 of this part.

(b) Licensee shall submit quarterly statements of account on a form provided by the agent designated to collect such forms and the quarterly royalty payments.

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

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

(i) Those employees, agents, consultants and independent contractors of the designated agent, 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

(ii) 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.

(e) The designated agent 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 no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the designated agent 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.

§ 26_.6 Notice and Recordkeeping.

(a) General. This Exhibit prescribes rules under which Licensees shall serve copyright owners with notice of use of their sound recordings, what the content of that notice should be, and under which records of such use shall be kept and made available.

(b) Definition. A “*Report of Use of Sound Recordings Under Statutory License*” (sometimes referred to as a “*Report of Use*”) is the sole report of use required to be provided by a Licensee under this Agreement.

(c) Service. Reports of Use shall be served upon SoundExchange. Licensees shall have no obligation to provide Reports of Use for any period prior to January 1, 2006. Licensees shall serve Reports of Use on SoundExchange by no later than the ninetieth day after the close of each month. Reports of Use shall be served, by certified or registered mail, or by other means provided in SoundExchange’s “File and Reports of Use Delivery Specifications” filed in the Copyright Office in Docket No. RM 2002-1B or agreed upon by a Licensee and SoundExchange.

(d) Content.

(1) A “Report of Use of Sound Recordings under Statutory License” shall be identified as such by prominent caption or heading, and shall include a Licensee’s intended or actual playlist for each channel and each day of the reported month, except that no reporting requirement shall apply to channels reasonably classified as news, talk or sports. Subject to paragraph (d)(2) of this Exhibit, each intended or actual playlist shall include a consecutive listing of every recording scheduled to be or actually transmitted, as the case may be, and shall contain the following information in the following order:

(A) The name of the service or entity;

(B) The channel;

- (C) The sound recording title;
- (D) The featured recording artist, group, or orchestra;
- (E) The retail album title;
- (F) The marketing label of the commercially released and available album or other product on which the sound recording is found;
- (G) The catalog number for albums or other products commercially released;
- (H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible, for albums or other products commercially released after 1998;
- (I) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol ℗ (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording, for commercially released albums or other products;
- (J) The date of transmission;
- (K) The time of transmission; and
- (L) The release year of the retail album or other product (as opposed to an the individual sound recording), as provided in the copyright notice on the retail album or other product (e.g., following the symbol © (the letter C in a circle), if present, or otherwise following the symbol ℗ (the letter P in a circle)), for commercially released albums or other products.

(2) Notwithstanding paragraph (d)(1) of this Exhibit –

(A) In the case of programming provided to a Licensee by a third party programmer –

(i) if such programming is provided to the Licensee under a contract entered into before the Execution Date and not thereafter amended or renewed, then the Licensee shall have no obligation to provide Reports of Use with respect to that programming; and

(ii) the Licensee shall use commercially reasonable efforts to include in any new contract for programming, or any amendment or renewal of such a contract, a requirement that the provider of programming provide the Licensee the information required by

paragraph (d)(1) of this Exhibit, or in the case of programming consisting of simultaneous retransmission of an over-the-air terrestrial AM or FM radio broadcast by a broadcaster that also transmits such programming over the Internet, such information as may from time to time be required by Copyright Office regulations relating to the broadcaster's transmissions over the Internet, and the Licensee shall provide SoundExchange Reports of Use containing the information provided by the third party programmer.

In any case in which a Licensee does not provide Reports of Use for programming provided to a Licensee by a third party programmer, the Licensee shall report to SoundExchange the relevant channel and the reason it is unable to provide such Reports of Use.

(B) Licensees only shall be required to provide the information identified in paragraph (d)(1)(C) through (I) and (L) of this Exhibit to the extent that such information can be provided using commercially reasonable efforts.

(C) Licensees shall not be required to provide information with respect to an incidental performance that both: (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(e) Signature. Reports of Use shall include a signed statement by the appropriate officer or representative of the Licensee attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(f) Other Media. If a Licensee makes digital audio transmissions of sound recordings in any medium other than through its SDARS, reports containing the elements set forth in paragraph (d) of this Exhibit shall be deemed to satisfy the Licensee's obligations to identify the sound recordings used in such transmissions (in contrast to any obligations the Licensee may have under applicable regulations to provide information concerning matters other than the identity of such sound recordings).

(g) Format. Reports of Use shall be provided in accordance with SoundExchange's "File and Reports of Use Delivery Specifications" filed in the Copyright Office in Docket No. RM 2002-1B.

(h) Confidentiality.

1.1 (1) Definition. “Confidential Information” means information submitted by a Licensee to SoundExchange in a Report of Use that is uniquely specific to Licensee, including without limitation, the number of performances made by the Licensee and the identification of particular sound recordings as having been performed by the Licensee, but not any information that at the time of delivery to Sound Exchange is generally known to the public or subsequently becomes generally known to the public through no fault of SoundExchange, including without limitation, information identifying sound recordings themselves.

1.2 (2) Use of Confidential Information. SoundExchange shall not use any Confidential Information for any purpose other than royalty collection and distribution, determining and enforcing compliance with statutory license requirements and the requirements of this Agreement, and activities directly related to the foregoing; provided that SoundExchange may report Confidential Information to its members in a form in which information pertaining to both Licensees is aggregated with information pertaining to other statutory licensees such that Confidential Information pertaining to Licensees, either individually or collectively, cannot readily be identified.

1.3 (3) Disclosure of Confidential Information. Access to Confidential Information shall be limited to those employees, agents, attorneys, consultants and independent contractors of SoundExchange, subject to an appropriate confidentiality agreement, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of their work, require access to Confidential Information. SoundExchange also may disclose Confidential Information to a successor or assignee permitted by this Agreement.

(i) Documentation. Licensees shall, for a period of at least three years from the date of service of the Report of Use, keep and retain a copy of the Report of Use.

(j) Regulation. If the Copyright Royalty Board, the Librarian of Congress, or other judicial body, or administrative or regulatory agency adopts regulations for Notice and Recordkeeping or Reports of Use, applicable to Licensees or other services under the § 114(d) statutory license, that are considered by a Licensee to be in the aggregate more favorable than those set forth in this section, Licensee shall inform SoundExchange within 90 days thereafter if Licensee determines to provide Reports of Use pursuant to such other regulations.